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OFFICE OF GOVERNMENT ETHICS

5 CFR Part 2641

RIN 3209–AA14

Post-Employment Conflict of Interest Restrictions; Revision of Departmental Component Designations

AGENCY: Office of Government Ethics.

ACTION: Final rule.

SUMMARY: The U.S. Office of Government Ethics (OGE) is issuing this final rule to revise the component designations of two agencies for purposes of the one-year post-employment conflict of interest restriction for senior employees. Specifically, OGE is revoking two existing component designations and adding five new component designations, based on the recommendations of the agencies concerned.

DATES: This rule is effective December 29, 2016, except for the amendments to Appendix B to 5 CFR part 2641 set forth in amendatory instructions 2.b. and 2.c., which are effective March 29, 2017.

FOR FURTHER INFORMATION CONTACT: Kimberly L. Sikora Panza, Associate Counsel, Office of Government Ethics, Suite 500, 1201 New York Avenue NW., Washington, DC 20005–3917; Telephone: (202) 482–9300; TTY: (800) 877–8339; FAX: (202) 482–9237.

SUPPLEMENTARY INFORMATION:

I. Background

The Director of OGE (Director) is authorized by 18 U.S.C. 207(h) to designate distinct and separate departmental or agency components in the executive branch for purposes of 18 U.S.C. 207(c), the one-year post-employment conflict of interest restriction for senior employees. The representational bar of 18 U.S.C. 207(c) usually extends to the whole of any department or agency in which a former senior employee served in any capacity during the year prior to termination from a senior employee position. However, 18 U.S.C. 207(h) provides that whenever the Director determines that an agency or bureau within a department or agency in the executive branch exercises functions which are distinct and separate from the remaining functions of the department or agency and there exists no potential for use of undue influence or unfair advantage based on past Government service, the Director shall by rule designate such agency or bureau as a separate component of that department or agency. Under 18 U.S.C. 207(h)(2), component designations do not apply to persons employed at a rate of pay specified in or fixed according to subchapter II of 5 U.S.C. chapter 53 (the Executive Schedule). Component designations are listed in appendix B to 5 CFR part 2641.

Pursuant to the procedures prescribed in 5 CFR 2641.302(e), two agencies forwarded written requests to OGE to amend their listings in appendix B to part 2641, and on October 18, 2016, OGE published a proposed rule in the **Federal Register**, 81 FR 71644, Oct. 18, 2016, that proposed to revise the component designations of those two agencies. The proposed rule provided a 30-day comment period, which ended on November 17, 2016. OGE did not receive any comments. The rationale for the proposed rule, which OGE is now adopting as final, is explained in the preamble at: *https://www.gpo.gov/fdsys/pkg/FR-2016-10-18/pdf/2016-25054.pdf*.

For the reasons stated in the preamble to the proposed rule, OGE is granting the request of the Department of Labor and is amending the agency's listing in appendix B to part 2641 to remove the designation of the Employment Standards Administration (ESA), and in the place of ESA, designate the Office of Federal Contract Compliance Programs, Office of Labor Management Standards, Office of Workers' Compensation Programs, and the Wage and Hour Division as distinct and separate components of the Department of Labor for purposes of 18 U.S.C. 207(c). OGE also is granting the request of the Department of Transportation and amending the agency's listing in appendix B to part 2641 to remove the designation of the Surface Transportation Board and designate the Pipeline and Hazardous Materials Safety Administration as a distinct and separate component of the Department of Transportation for purposes of 18 U.S.C. 207(c).

As indicated in 5 CFR 2641.302(f), a designation ''shall be effective on the date the rule creating the designation is published in the **Federal Register** and shall be effective as to individuals who terminated senior service either before, on or after that date.'' Initial designations in appendix B to part 2641 were effective as of January 1, 1991. The effective date of subsequent designations is indicated by means of parenthetical entries in appendix B. The new component designations made in this rule are effective December 29, 2016.

As also indicated in 5 CFR 2641.302(f), revocation of a component designation is effective 90 days after the publication in the **Federal Register** of the rule that revokes the designation. Accordingly, the component designation revocations made in this rule will take effect March 29, 2017. Revocations are not effective as to any individual terminating senior service prior to the expiration of the 90-day period.

II. Matters of Regulatory Procedure

Regulatory Flexibility Act

As Director of the Office of Government Ethics, I certify under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that this final rule will not have a significant economic impact on a substantial number of small entities because it affects only Federal departments and agencies and current and former Federal employees.

Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply to this final rule because it does not contain information collection requirements that require the approval of the Office of Management and Budget.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. chapter 25, subchapter II), this final rule will not significantly or uniquely affect small governments and will not result in increased expenditures by State, local, and tribal governments, in the aggregate,

or by the private sector, of $100 million or more (as adjusted for inflation) in any one year.

Congressional Review Act

The final rule is not a major rule as defined in 5 U.S.C. chapter 8, Congressional Review of Agency Rulemaking.

Executive Orders 12866 and 13563

In promulgating this final rule, the Office of Government Ethics has adhered to the regulatory philosophy and the applicable principles of regulation set forth in Executive Orders 12866 and 13563. This rule has not been reviewed by the Office of Management and Budget under Executive Order 12866 because it is not a ''significant'' regulatory action for the purposes of that order.

Executive Order 12988

As Director of the Office of Government Ethics, I have reviewed this final rule in light of section 3 of Executive Order 12988, Civil Justice Reform, and certify that it meets the applicable standards provided therein.

List of Subjects in 5 CFR Part 2641

Conflict of interests, Government employees.

Approved: December 22, 2016.

Walter M. Shaub, Jr.,

Director,Office of Government Ethics.

Accordingly, for the reasons set forth in the preamble, the Office of Government Ethics is amending 5 CFR part 2641 as set forth below:

PART 2641—POST-EMPLOYMENT CONFLICT OF INTEREST RESTRICTIONS

■ 1. The authority citation for part 2641 continues to read as follows:

Authority: 5 U.S.C. app. (Ethics in Government Act of 1978); 18 U.S.C. 207; E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

■ 2. Amend appendix B to part 2641 as follows:

■ a. Revise the listings for Parent: Department of Labor and Parent: Department of Transportation.

■ b. Effective March 29, 2017, remove the Employment Standards Administration component from the listing for Parent: Department of Labor

■ c. Effective March 29, 2017, remove the Surface Transportation Board component from the listing for Parent: Department of Transportation.

The revisions read as follows:

Appendix B to Part 2641—Agency Components for Purposes of 18 U.S.C. 207(c)

* * * * *

Parent: Department of Labor

Components:

Bureau of Labor Statistics.
Employee Benefits Security Administration (formerly Pension and Welfare Benefits Administration) (effective May 16, 1997).
Employment and Training Administration.
Employment Standards Administration.
Mine Safety and Health Administration.
Occupational Safety and Health Administration.
Office of Disability Employment Policy (effective January 30, 2003).
Office of Federal Contract Compliance Programs (effective December 29, 2016).
Office of Labor Management Standards (effective December 29, 2016).
Office of Workers' Compensation Programs (effective December 29, 2016).
Pension Benefit Guaranty Corporation (effective May 25, 2011).
Wage and Hour Division (effective December 29, 2016).

* * * * *

Parent: Department of Transportation

Components:

Federal Aviation Administration.
Federal Highway Administration.
Federal Motor Carrier Safety Administration (effective January 30, 2003).
Federal Railroad Administration.
Federal Transit Administration.
Maritime Administration.
National Highway Traffic Safety Administration.
Pipeline and Hazardous Materials Safety Administration (effective December 29, 2016).
Saint Lawrence Seaway Development Corporation.
Surface Transportation Board (effective May 16, 1997).

* * * * *

[FR Doc. 2016–31457 Filed 12–28–16; 8:45 am]

BILLING CODE 6345–03–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2014–0498; Directorate Identifier 2013–SW–052–AD; Amendment 39–18745; AD 2016–25–19]

RIN 2120–AA64

Airworthiness Directives; Airbus Helicopters (Previously Eurocopter France) Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are superseding airworthiness directive (AD) 2010–21–07 for Eurocopter France (now Airbus Helicopters) Model AS350B3 and EC130B4 helicopters. AD 2010–21–07 required inspecting the pilot's and co-pilot's throttle twist for proper operation of the contactors. This new AD retains the requirements of AD 2010–21–07, includes additional inspection procedures, and revises the inspection interval. These actions are intended to address the unsafe condition on these products.

DATES: This AD is effective February 2, 2017.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of February 2, 2017.

ADDRESSES: For service information identified in this final rule, contact Airbus Helicopters, Inc., 2701 N. Forum Drive, Grand Prairie, TX 75052; telephone (972) 641–0000 or (800) 232–0323; fax (972) 641–3775; or at *http://www.airbushelicopters.com/techpub.* You may view this referenced service information at the FAA, Office of the Regional Counsel, 10101 Hillwood Parkway, Fort Worth, Texas, 76177. It is also available on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2014–0498.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov in* Docket No. FAA–2014–0498; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the European Aviation Safety Agency (EASA) AD, any incorporated-by-reference information, the economic evaluation, any comments received, and other information. The address for the Docket Office (phone: 800–647–5527) is Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: George Schwab, Aviation Safety Engineer, Safety Management Group, Rotorcraft Directorate, FAA, 10101 Hillwood Parkway, Fort Worth, Texas, 76101; telephone (817) 222–5110; email *george.schwab@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to remove AD 2010–21–07, Amendment 39–16467 (75 FR 63052,

October 14, 2010) and add a new AD. AD 2010–21–07 required repetitively inspecting the pilot's and co-pilot's throttle twist for proper operation of the contactors, which provide for changes between the ''IDLE'' and ''FLIGHT'' positions of the throttle twist grip control. The NPRM published in the **Federal Register** on July 30, 2014 (79 FR 44142), and proposed to retain the inspection requirements of AD 2010–21–07 and included additional requirements to inspect for proper operation of contactors 53Ka and 53Kb and the pilot and copilot throttle twist grip controls for proper functioning. The NPRM also proposed to reduce the intervals of the inspections from 600 hours time-in-service (TIS) to 300 hours TIS.

The NPRM was prompted by AD No. 2013–0191–E, dated August 22, 2013, issued by EASA, which is the Technical Agent for the Member States of the European Union. EASA advises that the switches in the engine ''IDLE'' or ''FLIGHT'' control system could be affected by the corrosive effects of a salt-laden atmosphere, which could lead to engine power loss. EASA states that these corrosive effects are not prevented by MOD 074263, which Eurocopter designed to address the unsafe condition identified in AD 2010–21–07. According to EASA, a subsequent accident occurred which involved power loss in flight of a Model AS350B3 helicopter with MOD 074263 installed. As a result, EASA AD No. 2013–0191–E does not accept MOD 074263 as terminating action for the required repetitive maintenance actions. Accordingly, the two letters we issued approving MOD 074263 as an Alternate Method of Compliance for AD 2010–21–07 are no longer valid.

Comments

After our NPRM (79 FR 44142, July 30, 2014) was published, we received comments from three commenters.

Request

Two commenters requested that we change the compliance times for the recurring inspection to allow for a longer compliance time for helicopters that do not operate in corrosive or salt laden environments. One commenter noted that the failures have been attributed to operations in a corrosive environment. The other commenter stated the proposed AD would penalize operators in non-salt laden environments by requiring the shorter compliance time. The commenters also requested that we adopt the same compliance intervals, 330 hours TIS or 660 hours TIS for helicopters that do not operate in salt laden environments, allowed by the manufacturer's service information. The commenters stated that this would facilitate maintenance scheduling.

We agree. We are adding a longer recurring inspection compliance interval for helicopters that do not operate in salt laden conditions to match the manufacturer's service information. We have also increased the compliance intervals for the recurring inspection to 330 hours TIS for helicopters operating in salt-laden environments and to 660 hours TIS for all other helicopters.

One commenter requested that the proposed AD condition compliance with paragraph 3.B.2 of the manufacturer's service information on the results of the inspection in paragraph 3.B.1. The commenter noted that the proposed AD requires compliance with paragraph 3.B.1 through 3.B.6 of the service information, but does not clarify that compliance with paragraph 3.B.2 is only required if the aircraft fails the prior inspection.

We agree that compliance with paragraph 3.B.2 of the service information is conditional, but we do not agree that a change to the AD language is necessary. There is no ambiguity in the service information incorporated by reference in the AD as to when compliance with paragraph 3.B.2 is necessary.

FAA's Determination

We have reviewed the relevant information and determined that an unsafe condition exists and is likely to exist or develop on other helicopters of these same type designs and that air safety and the public interest require adopting the AD requirements as proposed, except for the changes described previously. We have also changed the service information that is incorporated by reference to the most current revision. These changes are consistent with the intent of the proposals in the NPRM (79 FR 44142, July 30, 2014) and will not increase the economic burden on any operator nor increase the scope of the AD.

Interim Action

We consider this AD interim action. The design approval holder is currently developing a modification that will address the unsafe condition identified in this proposed AD. Once this modification is developed, approved, and available, we might consider additional rulemaking.

Related Service Information Under 1 CFR Part 51

Since we published the NPRM (79 FR 44142, July 30, 2014), Airbus Helicopters (previously Eurocopter) revised its service information. We reviewed one document that co-publishes 3 Emergency Alert Service Bulletin (EASB) identification numbers: No. 05.00.61, Revision 3, dated June 15, 2015, for Model AS350B3 helicopters; No. 05.00.41, Revision 2, dated June 15, 2015, for the non-FAA type-certificated Model AS550C3 helicopter; and No. 05A009, Revision 3, dated June 15, 2015, for Model EC130B4 helicopters. EASB Nos. 05.00.61 and 05A009 are incorporated by reference in this AD. EASB No. 05.00.41 is not incorporated by reference in this AD.

This service information describes procedures for a functional check and installation of a protection for micro-contacts (microswitches) 53Ka, 53Kb, and 65K (IDLE/FLIGHT mode). EASA classified the prior revision of this service information as mandatory and issued EASA Emergency AD No. 2013–0191–E, dated August 22, 2013, to ensure the continued airworthiness of these helicopters.

Because this revision of EASB No. 05.00.61 and No. 05A009 specifies the same actions but clarifies the procedures used in applying varnish to the microswitches, we are incorporating this revision by reference in this AD.

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

Costs of Compliance

We estimate that this AD will affect 517 helicopters of U.S. Registry.

We estimate that operators will incur the following costs in order to comply with this AD. The average labor rate is $85 per work hour. It will take about 4 work hours for the inspections and any necessary maintenance, for a total cost of $340 per helicopter and $175,780 for the U.S. fleet per inspection cycle.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that

section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

(3) Will not affect intrastate aviation in Alaska to the extent that a regulatory distinction is required, and

(4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2010–21–07, Amendment 39–16467 (75 FR 63052, October 14, 2010), and adding the following new AD:

2016–25–19 Airbus Helicopters (Previously Eurocopter France) Helicopters: Amendment 39–18745; Docket No. FAA–2014–0498; Directorate Identifier 2013–SW–052–AD.

(a) Applicability

This AD applies to Model AS350B3 and EC130B4 helicopters, certificated in any category, with the ARRIEL 2B1 engine with the two-channel Full Authority Digital Engine Control (FADEC) and with new twist grip modification (MOD) 073254 for the Model AS350B3 helicopter or MOD 073773 for the Model EC130B4 helicopter, installed.

(b) Unsafe Condition

This AD defines the unsafe condition as failure of one of the two contactors, 53Ka or 53Kb, which can prevent switching from ''IDLE'' mode to ''FLIGHT'' mode during autorotation training making it impossible to recover from the practice autorotation and compelling the pilot to continue the autorotation to the ground. This condition could result in unintended touchdown to the ground at a flight-idle power setting during a practice autorotation, damage to the helicopter, and injury to occupants.

(c) Affected ADs

This AD supersedes AD 2010–21–07, Amendment 39–16467 (75 FR 63052, October 14, 2010).

(d) Effective Date

This AD becomes effective February 2, 2017.

(e) Compliance

You are responsible for performing each action required by this AD within the specified compliance time unless it has already been accomplished prior to that time.

(f) Required Actions

(1) Before the next practice autorotation or on or before 100 hours time-in-service (TIS), whichever occurs first, inspect the wiring, perform an insulation test, inspect the pilot and copilot throttle twist grip controls, and test the pilot and copilot throttle twist grip controls for proper functioning by following the Accomplishment Instructions, paragraph 3.B.1 through 3.B.6, of Airbus Helicopters Emergency Alert Service Bulletin (EASB) No. 05.00.61, Revision 3, dated June 15, 2015, for Model AS350B3 helicopters or EASB No. 05A009, Revision 3, dated June 15, 2015, for Model EC130B4 helicopters, as appropriate for your model helicopter.

(2) Repeat the inspections in paragraph (f)(1) of this AD at intervals not to exceed the following compliance times. For purposes of this AD, salt laden conditions exist when a helicopter performs a flight from a takeoff and landing area, heliport, or airport less than 0.5 statute mile from salt water or performs a flight within 0.5 statute mile from salt water below an altitude of 1,000 ft. above ground or sea level.

(i) For helicopters that have operated in salt laden conditions since the previous inspection required by this AD, at intervals not to exceed 330 hours TIS.

(ii) For helicopters that have not operated in salt laden conditions since the previous inspection required by this AD, at intervals not to exceed 660 hours TIS.

(g) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Safety Management Group, FAA, may approve AMOCs for this AD. Send your proposal to: George Schwab, Aviation Safety Engineer, Safety Management Group, Rotorcraft Directorate, 10101 Hillwood Parkway, Fort Worth, Texas 76177; telephone (817) 222–5110; email *george.schwab@faa.gov.*

(2) For operations conducted under a 14 CFR part 119 operating certificate or under 14 CFR part 91, subpart K, we suggest that you notify your principal inspector, or lacking a principal inspector, the manager of the local flight standards district office or certificate holding district office, before operating any aircraft complying with this AD through an AMOC.

(h) Additional Information

The subject of this AD is addressed in European Aviation Safety Agency (EASA) Emergency AD No. 2013–0191–E, dated August 22, 2013. You may view the EASA AD at *http://www.regulations.gov* in Docket No. FAA–2014–0498.

(i) Subject

Joint Aircraft Service Component (JASC) Code: 76 Engine Controls.

(j) Material Incorporated by Reference

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

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

(i) Airbus Helicopters Emergency Alert Service Bulletin (EASB) No. 05.00.61, Revision 3, dated June 15, 2015.

(ii) Airbus Helicopters EASB No. 05A009, Revision 3, dated June 15, 2015.

Note 1 to paragraph (j)(2): Airbus Helicopters EASB No. 05.00.61, Revision 3, dated June 15, 2015, and Airbus Helicopters EASB No. 05A009, Revision 3, dated June 15, 2015 are co-published as one document along with Airbus Helicopters EASB No. 05.00.41, Revision 2, dated June 15, 2015, which is not incorporated by reference in this AD.

(3) For Airbus Helicopters service information identified in this final rule, contact Airbus Helicopters, Inc., 2701 N. Forum Drive, Grand Prairie, TX 75052; telephone (972) 641–0000 or (800) 232–0323; fax (972) 641–3775; or at *http://www.airbushelicopters.com/techpub.*

(4) You may view this service information at FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy, Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Fort Worth, Texas, on December 6, 2016.

Scott A. Horn,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2016–30020 Filed 12–28–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–6898; Directorate Identifier 2016–NM–010–AD; Amendment 39–18752; AD 2016–25–26]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for all The Boeing Company Model MD–90–30 airplanes. This AD was prompted by reports of stick shaker activation at airspeeds that were above the stall protection system's stick shaker schedule. This AD requires installing angle-of-attack (AOA) sensor external case heaters on the existing AOA sensors, installing additional wires, and doing a functional test and applicable corrective actions. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective February 2, 2017.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of February 2, 2017.

ADDRESSES: For service information identified in this final rule, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; Internet *https://www.myboeingfleet.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221. It is also available on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–6898.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–6898; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (phone: 800–647–5527) is Docket Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Eric Igama, Aerospace Engineer, Systems and Equipment Branch, ANM–130L, FAA, Los Angeles Aircraft Certification Office (ACO), 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 562–627–5388; fax: 562–627–5210; email: *roderick.igama@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all The Boeing Company Model MD–90–30 airplanes. The NPRM published in the **Federal Register** on June 13, 2016 (81 FR 38113) (''the NPRM''). The NPRM was prompted by reports of stick shaker activation at airspeeds that were above the stall protection system's stick shaker schedule. The NPRM proposed to require installing AOA sensor external case heaters on the existing AOA sensors, installing additional wires, and doing a functional test and applicable corrective actions. We are issuing this AD to prevent ice formation between the AOA sensor vane and face plate, which could cause both vanes to become immobilized. If both vanes become immobilized, the stall protection system could become unreliable or non-functional, which could result in loss of control of the airplane.

Comments

We gave the public the opportunity to participate in developing this AD. The following presents the comments received on the NPRM and the FAA's response to each comment.

Support of the NPRM

The Air Line Pilots Association, International provided comments that supported the intent of the NPRM.

Request To Change Boeing Address Identified in the NPRM

Boeing asked that we change its mailing address for obtaining copies of service information as specified in the NPRM to the following: Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1092; Internet *https://www.myboeingfleet.com.* Boeing stated that this address is valid for this and all future ADs affecting Boeing airplanes.

We agree with the commenter's request. We have updated the contact information accordingly. However, we have corrected the telephone number; it should be 562–797–1717. We have changed this AD to include this new mailing address for Boeing service information.

Request To Clarify Certain Language in the NPRM

Boeing asked that we clarify the language specifying what prompted the AD action, and the description of the unsafe condition, as specified in the **SUMMARY** section. Boeing stated that the reported incident occurred ''on Model 717–200 airplanes'' and included further description of what prompted the AD action. Boeing also stated that including this description clarifies the airplane model on which the safety issue was identified. Boeing also asked that we revise the description of the unsafe condition, which stated that ''the vane'' could become immobilized. Boeing noted that the safety issue is a common cause failure (both vanes could become immobilized) due to an external threat (*i.e.,* weather).

We agree to add ''both vanes'' to the Discussion section and paragraph (e) of this AD for clarification. Information concerning the origin of the safety issue on Model 717–200 airplanes was included in the Discussion section of the NPRM. Since the information in the Discussion section of the NPRM does not reappear in the final rule, we have not changed this AD in this regard. In addition, we do not agree that the requested changes are necessary in the **SUMMARY** section, which merely provides a high-level description of the relevant information. Details concerning the unsafe condition that appeared in the **SUMMARY** section of the NPRM have been removed from this final rule in response to new guidance from the Office of the Federal Register.

Boeing also asked that we clarify the AD requirements by specifying ''installing additional wires'' in lieu of ''changing wires'' and installing AOA sensor external case heaters ''on the AOA sensors'' in lieu of ''and AOA sensors.'' Delta Air Lines (Delta) asked that we change ''and AOA sensors'' to

''and existing AOA sensors'' since they are not new sensors.

We agree to make the requested changes in the **SUMMARY** section, the Discussion and the Related Service Information under 1 CFR part 51 sections of this final rule, and in paragraph (g) of this AD for clarification.

Delta asked that we remove the references to ''water intrusion'' from the NPRM related to the description of the unsafe condition. Delta stated that the referenced service information does not address water intrusion. Delta added that the installation of the external case heater only prevents the existing water from freezing and rendering the vane immobilized. UTC Aerospace Systems (UTC) also asked that we remove the reference to moisture (water) intrusion since the referenced service information does nothing to reduce or eliminate the problem; it simply keeps the water from freezing. UTC also asked that we add to the description of the unsafe condition that the AD is intended to reduce or eliminate ice formation between the AOA sensor vane and face plate.

We partially agree with the commenters' requests. Water intrusion is addressed in the referenced service information since it contributes to ice formation between the AOA sensor vane and face plate. However, water intrusion is not corrected by this AD. Therefore, we have revised the Discussion section and paragraph (e) of this AD to state ''We are issuing this AD to prevent ice formation between the angle-of-attack (AOA) sensor vane and face plate.''

Request To Clarify Corrective Actions

UTC asked that we re-identify the corrective actions in the SUMMARY and Discussion sections of the NPRM as removing and replacing the existing AOA unit having part number (P/N) 0861EW1 with a certified AOA, or installing a new AOA in accordance with the instructions specified in Boeing Alert Service Bulletin MD90–30A029, dated November 25, 2015. UTC stated that this would clarify the potential cause of the problem as related to the subject AOA and provide another choice for operators to comply with the proposed AD. UTC added that this would also define the AOA replacement as not including the existing AOA unit having P/N 0861EW1.

We agree that clarification is necessary; however, we do not agree that this clarification should be included in the **SUMMARY** section and the Discussion section of this final rule. The purpose of the language in the **SUMMARY** section is to provide a high-level description of the relevant information, and the information in the Discussion section of the NPRM does not reappear in the final rule. Therefore, we have revised the description of the required actions in the Related Service Information under 1 CFR part 51 section of this final rule, as specified by the commenter, to provide clarification to operators. We have also included the correct part number for the existing AOA unit in paragraph (g) of this AD.

Request To Update Referenced Service Information To Include the Correct Part Number

UTC asked that Boeing Alert Service Bulletin MD90–30A029, dated November 25, 2015, be updated to correct the part number for the AOA sensor identified therein. UTC stated that the service information identifies replacing any AOA sensor having P/N ''081EW1,'' but the correct part number is ''0861EW1.''

We acknowledge the commenter's concern; however, Boeing Alert Service Bulletin MD90–30A029, dated November 25, 2015, has not yet been revised by the airplane manufacturer. We have confirmed that this part number does not exist, and have clarified the correct part number for the existing AOA sensor in paragraph (g) of this AD.

Request To Change the Costs of Compliance Section

Boeing asked that we change the Costs of Compliance section of the NPRM to include the parts cost for the external case heaters, as provided by the supplier. Boeing stated that the supplier of these heaters has received FAA parts manufacturer approval (PMA), which allows operators to go directly to the supplier to procure the parts. Boeing noted that the parts cost for two heaters is $2,389 each, for a total of $4,778 (operators are required to purchase two external case heaters for installation).

We agree with the commenter's request for the reason provided. We have changed the Costs of Compliance section in this final rule accordingly.

Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting this AD with the changes described previously and minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

We also determined that these changes will not increase the economic burden on any operator or increase the scope of this AD.

Related Service Information Under 1 CFR Part 51

We reviewed Boeing Alert Service Bulletin MD90–30A029, dated November 25, 2015. The service information describes procedures for installing AOA sensor external case heaters on the existing AOA sensors, installing additional wires, and doing a functional test and applicable corrective actions. The applicable corrective actions include removing and replacing the existing AOA unit (P/N 0861EW1) with a certified AOA, or installing a new AOA. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

We estimate that this AD affects 95 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Installation of AOA sensor external case heaters on the AOA sensors, installation of additional wires, and a functional test.	Up to 44 work-hours (depending on the group number) × $85 per hour = $3,740.	Up to $5,998 (depending on the group number).	Up to $9,738 (depending on the group number).	Up to $925,110 (depending on the group number).

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII: Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

This AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

(3) Will not affect intrastate aviation in Alaska, and

(4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

2016–25–26 The Boeing Company: Amendment 39–18752; Docket No. FAA–2016–6898; Directorate Identifier 2016–NM–010–AD.

(a) Effective Date

This AD is effective February 2, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all The Boeing Company Model MD–90–30 airplanes, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 34, Navigation.

(e) Unsafe Condition

This AD was prompted by reports of stick shaker activation at airspeeds that were above the stall protection system's stick shaker schedule. We are issuing this AD to prevent ice formation between the angle-of-attack (AOA) sensor vane and face plate, which could cause both vanes to become immobilized. If both vanes become immobilized, the stall protection system could become unreliable or non-functional, which could result in loss of control of the airplane.

(f) Compliance

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

(g) Installation of AOA Sensor External Case Heater

Within 6 years after the effective date of this AD, install AOA sensor external case heaters on the existing AOA sensors, install additional wires, and do a functional test and applicable corrective actions, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin MD90–30A029, dated November 25, 2015. All applicable corrective actions must be done before further flight. The correct part number for the existing AOA sensor is P/N 0861EW1.

(h) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Los Angeles Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in paragraph (i) of this AD. Information may be emailed to: *9-ANM-LAACO-AMOC-Requests@faa.gov.*

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

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Los Angeles ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(4) For service information that contains steps that are labeled as Required for Compliance (RC), the provisions of paragraphs (h)(4)(i) and (h)(4)(ii) of this AD apply.

(i) The steps labeled as RC, including substeps under an RC step and any figures identified in an RC step, must be done to comply with the AD. If a step or substep is labeled ''RC Exempt,'' then the RC requirement is removed from that step or substep. An AMOC is required for any deviations to RC steps, including substeps and identified figures.

(ii) Steps not labeled as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the RC steps, including substeps and identified figures, can still be done as specified, and the airplane can be put back in an airworthy condition.

(i) Related Information

For more information about this AD, contact Eric Igama, Aerospace Engineer, Systems and Equipment Branch, ANM–130L, FAA, Los Angeles ACO, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 562–627–5388; fax: 562–627–5210; email: *roderick.igama@faa.gov.*

(j) Material Incorporated by Reference

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

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

(i) Boeing Alert Service Bulletin MD90–30A029, dated November 25, 2015.

(ii) Reserved.

(3) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; Internet *https://www.myboeingfleet.com.*

(4) You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington, on December 7, 2016.

Dionne Palermo,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2016–30279 Filed 12–28–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 121

[Docket No.: FAA–2016–9526; Amdt. No. 121–377A]

RIN 2120–AK95

Qualification, Service, and Use of Crewmembers and Aircraft Dispatchers; Related Aircraft Amendment

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; Correction.

SUMMARY: The FAA is correcting a final rule published on December 16, 2016. In that final rule, which becomes effective on January 17, 2017, the FAA will allow air carriers to seek a deviation from the flight simulation training device (FSTD) requirements for related aircraft proficiency checks. As a result, that rule will eliminate an inconsistency that currently permits carriers that have obtained FAA approval to modify the FSTD requirements for related aircraft differences training, but not for corresponding proficiency checks. The FAA inadvertently listed an incorrect Amendment Number for that final rule. This document corrects that error.

DATES: Effective January 17, 2017.

FOR FURTHER INFORMATION CONTACT: Sheri Pippin, Air Transportation Division, AFS–200, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267–8166; email *sheri.pippin@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

On December 16, 2016, the FAA published a final rule entitled, ''Qualification, Service, and Use of Crewmembers and Aircraft Dispatchers; Related Aircraft Amendment.'' 81 FR 90979. In that final rule, effective January 17, 2017, the FAA inadvertently listed the incorrect Amendment Number for part 121 in the header information of the final rule as 121–397. The correct amendment number is 121–377.

Correction

In the final rule, FR Doc. 2016–30211, published on December 16, 2016, at 81 FR 90979 make the following correction:

1. On page 90979 in the heading of the final rule, revise ''Amdt. No. 121–397'' to read as ''121–377''.

Issued in Washington, DC, under the authority provided by 49 U.S.C. 106(f), on December 22, 2016.

Lirio Liu,

Director, Office of Rulemaking.

[FR Doc. 2016–31507 Filed 12–28–16; 8:45 am]

BILLING CODE 4910–13–P

DELAWARE RIVER BASIN COMMISSION

18 CFR Parts 401 and 420

Regulatory Program Fees and Water Supply Charges

AGENCY: Delaware River Basin Commission.

ACTION: Final rule.

SUMMARY: The Commission amends the *Rules of Practice and Procedure* and the *Basin Regulations—Water Supply Charges,* respectively, to adopt a new project review fee structure and provide for automatic inflation adjustments. These changes are also incorporated into the Commission's Comprehensive Plan.

DATES: This final rule is effective January 1, 2017.

FOR FURTHER INFORMATION CONTACT: Richard C. Gore, Director of Administration and Finance, 609–883–9500, ext. 201.

SUPPLEMENTARY INFORMATION:

Background. The Delaware River Basin Commission (''DRBC'' or ''Commission'') is a Federal-interstate compact agency charged with managing the water resources of the Delaware River Basin on a regional basis without regard to political boundaries. Its members are the governors of the four basin states—Delaware, New Jersey, New York and Pennsylvania—and on behalf of the federal government, the North Atlantic Division Commander of the U.S. Army Corps of Engineers.

By Resolution No. 2016–8 on December 14, 2016 the Commission approved a comprehensive revision of its project review fee structure, including an automatic annual indexed inflation adjustment for most fees. An inflation adjustment was also approved for DRBC's water supply charges rates applicable to consumptive and non-consumptive surface water withdrawals. The changes to DRBC's regulatory program fees are designed to provide a more predictable and sustainable source of revenues and to close the annual gap in funding needed to support DRBC's project review program. They also adjust the fees program to better align with the One Process/One Permit Program instituted earlier in 2016. The changes to DRBC's water supply charges regulations are designed to help revenues assigned to DRBC's Water Supply Storage Facilities Fund keep pace with inflation.

Public Process. A Notice of Proposed Rulemaking and Public Hearing was posted to the Commission's Web site on May 9, 2016. A detailed set of questions and answers about the proposal (''FAQs'') and a press release accompanied the May 9, 2016 web posting. On May 10, 2016, an email alert, including a link to the notice and supporting documents, was transmitted to all parties subscribed to DRBC's list serve. Notice of the proposed rules was published in the **Federal Register** at 81 FR 35662, June 3, 2016 and appeared in the *Delaware Register of Regulations,* 19 DE Reg., 1052, June 1, 2016; *New Jersey Register,* 48 N.J.R. 949, June 6, 2016; *New York State Register,* May 25, 2016 (page 1); and *Pennsylvania Bulletin,* 46 Pa.B. 2967, June 11, 2016. DRBC staff hosted a public informational meeting on the proposal on Wednesday, June 15, 2016 in Washington Crossing, Pa., including presentations by staff and informal questions and answers. The FAQs posted on the Commission's Web site were thereafter supplemented with questions and responses offered during the informational meeting. A public hearing on the proposed amendments took place at the Commission's office building in West Trenton, N.J. on July 27, 2016 and written comments were accepted through August 12, 2016.

In response to the written and oral comments submitted on the draft rules, staff developed a detailed comment and response document, including modest changes to the rule text. After careful consideration and consultation with staff on the comments and proposed changes to the draft rules, the Commissioners determined that the changes were appropriate, responsive to the public's concerns and a logical outgrowth of the rules as proposed. The changes and the staff response to comments were adopted by unanimous vote of the Commissioners to approve Resolution No. 2016–8 at the Commission's public business meeting on December 14, 2016.

Additional materials. The following additional materials can be found on the Commission's Web site, *www.drbc.net*:

• Resolution No. 2016–8, at *http://www.nj.gov/drbc/library/documents/Res2016-09_Fee-Rule.pdf.* Attachments to the resolution include a redline version of the regulatory program fees rule text, showing changes between the draft and final versions of the new rule; and a redline version of the schedule of water charges, comparing the text that has been in place since 2011 with the text of this final rule.

• The detailed comment and response document prepared by staff and adopted by the Commission when it approved the final rule on December 14, 2016, at *http://www.nj.gov/drbc/library/documents/regs/CR_fees-rulemaking121416.pdf.*

• A questions and answers document (''FAQs'') prepared by staff to explain the purpose and effect of the rule changes, at *http://www.nj.gov/drbc/library/documents/FAQ_fees-charges121416.pdf.*

• The Commission's press release dated December 14, 2016, announcing adoption of the project review fees restructuring and amendment of the schedule of water charges, at *http://www.nj.gov/drbc/home/newsroom/news/approved/20161214_newsrel_fees.html.*

• Updated versions of the *Rules of Practice and Procedure* and the *Basin Regulations—Water Supply Charges,* at *http://www.nj.gov/drbc/about/regulations/.*

List of Subjects

18 CFR Part 401

Administrative practice and procedure, Project review, Water pollution control, Water resources.

18 CFR Part 420

Water supply.

For the reasons set forth in the preamble, the Delaware River Basin Commission amends parts 401 and 420 of title 18 of the Code of Federal Regulations as set forth below:

PART 401—RULES OF PRACTICE AND PROCEDURE

■ 1. The authority citation for part 401 continues to read as follows:

Authority: Delaware River Basin Compact (75 Stat. 688), unless otherwise noted.

Subpart C—Project Review Under Section 3.8 of the Compact

■ 2. Add § 401.43 to subpart C to read as follows:

§ 401.43 Regulatory program fees.

(a) *Purpose.* The purpose of this section is to provide an adequate, stable and reliable stream of revenue to cover the cost of the Commission's regulatory program activities, an important means by which the Commission coordinates management of the shared water resources of the Basin. Activities to be covered by the fees include the review of applications for projects that are subject to review under the Delaware River Basin Compact and implementing regulations; and ongoing activities associated with such projects, including but not limited to, effluent and ambient monitoring, data analysis, hydrodynamic and water quality modeling, and coordination with state and federal agencies.

(b) *Types of fees.* The following types of fees are established by this section:

(1) *Docket application fee.* Except as set forth in paragraph (b)(1)(iii) of this section, the docket application fee shall apply to:

(i) *Project requiring a DRBC-issued docket or permit.* Any project that, in accordance with the Delaware River Basin Compact and DRBC regulations, requires a Commission-issued docket or permit, whether it be a new or existing project for which the Commission has not yet issued an approval or a project for which the renewal of a previous Commission approval is required.

(ii) *Project requiring inclusion in the comprehensive plan.* Any project that in accordance with section 11 or section 13.1 of the *Delaware River Basin Compact* and DRBC regulations must be added to the Comprehensive Plan (also, ''Plan''). In addition to any new project required to be included in the Plan, such projects include existing projects that in accordance with section 13.1 of the *Compact* are required to be included in the Plan and which were not previously added to the Plan. Any existing project that is changed substantially from the project as described in the Plan shall be deemed to be a new and different project for purposes of this section.

(iii) *Exemptions.* The docket application fee shall not apply to:

(A) Any project for which the Signatory Party Agency serves as lead under the One Permit Program rule (§ 401.42), unless such project must be added by the Commission to the Comprehensive Plan.

(B) Any project for which an agency, authority or commission of a signatory to the Compact is the primary sponsor. Projects sponsored by political subdivisions of the signatory states shall not be included in this exemption. For purposes of this section ''political subdivisions'' shall include without limitation municipalities, municipal utility authorities, municipal development corporations, and all other entities not directly under the budgetary and administrative control of the Commission's members.

(2) *Annual monitoring and coordination fee.* An annual monitoring and coordination fee shall apply to each withdrawal and/or discharge project for which a water allocation or wastewater discharge approval issued pursuant to the *Compact* and implementing regulations is in effect, regardless of whether the approval was issued by the Commission in the form of a docket, permit or other instrument, or by a Signatory Party Agency under the One Permit Program rule (§ 401.42). The fee shall be based on the amount of a project's approved monthly water allocation and/or approved daily discharge capacity.

(3) *Alternative review fee.* In instances where the Commission's activities and related costs associated with the review of an existing or proposed project are expected to involve extraordinary time and expense, an alternative review fee equal to the Commission's actual costs may be imposed. The Executive Director shall inform the project sponsor in writing when the alternative review fee is to be applied and may require advance payment in the amount of the Commission's projected costs. Instances in which the alternative review fee may apply include, but are not limited to, matters in which:

(i) DRBC staff perform a detailed pre-application review, including but not limited to the performance or review of modeling and/or analysis to identify target limits for wastewater discharges.

(ii) DRBC staff perform or review complex modeling in connection with the design of a wastewater discharge diffuser system.

(iii) DRBC manages a public process for which the degree of public involvement results in extraordinary effort and expense, including but not limited to, costs associated with multiple stakeholder meetings, special public hearings, and/or voluminous public comment.

(iv) DRBC conducts or is required to engage third parties to conduct additional analyses or evaluations of a project in response to a court order.

(4) *Additional fees*—(i) *Emergency approval.* A request for an emergency certificate under § 401.40 to waive or amend a docket condition shall be subject to a minimum fee in accordance with paragraph (e) of this section. An alternative review fee also may be charged in accordance with paragraph (b)(3) of this section.

(ii) *Late filed renewal application.* Any renewal application submitted

fewer than 120 calendar days in advance of the expiration date or after such other date specified in the docket or permit or letter of the Executive Director for filing a renewal application shall be subject to a late filed renewal application charge in excess of the otherwise applicable fee.

(iii) *Modification of a DRBC approval.* Following Commission action on a project, each project revision or modification that the Executive Director deems substantial shall require an additional docket application fee calculated in accordance with paragraph (e) of this section and subject to an alternative review fee in accordance with paragraph (b)(3) of this section.

(iv) *Name change.* Each project with a docket or permit issued by the DRBC or by a Signatory Party Agency pursuant to the One Permit Program rule (§ 401.42) will be charged an administrative fee as set forth in paragraph (e) of this section.

(v) *Change of ownership.* Each project that undergoes a ''change in ownership'' as that term is defined at 18 CFR 420.31(e)(2) will be charged an administrative fee as set forth in paragraph (e) of this section.

(c) *Indexed adjustment.* On July 1 of every year, beginning July 1, 2017, all fees established by this section will increase commensurate with any increase in the annual April 12-month Consumer Price Index (CPI) for Philadelphia, published by the U.S. Bureau of Labor Statistics during that year.[1] In any year in which the April 12-month CPI for Philadelphia declines or shows no change, the docket application fee and annual monitoring and coordination fee will remain unchanged. Following any indexed adjustment made under this paragraph (c), a revised fee schedule will be published in the **Federal Register** by July 1 and posted on the Commission's Web site. Interested parties may also obtain the fee schedule by contacting the Commission directly during business hours.

(d) *Late payment charge.* When any fee established by this section remains unpaid 30 calendar days after the payment due date provided on the Commission's invoice, an incremental charge equal to 2% of the amount owed shall be automatically assessed. Such charge shall be assessed every 30 days thereafter until the total amount owed, including any late payment charges has been paid in full.

(e) *Fee schedules.* The fees described in this section shall be as follows:

TABLE 1 TO § 401.43—DOCKET APPLICATION FILING FEE

Project type	Docket application fee	Fee maximum
Water Allocation	$400 per million gallons/month of allocation,[1] not to exceed $15,000.[1] Fee is doubled for any portion to be exported from the basin.	Greater of: $15,000[1] or Alternative Review Fee.
Wastewater Discharge	Private projects: $1,000,[1] Public projects: $500[1]	Alternative Review Fee.
Other	0.4% of project cost up to $10,000,000 plus 0.12% of project cost above $10,000,000 (if applicable), not to exceed $75,000[1].	Greater of: $75,000[1] or Alternative Review Fee.

[1] Subject to annual adjustment in accordance with paragraph (c) of this section.

TABLE 2 TO § 401.43—ANNUAL MONITORING AND COORDINATION FEE

	Annual fee	Allocation
Water Allocation	[1] $300	<4.99 mgm.
	[1] 450	5.00 to 49.99 mgm.
	[1] 650	50.00 to 499.99 mgm.
	[1] 825	500.00 to 9,999.99 mgm.
	[1] 1,000	> or = to 10,000 mgm.
	Annual fee	**Discharge design capacity**
Wastewater Discharge	[1] $300	< 0.05 mgd.
	[1] 610	0.05 to 1 mgd.
	[1] 820	1 to 10 mgd.
	[1] 1,000	>10 mgd.

[1] Subject to annual adjustment in accordance with paragraph (c) of this section.

TABLE 3 TO § 401.43—ADDITIONAL FEES

Proposed action	Fee	Fee maximum
Emergency Approval Under 18 CFR 401.40	$5,000	Alternative Review Fee.
Late Filed Renewal Surcharge	$2,000.	
Modification of a DRBC Approval	At Executive Director's discretion, Docket Application Fee for the appropriate project type.	Alternative Review Fee.
Name change	$1,000[1].	
Change of Ownership	$1,500[1].	

[1] Subject to annual adjustment in accordance with paragraph (c) of this section.

[1] Consumer Price Index—U/Series ID: CWURA102SA0/Not Seasonally Adjusted/Area: Philadelphia-Wilmington-Atlantic City, PA-NJ-DE-MD/Item: All items/Base Period: 1982–84 = 100.

PART 420—BASIN REGULATIONS—WATER SUPPLY CHARGES

■ 3. The authority citation for part 420 continues to read as follows:

Authority: Delaware River Basin Compact, 75 Stat. 688.

■ 4. Revise § 420.41 to read as follows:

§ 420.41 Schedule of water charges.

The schedule of water charges established in accordance with § 420.22 shall be as follows:

(a) $80 per million gallons for consumptive use, subject to paragraph (c) of this section; and

(b) $0.80 per million gallons for non-consumptive use, subject to paragraph (c) of this section.

(c) On July 1 of every year, beginning July 1, 2017, the rates established by this section will increase commensurate with any increase in the annual April 12-month Consumer Price Index (CPI) for Philadelphia, published by the U.S. Bureau of Labor Statistics during that year.[1] In any year in which the April 12-month CPI for Philadelphia declines or shows no change, the water charges rates will remain unchanged. Following any indexed adjustment made under this paragraph (c), revised consumptive and non-consumptive use rates will be published in the **Federal Register** by July 1 and posted on the Commission's Web site. Interested parties may also obtain the rates by contacting the Commission directly during business hours.

Dated: December 20, 2016.

Pamela M. Bush,

Commission Secretary.

[FR Doc. 2016–31146 Filed 12–23–16; 4:15 pm]

BILLING CODE 6360–01–P

[1] Consumer Price Index—U/Series ID: CWURA102SA0/Not Seasonally Adjusted/Area: Philadelphia-Wilmington-Atlantic City, PA-NJ-DE-MD/Item: All items/Base Period: 1982–84 = 100.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 1105

[Docket No. FDA–2016–N–1555]

Refuse To Accept Procedures for Premarket Tobacco Product Submissions

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing a final rule describing when FDA will refuse to accept a tobacco product submission (or application) because the application has not met a minimum threshold for acceptability for FDA review. Under the rule, FDA will refuse to accept a tobacco product submission, for example, that is not in English, does not pertain to a tobacco product, or does not identify the type of submission. By refusing to accept submissions that have the deficiencies identified in the proposed rule, FDA will be able to focus our review resources on submissions that meet a threshold of acceptability and encourage quality submissions.

DATES: This rule is effective January 30, 2017.

FOR FURTHER INFORMATION CONTACT: Annette Marthaler or Paul Hart, Office of Regulations, Center for Tobacco Products (CTP), Food and Drug Administration, Document Control Center, Bldg. 71, Rm. G335, 10903 New Hampshire Ave., Silver Spring, MD 20993–0002, 877–287–1373, *CTPRegulations@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Purpose of the Rule

FDA is issuing this refuse to accept rule to identify deficiencies that will result in FDA's refusal to accept certain tobacco product submissions under sections 905, 910, and 911 of the Federal Food, Drug, and Cosmetic Act (the FD&C Act), as amended by the Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act) (21 U.S.C. 387e, 387j, and 387k).[1] Because these submissions will be refused before they enter FDA's review queue, more resources will be available for submissions that are ready for further review. This rule establishes a refuse to accept process for premarket tobacco product submissions, including premarket tobacco product applications (PMTAs), modified risk tobacco product applications (MRTPAs), substantial equivalence (SE) applications (also called SE reports), and exemption requests (including subsequent abbreviated reports).

B. Summary of the Major Provisions of the Regulatory Action

The rule explains when FDA will refuse to accept a premarket submission, including PMTAs, MRTPAs, SE applications, and exemption requests (including subsequent abbreviated reports). The rule is based on FDA's experience in reviewing these submissions. Under the rule, FDA will refuse to accept a premarket submission that: (1) Does not pertain to a tobacco product; (2) is not in English (or does not include a complete translation); (3) is submitted in an electronic format that FDA cannot process, read, review, or archive; (4) does not include the applicant's contact information; (5) is from a foreign applicant and does not include the name and contact information of an authorized U.S. agent (authorized to act on behalf of the applicant for the submission); (6) does not include a required form(s); (7) does not identify the tobacco product; (8) does not identify the type of submission; (9) does not include the signature of a responsible official authorized to represent the applicant; or (10) does not include an environmental assessment or claim of a categorical exclusion, if applicable. Under the rule, if FDA refuses to accept the submission, FDA will send the contact (if available) a notification. If the submission is accepted for further review, FDA will send an acknowledgement letter.

II. Background

FDA published two rulemaking documents concerning refuse to accept procedures in the **Federal Register** of August 8, 2016: A direct final rule (81 FR 52329) and a companion proposed rule (81 FR 52371). We published the direct final rule because we believed that the rule was noncontroversial, and we did not anticipate that it would receive any significant adverse comments. As a companion to the direct final rule, we published a proposed rule with the same codified language published in the proposed rules section of the **Federal Register**. The companion proposed rule provides a procedural framework to finalize the rule in the event that the direct final rule receives any adverse comment and is withdrawn. We received adverse comment on the direct final rule and withdrew the direct final rule by issuing a notice in the **Federal Register** of November 16, 2016 (81 FR 80567). We are now finalizing the proposed rule and responding to the comments we received.

[1] FDA has published a final rule extending the Agency's ''tobacco product'' authorities in the FD&C Act to all categories of products that meet the statutory definition of ''tobacco product'' in the FD&C Act, except accessories of such newly deemed tobacco products (Final Rule Deeming Tobacco Products To Be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act; Restrictions on the Sale and Distribution of Tobacco Products and Required Warning Statements for Tobacco Products (81 FR 28974, May 10, 2016) (the Deeming rule)). This rule will apply to all tobacco products FDA regulates under Chapter IX of the FD&C Act.

III. Purpose and Legal Authority

A. Purpose

FDA is issuing this refuse to accept rule to efficiently handle submissions that do not meet a threshold of acceptability for FDA review (*e.g.,* the submission lacks certain information FDA needs for substantive review of the submission). Currently, FDA often expends extensive time and resources in attempts to obtain information and resolve the deficiencies identified in the rule simply to begin substantively processing the submission. FDA expects that this rule will enhance the quality of the submissions and that submissions will move expeditiously through the review process. In addition, this rule will help submitters better understand the common hurdles FDA encounters in conducting a substantive review of submissions.

The rule identifies deficiencies that FDA has seen across types of premarket submissions and will result in FDA refusing to accept the submission. This rule applies to all tobacco product applications; we note that there are additional deficiencies that are not covered in this rule that may arise for specific types of premarket submissions that would also result in FDA's refusal to accept that specific type of premarket submission (*e.g.,* omission of labeling for a PMTA that is required under section 910(b)(1)(F) of the FD&C Act).

FDA's refusal to accept a tobacco product submission does not preclude an applicant from resubmitting a new submission that addresses the deficiencies. In addition, acceptance of a submission does not mean that FDA has determined that the submission is complete, rather only that the submission meets the basic, minimum threshold for acceptance. Substantive review of the submission will begin once FDA accepts the submission, and for submissions with filing requirements (*i.e.,* PMTAs and MRPTAs), once filed. This rule establishes a general process for refusing to accept submissions for premarket tobacco review, including PMTAs, MRTPAs, SE applications, and exemption requests (including subsequent abbreviated reports). Because administratively incomplete submissions will be refused before FDA begins substantive review, we will be able to use our resources on submissions that are more complete and better prepared for further review. In addition, FDA intends to determine, as soon as practicable, whether the submission will be accepted. We intend to determine whether we will refuse to accept most premarket submissions under this rule by 21 to 60 days of receipt, with less lengthy submissions, such as some exemption requests, taking closer to 21 days or fewer and other more lengthy submissions taking closer to 60 days or fewer; however, this range is an initial estimate and the actual time required may vary depending on the volume of submissions received at any one time. FDA remains committed to an efficient product review process and intends to establish and implement performance goals for this action once it has experience with the volume of submissions it will receive for newly deemed tobacco products. FDA expects the performance goals to be generally similar to other Agency performance goals, *i.e.* a certain percentage of refuse to accept determinations made within a defined period of time, and with the percentage rising over time.

B. Legal Authority

Section 701(a) of the FD&C Act (21 U.S.C. 371(a)) provides FDA with the authority to issue regulations for the efficient enforcement of the FD&C Act. This rule will allow FDA to more efficiently use our resources to review premarket submissions under sections 905, 910, and 911 of the FD&C Act. FDA has processed and reviewed many submissions since the enactment of the Tobacco Control Act, and submissions with the deficiencies identified in the rule have been repeatedly identified by FDA as reflecting submissions that are incomplete and not prepared for further review.

IV. Overview of the Final Rule

We are finalizing the proposed rule with only editorial changes. The rule adds part 1105 (21 CFR part 1105) to title 21, specifically § 1105.10. Section 1105.10 provides that FDA will refuse to accept, as soon as practicable, PMTAs, MRTPAs, SE applications, and exemption requests (including subsequent abbreviated reports) for the reasons listed in paragraphs (a)(1) through (a)(10), if applicable.

V. Comments on the Proposed Rule

We consider any comments that were submitted on the direct final rule to have been submitted on the proposed rule. We received two sets of comments on the proposed rule, one from a tobacco product manufacturer and another from a public health group. In general, one of the commenters expressed strong support for this rule, asking that it be applied to a broader set of applications, while the other commenter identified concerns with the rulemaking, including that ''promulgating a direct final rule was procedurally improper.'' This commenter suggested that FDA withdraw the rule in its entirety and issue any future rule only after engaging in notice and comment rulemaking. This rulemaking, however, did provide both notice and an opportunity for comments. As previously noted, FDA withdrew the direct final rule and is proceeding with the rulemaking under the procedural framework of the proposed rule. FDA has considered the comments submitted to the docket for the rulemaking and responds to the comments in the following paragraphs.

To make it easier to identify comments and our responses, the word ''Comment,'' in parentheses, will appear before each comment, and the word ''Response,'' in parentheses, will appear before each response. We have numbered the comments to make it easier to distinguish between comments; the numbers are for organizational purposes only and do not reflect the order in which we received the comments or any value associated with the comment. We have combined similar comments under one numbered comment.

(Comment 1) One commenter suggested that FDA apply the rule to provisional substantial equivalence applications submitted by manufacturers under section 910(a)(2)(B) of the FD&C Act for new tobacco products that were first introduced or delivered for introduction into interstate commerce between February 15, 2007, and March 22, 2011.

(Response) FDA disagrees with this comment. We do not believe that this rule should be applied retroactively to refuse to accept submissions submitted before the rule is effective. While the refuse to accept criteria represent a minimum threshold that applications should be able to meet, we believe that applying this rule retroactively would be unfair to applicants because they had no notice that they would be subject to the rule's requirements.

(Comment 2) One commenter suggested that FDA apply this ''commonsense regulation'' to premarket submissions for newly deemed tobacco products submitted during the compliance period announced in the Deeming rule.

(Response) FDA notes that, as explained in the proposed rule, the rule once effective, will apply to premarket submissions for all tobacco products, including those that are for products covered by the Deeming rule.

(Comment 3) One commenter requested that FDA revise and expand the requirements of the rule to allow FDA to refuse to accept substantial equivalence applications that fail to

comply with certain criteria that relate to the substantial equivalence pathway, such as creating product-identifying information requirements for predicate products.

(Response) FDA disagrees with this comment. The rule creates a minimum threshold of acceptability for all premarket submissions, regardless of the type of submission, and is not intended to address content specific to only one type of premarket submission. FDA plans to consider including refuse to accept criteria that are specific to a particular premarket pathway as part of future rulemakings. For example, FDA has already issued one such rule, ''Tobacco Products, Exemptions From Substantial Equivalence Requirements,'' which contains refuse to accept criteria relating specifically to exemption requests (July 5, 2011, 76 FR 38961).

(Comment 4) One commenter argued that FDA lacks the legal authority to implement the rule. The commenter stated that because the Tobacco Control Act does not set forth content requirements for substantial equivalence applications or exemption requests, FDA has no statutory justification for pre-review of those submissions. The commenter further stated that while the Tobacco Control Act does set forth content requirements for premarket tobacco product applications and modified risk tobacco product applications that grant FDA authority to conduct filing reviews of those submissions, FDA lacks the statutory authority to conduct a separate acceptance review as part of the pre-review of an application. In sum, the commenter argued that FDA does not have the statutory authority, either explicit or implicit, to refuse to accept tobacco product submissions.

(Response) FDA disagrees with this comment. As described in section III.B of the rule, section 701(a) grants FDA the authority to issue regulations for the efficient enforcement of the FD&C Act. As also discussed in the proposed rule, this rule will allow FDA to efficiently enforce the premarket review requirements of sections 905, 910, and 911 of the FD&C Act by allowing FDA to refuse to accept submissions that do not meet basic criteria and focus its resources on those submissions that are ready for review.

(Comment 5) One commenter argued that unless FDA establishes a time by which FDA will refuse to accept a premarket submission, the rule is legally problematic for a number of reasons. While two of the specific reasons are discussed in this document in separate comments and responses, overall, the commenter suggested that FDA should, similar to its approach for new drug applications and premarket approval applications for medical devices, create a limit of 15 days in which to determine whether it will refuse to accept a premarket submission.

(Response) FDA declines the suggestion that FDA adopt a 15-day time limit similar to the refuse to accept review periods for refuse to accept notifications for 510(k) and premarket approval applications established by the Center for Devices and Radiological Health (CDRH). CDRH has had a significantly longer time reviewing such applications and has gained extensive experience doing so. CTP currently lacks sufficient experience reviewing tobacco product submissions to develop specific timeframes. Moreover, there is some uncertainty regarding the types and number of applications that manufacturers will choose to submit for products covered by the Deeming rule and regarding the precise timing of such submissions. Given the size of the industry and the number of newly deemed products on the market, FDA anticipates a large influx of applications, many of which could be at the end of the initial compliance periods for each premarket pathway. It is likely that many applicants will have no experience with the FDA premarket review process, so the quality of the submissions is likewise very difficult to predict. Due to this uncertainty and the difficulty predicting the level of resources FDA will have to expend as a result, FDA is not prepared at this time to commit to a single time limit for all submissions. Instead, FDA is providing an estimated timeframe in which it intends to determine whether to accept submissions: FDA intends to make the determination of whether it will accept an application for review based upon the requirements in the rule by 21 to 60 days of receipt. Further, we intend to establish performance goals or other timeframes once we gain sufficient experience.

(Comment 6) One commenter argues that the absence of a time limit in the rule poses a problem under the First Amendment. Specifically, the commenter alleges that FDA's premarket review of tobacco product submissions, particularly with regard to MRTPAs, are prior restraints on speech; thus, the lack of a time limit for FDA to make acceptance determinations allows the Agency to delay the applicant's truthful and non-misleading speech indefinitely.

(Response) FDA disagrees with the commenter's assertion that the rule's provisions are problematic under the First Amendment. First, as the commenter acknowledges in a footnote, members of the tobacco industry challenged the MRTP provisions, including the absence of a time limit, on First Amendment grounds, and the Sixth Circuit rejected that challenge and upheld the MRTP provisions (*Discount Tobacco* v. *United States,* 674 F.3d 509, 537 (6th Cir. 2012)). Second, the premarket review process is not unique to FDA's regulation of tobacco and in fact is employed widely across most of FDA's product areas. The commenter singles out the MRTP review process as particularly problematic, but they misapprehend the structure of the provision, which imposes no direct restriction on speech. Rather, it requires premarket review before a product may be introduced into interstate commerce and defines such product in part by reference to its promotional claims. Courts have upheld FDA premarket reviews in other product areas based on a similar scheme. See, *e.g., United States* v. *LeBeau,* 2016 U.S. App. LEXIS 12375 (7th Cir. 2016); *Whitaker* v. *Thompson,* 353 F.3d 947 (D.C. Cir. 2004); *United States* v. *Cole,* 84 F. Supp. 3d 1159, 1166 (D. Or. 2015). Third, there is a split in authority regarding whether the prior restraint doctrine applies to commercial speech; the Sixth Circuit in *Discount Tobacco* found that the doctrine did not apply to evaluation of the MRTP provisions (674 F.3d at 532–33). Fourth, even assuming that the marketing of a tobacco product is speech to which the prior restraint doctrine could possibly apply, the process established here would satify the requirements of that doctrine. First, prior restraints are not acceptable where they place ''unbridled discretion in the hands of a government official or agency.'' (*FW/PBS, Inc.* v. *Dallas,* 493 U.S. 215, 225–226 (1990) (plurality opinion).) Here, however, the rule lays out 10 basic requirements for tobacco product applications which, if not met, will cause FDA to refuse to accept the submission. Further, when assessing whether a submission meets that minimum threshold of acceptability, FDA will look only to whether the submission is facially complete and it will not conduct a substantive review. Second, the prior restraint doctrine requires that decisions ''must be issued within a reasonable period of time.'' (*City of Littleton* v. *Z.J. Gifts D–4, L.L.C,* 541 U.S. 774, 780 (2004).) For instance, in a case involving FDA premarket review of health claims for dietary supplements, the Second Circuit held that a 540-day period was permissible ''given the need to protect consumers before any harm occurs,'' to ''evaluate the evidence in support of labeling

claims,'' and to develop ''a record on the matter so that a court can determine whether the regulated speech is, in fact, truthful and non-misleading.'' (*Nutritional Health Alliance* v. *Shalala,* 144 F.3d 220 (2d Cir. 1998).) Furthermore, as the district court in the *Discount Tobacco* case noted, the Administrative Procedure Act (APA) ''imposes a general but nondiscretionary duty upon an administrative agency to pass upon a matter presented to it 'within a reasonable time,' 5 U.S.C. 555(b), and authorizes a reviewing court to 'compel agency action unlawfully withheld or unreasonably delayed,' 5 U.S.C. 706(1).'' (*Commonwealth Brands, Inc.* v. *United States,* 678 F. Supp. 2d 512, 533 (W.D. Ky. 2010).) The APA requirement that the Agency act on matters before it ''within a reasonable time,'' in conjunction with FDA's estimated timeframes and the performance goals for refuse to accept review that FDA intends to establish, indicate that FDA will not leave applications ''in limbo,'' as claimed by the commenter, but will act on them in a reasonable amount of time. For all of these reasons, the rule's provisions do not constitute an unconstitutional prior restraint.

(Comment 7) One commenter argued that implementing the rule would allow FDA to deprive manufacturers of the valuable substantive right to market their products during the compliance period for deemed products with no hearing and no substantive review, which is contrary to Congress' intent in the Tobacco Control Act. The commenter further argued that the Tobacco Control Act allows FDA to require certain tobacco products to be taken off of the market only upon making a substantive determination that the action is warranted under statutory standards, and thus FDA cannot require that products be removed from the market without any such substantive review.

(Response) FDA disagrees with this comment. Under the FD&C Act, generally, a new tobacco product may not be introduced or delivered for introduction into interstate commerce unless it is subject to a marketing order under section 910(c)(1)(A)(i), FDA has issued an order finding the new tobacco product substantially equivalent to a predicate product, or FDA has issued an exemption from the requirements of substantial equivalence. The final Deeming rule, issued with notice and an opportunity for comment, extends this requirement to newly regulated products that are not grandfathered (*i.e.,* marketed as of February 15, 2007). Thus, as of August 8, 2016, marketing these products without FDA authorization is prohibited by statute. However, FDA is affording staggered compliance periods during which FDA does not intend to enforce the premarket review requirements. These compliance periods are general statements of policy that do not establish any rights for any person, and are not binding on FDA or the public. (See *e.g., Professionals and Patients for Customized Care* v. *Shalala,* 56 F.3d 592 (5th Cir. 1995).) The commenter gives a vague reference to the rule depriving manufacturers of a ''substantive right'' to market with no hearing or substantive review, but without citing any authority for such a right. Irrespective of the rule, a manufacturer does not have a right to market a product that is in violation of the FD&C Act because it does not have a required premarket authorization.

(Comment 8) One commenter stated that FDA should allow manufacturers to amend applications that FDA finds to be deficient and consider the amended applications to be received as of their original submission dates. The commenter explained that this approach would not tie up Agency resources because FDA could simply notify an applicant of any deficiencies and suspend substantive review until the applicant resolves those issues and, as such, there is no valid reason for requiring that applications be resubmitted rather than amended.

(Response) FDA disagrees with this suggestion. Creating a queue of deficient premarket submissions that FDA must track and manage is the type of inefficient process that FDA seeks to eliminate from the premarket submission review process with the rule. A queue for plainly deficient submissions will require a redirection of FDA resources away from more complete, quality submissions. Additionally, we disagree with the suggestion that we should consider amended submissions to have been received by the original submission date. This would allow manufacturers to submit woefully deficient premarket submissions and rely on FDA to identify deficiencies to be resolved.

(Comment 9) One commenter argued that FDA should withdraw the rule and instead issue rules specifying the content that must be contained in each type of application because without such application-specific rules, the rule is unconstitutionally vague. The commenter further explained that without the promulgation of such content regulations, it considers the rule to violate the Due Process Clause of the 5th Amendment as well as the APA because it would allow FDA to deny applications without fully explaining application content requirements to applicants. Additionally, the comment asserts that the rule is unduly vague under the Due Process Clause and the APA on the basis that some of the criteria are either ''ill-defined or entirely undefined.''

(Response) FDA disagrees with this comment. The rule is not impermissibly vague as it provides applicants with fair notice of 10 criteria by which FDA will refuse to accept a premarket submission. These criteria are not specific to the requirements of any one premarket pathway but instead include basic parameters that apply to all premarket submissions. Detailed criteria that are specific to each premarket pathway are not necessary to implementing a rule that applies to all types of premarket submissions generally without any consideration of content specific to each premarket pathway. Any additional grounds for which FDA may refuse a premarket submission exist independently from this rulemaking; therefore, the vagueness of such grounds, if any, is not attributable to the rule and does not cause it to violate the Due Process clause of the 5th Amendment or the APA. Further, the comment incorrectly asserts that some of the criteria required by the rule are unduly vague under the Due Process Clause and the APA. A law is impermissibly vague if it does not give ''a person of ordinary intelligence a reasonable opportunity to know what is prohibited.'' *Grayned* v. *City of Rockford,* 408 U.S. 104, 108 (1972). To the extent that the commenter identifies concerns with specific requirements of the rule, we address them in the responses to comments 10–14; however, FDA believes that the requirements of this rule are sufficiently clear to give submitters a reasonable opportunity to be aware of what information must be included with a tobacco product application.

(Comment 10) One commenter argued that FDA must edit the rule so that it comprehensively states all potential refuse to accept criteria for each premarket pathway and commit to accepting all submissions that meet those specific criteria because granting FDA discretion to refuse to accept submissions on the basis of criteria not specified in this rule violates the principles of fair notice embodied in the Constitution and the APA.

(Response) FDA disagrees. Under § 1105.10(b), FDA ''may accept the submission'' if it ''finds that none of the reasons in paragraph (a) of this section exists for refusing to accept a premarket submission.'' The use of the word

''may'' in this section reflects the fact that this rule addresses the basic threshold of acceptability that all premarket submissions must meet; however it does not address other grounds on which FDA could refuse to accept a specific type of premarket submission, such as the omission of labeling from a PMTA that is required by section 910(b)(1)(F) of the FD&C Act. Any additional grounds on which FDA may refuse to accept a premarket submission exist independently from this rulemaking and are outside of its scope.

(Comment 11) One commenter argues that FDA's discussion in the preamble of the proposed rule regarding ''other information'' that FDA recommends be included as part of the product-identifying information submitted under § 1105.10(a)(7) should either be deleted or modified to provide a full and complete description of what ''other information'' applicants should provide. The commenter also suggests that FDA must state whether failure to provide such information would be grounds for FDA to refuse to accept a submission.

(Response) FDA disagrees with this comment. Section 1105.10(a)(7) specifically lists the product-identifying information that is required under the rule: The manufacturer of the tobacco product; the product name, including the brand and subbrand; the product category and subcategory; package type and package quantity; and characterizing flavor. The preamble of the proposed rule notes that other information may be needed to identify the product, such as product descriptors that are not a part of the product name (*e.g.,* premium), but it merely requests such information be submitted to facilitate FDA's review. Failure to include additional product-identifying information beyond those specifically listed in § 1105.10(a)(7) is not grounds for FDA to refuse to accept a submission under the rule.

(Comment 12) One commenter argued that FDA must either remove the requirement in § 1105.10(a)(7) that applicants specify the category and subcategory of the tobacco product or provide a list of all potential categories and subcategories. The commenter further noted that FDA could require a uniform system of product identification under 21 U.S.C. 387e(e) (section 905(e) of the FD&C Act), but it has not yet issued a regulation doing so.

(Response) FDA disagrees with this comment. The rule requires applicants to describe the category and subcategory of the tobacco product that is the subject of the premarket submission. This is a requirement to provide basic product-identifying information, such as describing the product category as ''Smokeless Tobacco Product'' and the subcategory as ''Dissolvable,'' which in no way creates a rigid system of product identification with which an applicant must comply.[2] Creating an exhaustive product categorization system is not necessary for applicants to describe the product's category and subcategory and in some cases may not allow applicants to accurately describe new tobacco products that fall into novel categories or subcategories. Table 1 in the preamble of the proposed rule provides some recommendations on how an applicant may satisfy this requirement, but it is not intended to be an exhaustive list (for example, although recommendations for waterpipes were not included in table 1, submissions on waterpipes should include similar information). While the table is not an exhaustive list of every tobacco product category and subcategory that exists, manufacturers have enough information to reasonably understand how to comply with the requirement and can provide information based on internal classifications. Applicants unable to identify the category or subcategory of the tobacco product that will be the subject of a premarket submission are encouraged to contact FDA prior to submission.

(Comment 13) One commenter argued that FDA should not require an applicant to identify the submission type as part of a premarket submission because the list of submission types provided to implement § 1105.10(a)(8) is incomplete. To support this statement, the commenter notes that the list in the preamble of the proposed rule does not mention Product Quantity Change SE Reports as a potential premarket submission type.

(Response) FDA disagrees with the suggestion that manufacturers should not be required to identify the type of application they are submitting and that the list of submission types described in the preamble of the proposed rule is incomplete. Identifying the type of submission is necessary for FDA to review a premarket submission because it enables FDA to determine the appropriate decisional standard to apply to a submission (*e.g.,* whether it is a PMTA subject to the requirements of section 910 of the FD&C Act or an MRTPA subject to the requirements of section 911 of the FD&C Act). The commenter is also incorrect in its assertion that the proposed rule's discussion of the types of premarket submissions is incomplete. The only example the commenter provides to support this assertion is the Product Quantity Change SE Reports, which are SE applications. The preamble of the proposed rule described the types of premarket submissions, which are PMTAs, MRTPAs, SE applications, and exemption requests (and subsequent abbreviated reports). Applicants are welcome to provide additional information regarding their submission type, such as specifying that their SE application is being submitted for a product quantity change, provided that the basic submission type remains clear. Applicants unsure of how to identify the type of application that they are submitting are encouraged to contact FDA prior to submission.

(Comment 14) One commenter argued that FDA should remove the requirement that a premarket submission be accompanied by required forms because FDA has yet to require any forms and it is unclear what those forms may eventually require. The commenter stated that if and when FDA creates required forms, it can issue regulations providing how and when the forms must be submitted.

(Response) We disagree with the suggestion that this requirement should be removed from the rule. As described in section IV of the proposed rule, if and when FDA issues any forms it would need to do so in accordance with applicable requirements, *e.g.,* notice and opportunity to comment on such forms in accordance with rulemaking procedures and the Paperwork Reduction Act of 1995 and rulemaking under the APA. We have chosen to include the form submission requirement in this rule to provide notice that the failure to submit any required forms, if and whenever they are issued, will be grounds for refusing to accept a premarket submission.

(Comment 15) One commenter argued that FDA should not require applicants to identify whether a product has a characterizing flavor until FDA has issued a full explanation of what it considers to be a characterizing flavor and how it expects manufacturers to determine what the characterizing flavor of a tobacco product is. The commenter also argued that the requirement to identify a characterizing flavor has no statutory basis and is not necessary to identify a product in light of all other information FDA is requiring, such as the product name, brand, subbrand, category, and subcategory.

(Response) FDA disagrees with this comment. This requirement, along with

[2] Applicants should note that some categories are defined in section 900 of the FD&C Act (*e.g.,* cigarette (900(3)), cigarette tobacco (900(4)), roll-your-own tobacco (900(15)), smokeless tobacco (900(18))).

the other product-identifying information in § 1105.10(a)(7), will identify to FDA the specific tobacco product that is the intended subject of the application. As explained in the preamble to the proposed rule, FDA is requiring this product-identifying information under section 701 of the FD&C Act to efficiently enforce premarket review requirements for tobacco requirements. For example, FDA needs to be able to distinguish between products that have the same brand and subbrand, but different flavors (*e.g.,* brand X menthol or brand X cinnamon). This also helps ensure that FDA ultimately issues an order that addresses the intended tobacco product. For the purposes of the refuse to accept process and to appropriately identify the specific product that is the subject of the submission, FDA is solely looking to see how the applicant identifies the tobacco product as having no characterizing flavor or having a particular characterizing flavor. Thus, for example, a firm would give ''menthol'' as the characterizing flavor a tobacco product it identifies as ''Brand A menthol''. At the acceptance stage, FDA would not review beyond how the product is identified, such as to determine whether the product contains a different or additional characterizing flavor. Applicants that have questions regarding how to describe their product's characterizing flavor are encouraged to contact FDA prior to submission.

(Comment 16) One commenter argued that FDA should either modify the rule so that it contains procedures to resolve disputes regarding whether FDA should have refused to accept an application, or it should specify whether the procedures for internal Agency review of decisions specified in § 10.75 (21 CFR 10.75) applies.

(Response) The procedures for internal Agency review of decisions in § 10.75 apply to a decision of an FDA employee, other than commissioner, on a matter. Applicants seeking review of a refuse to accept decision may use this mechanism or consider other mechanisms set out in part 10. FDA expects, however, that most applicants will find that addressing any deficiencies in the application will quickly resolve issues.

VI. Paperwork Reduction Act of 1995

FDA concludes that this rule contains no collection of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

VII. Federalism

We have analyzed this rule in accordance with the principles set forth in Executive Order 13132. We have determined that the rule does not contain policies 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. Accordingly, we conclude that the rule does not contain policies that have federalism implications as defined in the Executive Order and, consequently, a federalism summary impact statement is not required.

VIII. Tribal Consultation

We have analyzed this rule in accordance with the principles set forth in Executive Order 13175. We have determined that the rule does not contain policies that would 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. Accordingly, we conclude that the rule does not contain policies that have tribal implications as defined in the Executive Order; consequently, a tribal summary impact statement is not required.

IX. Analysis of Environmental Impact

We have determined under 21 CFR 25.30(h) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

X. Economic Analysis of Impacts

We have examined the impacts of the rule under Executive Order 12866, Executive Order 13563, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Orders 12866 and 13563 direct us to assess all 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, and other advantages; distributive impacts; and equity). We believe that this rule is not a significant regulatory action as defined by Executive Order 12866.

The Regulatory Flexibility Act requires us to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because this rule establishes a procedure that FDA is responsible for implementing and has the effect of providing all entities useful feedback on the readiness of a submission, we certify that the rule will not have a significant economic impact on a substantial number of small entities.

The Unfunded Mandates Reform Act of 1995 (section 202(a)) requires us to prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule that includes 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 annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $146 million, using the most current (2015) Implicit Price Deflator for the Gross Domestic Product. This rule does not result in expenditure in any year that meets or exceeds this amount.

This rule identifies 10 significant and common deficiencies in premarket tobacco submissions that will cause FDA to refuse to accept them. Encouraging submissions that are free of the deficiencies listed in this rule does not represent a change in Agency expectations. One of the 10 deficiencies is required by statute (*i.e.,* must be a tobacco product). One of the deficiencies is required by another regulation (*i.e.,* must comply with requirements related to environmental assessments or exclusions from such assessments). The remaining eight deficiencies are basic expectations for an application to enter the review process. Therefore, this rule clarifies these expectations. This clarification will result in cost savings for both the applicant and FDA as less time is spent by FDA working with applicants to address these significant deficiencies. Applicants have clarity about basic expectations regarding requirements for acceptance of premarket applications. In addition, refusing to accept submissions with these deficiencies will allow Agency staff to more efficiently process submissions and quickly move those submissions without these deficiencies into review of substantial scientific issues.

List of Subjects in 21 CFR Part 1105

Administrative practices and procedures, Tobacco, Tobacco products.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act, and under authority delegated to the Commissioner

of Food and Drugs, 21 CFR chapter I is amended by adding part 1105, consisting of § 1105.10, to read as follows:

PART 1105—GENERAL

Authority: 21 U.S.C. 371(a), 387e, 387j, and 387k.

Subpart A—General Submission Requirements

§ 1105.10 Refusal to accept a premarket submission.

(a) FDA will refuse to accept for review, as soon as practicable, a premarket tobacco product application, modified risk tobacco product application, substantial equivalence application, or exemption request or subsequent abbreviated report for the following reasons, if applicable:

(1) The submission does not pertain to a tobacco product as defined in 21 U.S.C. 321(rr).

(2) The submission is not in English or does not contain complete English translations of any information submitted within.

(3) If submitted in an electronic format, the submission is in a format that FDA cannot process, read, review, and archive.

(4) The submission does not contain contact information, including the applicant's name and address.

(5) The submission is from a foreign applicant and does not identify an authorized U.S. agent, including the agent's name and address, for the submission.

(6) The submission does not contain a required FDA form(s).

(7) The submission does not contain the following product-identifying information: The manufacturer of the tobacco product; the product name, including the brand and subbrand; the product category and subcategory; package type and package quantity; and characterizing flavor.

(8) The type of submission is not specified.

(9) The submission does not contain a signature of a responsible official, authorized to represent the applicant, who either resides in or has a place of business in the United States.

(10) For premarket tobacco applications, modified risk tobacco product applications, substantial equivalence applications, and exemption requests only: The submission does not include a valid claim of categorical exclusion in accordance with part 25 of this chapter, or an environmental assessment.

(b) If FDA finds that none of the reasons in paragraph (a) of this section exists for refusing to accept a premarket submission, FDA may accept the submission for processing and further review. FDA will send to the submitter an acknowledgement letter stating the submission has been accepted for processing and further review and will provide the premarket submission tracking number.

(c) If FDA finds that any of the reasons in paragraph (a) of this section exist for refusing to accept the submission, FDA will notify the submitter in writing of the reason(s) and that the submission has not been accepted, unless insufficient contact information was provided.

Dated: December 22, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–31370 Filed 12–28–16; 8:45 am]

BILLING CODE 4164–01–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1610

RIN 3046–AB05

Availability of Records

AGENCY: Equal Employment Opportunity Commission.

ACTION: Interim final rule.

SUMMARY: The Equal Employment Opportunity Commission (EEOC or Commission) proposes to revise its Freedom of Information Act (FOIA) regulations in order to implement the substantive and procedural changes to the FOIA identified in the FOIA Improvement Act of 2016 and update two district offices addresses and the Office of Legal Counsel's fax number.

DATES: This interim final rule is effective on December 29, 2016. Comments must be received on or before January 30, 2017.

ADDRESSES: Written comments should be submitted to Executive Secretariat, Equal Employment Opportunity Commission, 131 M Street NE., Suite 6NE03F, Washington, DC 20507. As a convenience to commenters, the Executive Secretariat will accept comments by facsimile (''FAX'') machine. The telephone number of the FAX receiver is (202) 663–4114. (This is not a toll-free FAX number). Only comments of six or fewer pages will be accepted via FAX transmittal to ensure access to the equipment. Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Executive Secretariat staff at (202) 663–4070 (voice) or (202) 663–4074 (TTY). (These are not toll-free telephone numbers.) You may also submit comments and attachments electronically at *https://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments. Copies of comments submitted by the public will be available for review by prior appointment at the Commission's Library, 131 M Street NE., Suite 4NW08R, Washington, DC 20507, or can be reviewed anytime at *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Stephanie D. Garner, Assistant Legal Counsel (202) 663–4642 or Draga G. Anthony, Senior Attorney Advisor, Office of Legal Counsel (216) 522–7452(voice) or (202) 663–7026 (TTY). (These are not toll free numbers.) Requests for this document in an alternative format should be made to the Office of Communications and Legislative Affairs at (202) 663–4191 (voice) or (202) 663–4494 (TTY).

SUPPLEMENTARY INFORMATION:

Executive Summary

The interim final rule, as directed by the FOIA Improvement Act of 2016, Public Law 114–185, updates the Commission's FOIA regulations to reflect substantive and procedural changes to the FOIA and updates the addresses of two district offices and the Office of Legal Counsel's fax number.

Background

On June 30, 2016, President Obama signed the FOIA Improvement Act of 2016 (''Act''). The Act requires agencies to update FOIA regulations to conform to the Act by:

- Requiring federal agencies to make available their disclosable records and documents for public inspection in an electronic format;
- making available for inspection in an electronic format records that have been requested three or more times (frequently requested records);
- requiring that the Annual FOIA data be downloadable;
- prohibiting agencies from charging a fee for providing records if the agency misses a deadline for complying with a FOIA request unless unusual circumstances apply and more than 5,000 pages are necessary to respond to the request;
- prohibiting agencies from withholding information requested under FOIA Exemption (b)(5) unless the agency reasonably foresees that disclosure would harm an interest

protected by a FOIA exemption or disclosure is prohibited by law;

• codifying the Administration's presumption of openness;

• requiring that agencies consider partial disclosures;

• requiring that agencies take steps to segregate and release nonexempt information;

• limiting the FOIA exemption for agency communications, (b)(5), to allow the disclosure of agency ''deliberative process'' records created 25 years or more before the date of a FOIA request;

• requiring the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between agencies and FOIA requesters;

• expanding the authority and duties of the Chief FOIA Officer of each agency to require officers to serve as the primary agency liaison with OGIS and the Office of Information Policy;

• establishing a Chief FOIA Officer Council to develop recommendations for increasing compliance and efficiency in responding to FOIA requests; disseminating information about agency experiences; identifying, developing, and coordinating initiatives to increase transparency and compliance; and promoting performance measures to ensure agency compliance with FOIA requirements; and

• requiring the Director of the Office of Management and Budget to ensure the operation of a consolidated online request portal that allows a member of the public to submit a request for records to any agency from a single Web site;

Summary of Changes

In order to assist agencies and encourage consistency in FOIA practices across the government, the Department of Justice, Office of Information Policy (OIP), created a FOIA template for agencies to use as agencies publish and update their regulations. The template, which is located at *https://www.justice.gov/oip/template-agency-foia-regulations,* provides sample regulation language. The proposed language contained in these revised FOIA regulations utilizes the language provided in the Act or contained in OIP's template. In order to conform the Commission's FOIA regulations to the requirements of the Act, the proposed rule revises the following sections of 29 CFR part 1610:

• § 1610.1 (Definitions section is revised to utilize OIP's FOIA template);

• § 1610.2 (Statutory requirements section is revised to utilize OIP's template language);

• § 1610.3 (Purpose and scope section is revised to utilize OIP's template language);

• § 1610.4 (Public reference facilities and current index section is revised to utilize OIP's template language, reflect requirements of the Act, and update District Office addresses);

• § 1610.5 (Request for records section is revised to utilize OIP's template language);

• § 1610.6 (Records of other agencies section is deleted; the information is moved to another section and utilizes OIP's template language);

• § 1610.7 (Where to make request: form section is revised to utilize OIP's template language);

• § 1610.8 (Authority to determine section is revised to utilize OIP's template language);

• § 1610.9 (Responses: timing section is revised to utilize OIP's template language);

• § 1610.10 (Responses: form and content section is revised to utilize OIP's template language and as required by the Act);

• § 1610.11 (Appeals to the Legal Counsel from initial denials section is revised to utilize OIP's template language and as required by the Act);

• § 1610.13 (Maintenance of files section is revised to utilize OIP's template language);

• § 1610.15 (Schedule of fees and method of payment for services section is revised to utilize OIP's template and as required by the Act);

• § 1610.17 (Exemptions section is revised to utilize OIP's template language and as required by the Act);

• § 1610.19 (Predisclosure notification procedures for confidential commercial information section is revised to utilize OIP's template language); and

• § 1610.21 (Annual report section is revised to utilize OIP's template language and as required by the Act).

Comments

The Commission invites comments. At the conclusion of the comment period, the Commission will review the comments received, and, if appropriate, will revise the regulation to ensure it aligns with the Act.

Regulatory Procedures

Executive Orders 13563 and 12866

In promulgating this interim final rule, the Commission has adhered to the regulatory philosophy and applicable principles set forth in Executive Order 13563, 3 CFR 215 (2011). The proposed interim final rule has been drafted and reviewed in accordance with Executive Order 12866, 3 CFR 638 (1993). The rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866.

Paperwork Reduction Act

The proposed rule contains no new information collection requirements subject to review by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

Regulatory Flexibility Act

The Commission certifies under 5 U.S.C. 605(b) that the proposed rule will not have a significant economic impact on a substantial number of small entities because the proposed revisions do not impose any burdens upon FOIA requesters, including those that might be small entities. Therefore, a regulatory flexibility analysis is not required by the Regulatory Flexibility Act.

Unfunded Mandates Reform Act of 1995

The proposed rule will not result in the expenditure by State, local, or tribal governments in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501).

Congressional Review Act

The proposed rule is not subject to the reporting requirement of 5 U.S.C. 801 because it does not substantially affect the rights or obligations of non-agency parties and therefore is not a ''rule'' as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1998).

List of Subjects in 29 CFR Part 1610

Freedom of information.

■ For the reasons set forth in the preamble, the Equal Employment Opportunity Commission amends 29 CFR part 1610 as follows:

PART 1610—PRODUCTION OR DISCLOSURE UNDER 5 U.S.C. 552

■ 1. The authority citation for Part 1610 continues to read as follows:

Authority: 42 U.S.C. 2000e–12(a), 5 U.S.C. 552 as amended by Pub. L. 93–502, Pub. L. 99–570 and Pub. L. 105–231; for § 1610.15, non-search or copy portions are issued under 31 U.S.C. 9701.

§ 1610.1 [Amended]

■ 2. In § 1610.1, remove paragraphs (d), (e), (f), (g), (k), (l), (n), and (o) and redesignate paragraphs (h), (i), (j), and

(m) as paragraphs (d) through (g), respectively.

■ 3. Revise § 1610.2 to read as follows:

§ 1610.2 Statutory requirements.

(a) This subpart contains the rules that the Commission will follow in processing requests for records under the Freedom of Information Act (''FOIA''), 5 U.S.C. 552. These rules should be read in conjunction with the text of the FOIA and the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget (''OMB Guidelines''). Requests made by individuals for records about themselves under the Privacy Act of 1974, 5 U.S.C. 552a, are processed in accordance with the Commission's Privacy Act regulations as well as under this subpart. The Commission should administer the FOIA with a presumption of openness. As a matter of policy, the Commission may make discretionary disclosures of records or information exempt from disclosure under the FOIA whenever disclosure would not foreseeably harm an interest protected by a FOIA exemption. This policy does not create any right enforceable in court.

(b) As referenced in this subpart, ''component'' means each separate office within the Commission that is responsible for processing FOIA requests. The rules described in this regulation that apply to the Commission also apply to its components.

■ 4. Revise § 1610.3 to read as follows:

§ 1610.3 Purpose and scope.

(a) This subpart contains the regulations of the Equal Employment Opportunity Commission implementing 5 U.S.C. 552. The regulations of this subpart provide information concerning the procedures by which records may be obtained from all organizational units within the Commission. Official records of the Commission made available pursuant to the requirements of 5 U.S.C. 552 shall be furnished to members of the public only as prescribed by this subpart. Officers and employees of the Commission may continue to furnish to the public, informally and without compliance with the procedures prescribed herein, information and records which prior to the enactment of 5 U.S.C. 552 were furnished customarily in the regular performance of their duties.

(b) Nothing in this subpart shall be construed to entitle any person, as of right, to any service or to the disclosure of any record to which such person is not entitled under the FOIA.

■ 5. In § 1610.4, revise paragraphs (a), (b)(6) and (7), add paragraph (b)(8), and revise paragraph (c) to read as follows:

§ 1610.4 Public reference facilities and current index.

(a) Records that the FOIA requires the Commission to make available for public inspection in an electronic format may be accessed through the Commission's Web site. The Commission is responsible for determining which of its records must be made publicly available, for identifying additional records of interest to the public that are appropriate for public disclosure, and for posting and indexing such records. The Commission must ensure that its Web site of posted records and indices is reviewed and updated on an ongoing basis. The Commission has a FOIA Requester Service Center or FOIA Public Liaison who can assist individuals in locating records particular to the Commission. Contact information is located at *https://www.eeoc.gov/eeoc/foia/index.cfm.* A list of agency FOIA Public Liaisons is available at *http://www.foia.gov/report-makerequest.html.*

(b) * * *

(6) ''CCH Equal Employment Opportunity Commission Decisions'' (1973 and 1983);

(7) Commission awarded contracts; and

(8) Copies of all records, regardless of form or format, that because of the nature of their subject matter—

(i) The Commission determines have become, or are likely to become, the subject of subsequent requests for substantially the same records; or

(ii) That have been requested 3 or more times.

(c) The Commission's District Offices with public reading areas are:

Atlanta District Office, Sam Nunn Atlanta Federal Center, 100 Alabama Street SW., Suite 4R30, Atlanta, GA 30303 (includes the Savannah Local Office).

Birmingham District Office, Ridge Park Place, 1130 22nd Street South, Suite 2000, Birmingham, AL 35205–2397 (includes the Jackson Area Office and the Mobile Local Office).

Charlotte District Office, 129 West Trade Street, Suite 400, Charlotte, NC 28202 (includes the Raleigh Area Office, the Greensboro Local Office, the Greenville Local Office, the Norfolk Local Office, and the Richmond Local Office).

Chicago District Office, 500 West Madison Street, Suite 2000, Chicago, IL 60661 (includes the Milwaukee Area Office and the Minneapolis Area Office).

Dallas District Office, 207 S. Houston Street, 3rd Floor, Dallas, TX 75202–4726 (includes the San Antonio Field Office and the El Paso Area Office).

Houston District Office, Mickey Leland Building, 1919 Smith Street, 6th Floor, Houston, TX 77002 (includes the New Orleans Field Office).

Indianapolis District Office, 101 West Ohio Street, Suite 1900, Indianapolis, IN 46204–4203 (includes the Detroit Field Office, the Cincinnati Area Office, and the Louisville Area Office).

Los Angeles District Office, Roybal Federal Building, 255 East Temple Street, 4th Floor, Los Angeles, CA 90012 (includes the Fresno Local Office, the Honolulu Local Office, the Las Vegas Local Office, and the San Diego Local Office).

Memphis District Office, 1407 Union Avenue, 9th Floor, Memphis, TN 38104 (includes the Little Rock Area Office, and the Nashville Area Office).

Miami District Office, Miami Tower, 100 SE 2nd Street, Suite 1500, Miami, FL 33131 (includes the Tampa Field Office, and the San Juan Local Office).

New York District Office, 33 Whitehall Street, 5th Floor, New York, NY 10004 (includes the Boston Area Office, the Newark Area Office, and the Buffalo Local Office).

Philadelphia District Office, 801 Market Street, Suite 1300, Philadelphia, PA 19107–3127 (includes the Baltimore Field Office, the Cleveland Field Office, and the Pittsburgh Area Office).

Phoenix District Office, 3300 N. Central Avenue, Suite 690, Phoenix, AZ 85012–2504 (includes the Denver Field Office, and the Albuquerque Area Office).

San Francisco District Office, 450 Golden Gate Avenue, 5 West, P.O. Box 36025, San Francisco, CA 94102–3661 (includes the Seattle Field Office, the Oakland Local Office, and the San Jose Local Office).

St. Louis District Office, Robert A. Young Federal Building, 1222 Spruce Street, Room 8100, St. Louis, MO 63103 (includes the Kansas City Area Office, and the Oklahoma City Area Office).

■ 6. Revise § 1610.5 to read as follows:

§ 1610.5 Request for records.

(a) *General information.* (1) To make a request for records, a requester should write directly to the Commission's FOIA office that maintains the records sought. A request will receive the quickest possible response if it is addressed to the Commission FOIA office that maintains the records sought. Information concerning the Commission's FOIA offices is listed at: *https://www.eeoc.gov/eeoc/foia/index.cfm* and any additional requirements for submitting a request to the agency are listed at paragraphs (b)

and (d) of this section. The Commission's Web site contains instructions for submitting FOIA requests and other resources to assist requesters in determining where to send their requests.

(2) A requester who is making a request for records about himself or herself must comply with the verification of identity requirements as determined by the Commission.

(3) Where a request for records pertains to another individual, a requester may receive greater access by submitting either a notarized authorization signed by that individual or a declaration made in compliance with the requirements set forth in 28 U.S.C. 1746 by that individual authorizing disclosure of the records to the requester, or by submitting proof that the individual is deceased (for example, a copy of a death certificate or an obituary). As an exercise of administrative discretion, the Commission can require a requester to supply additional information if necessary in order to verify that a particular individual has consented to disclosure.

(b) *Description of records sought.* Requesters must describe the records sought in sufficient detail to enable Commission personnel to locate them with a reasonable amount of effort. To the extent possible, requesters should include specific information that may help the Commission identify the requested records, such as the date, title or name, author, recipient, subject matter of the record, case number, file designation, or reference number. Before submitting their requests, requesters may contact the Commission's District Office FOIA contact or FOIA Public Liaison to discuss the records they seek and to receive assistance in describing the records. If after receiving a request the Commission determines that it does not reasonably describe the records sought, the Commission must inform the requester what additional information is needed or why the request is otherwise insufficient. Requesters who are attempting to reformulate or modify such a request may discuss their request with the Commission's FOIA contact or FOIA Public Liaison. If a request does not reasonably describe the records sought, the agency's response to the request may be delayed.

(1) A written request for inspection or copying of a record of the Commission may be presented in person, by mail, by fax, by email at *FOIA@eeoc.gov,* online at *https://publicportalfoiapal.eeoc.gov/palMain.aspx,* or through the Commission employee designated in § 1610.7.

(2) A request must be clearly and prominently identified as a request for information under the ''Freedom of Information Act.'' If submitted by mail, or otherwise submitted under any cover, the envelope or other cover must be similarly identified.

(3) A respondent must always provide a copy of the ''Filed'' stamped court complaint when requesting a copy of a charge file. The charging party must provide a copy of the ''Filed'' stamped court complaint when requesting a copy of the charge file if the Notice of Right to Sue has expired as of the date of the charging party's request.

(4) Each request must contain information which reasonably describes the records sought and, when known, should contain date, title or name, author, recipient, subject matter of the record, case number, file designation, or reference number and location for the records requested in order to permit the records to be promptly located.

(5) Where a request is not considered reasonably descriptive or requires the production of voluminous records, or necessitates the utilization of a considerable number of work hours to the detriment of the business of the Commission, the Commission may require the person making the request or such person's agent to confer with a Commission representative in order to attempt to verify the scope of the request and, if possible, narrow such request.

(c) *Format.* Requests may specify the preferred form or format (including electronic formats) for the records the requester seeks. The Commission will accommodate the request if the records are readily reproducible in that form or format.

(d) *Requester information.* Requesters must provide contact information, such as their phone number, email address, and/or mailing address, to assist the agency in communicating with them and providing released records.

§ 1610.6 [Removed and Reserved]

■ 7. Remove and reserve § 1610.6.

■ 8. Revise § 1610.7 to read as follows:

§ 1610.7 Where to make request; form.

(a) *In general.* The Commission or component that first receives a request for a record and maintains that record is responsible for responding to the request. In determining which records are responsive to a request, the Commission ordinarily will include only records in its possession as of the date that it begins its search. If any other date is used, the Commission must inform the requester of that date. A record that is excluded from the requirements of the FOIA pursuant to 5 U.S.C. 552(c), is not considered responsive to a request. Requests for the following types of records, however, should be submitted to the District Director for the pertinent district, field, area, or local office, at the district office address listed in § 1610.4(c) or, in the case of the Washington Field Office, shall be submitted to the Field Office Director at 131 M Street NE., Fourth Floor, Washington, DC 20507:

(1) Information about current or former employees of an office;

(2) Existing non-confidential statistical data related to the case processing of an office;

(3) Agreements between the Commission and State or local fair employment agencies operating within the jurisdiction of an office; or

(4) Materials in office investigative files related to charges under: Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*); the Equal Pay Act (29 U.S.C. 206(d)); the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 *et seq.*); the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 *et seq.*); or the Genetic Information Nondiscrimination Act of 2008 (42 U.S.C. 2000ff *et seq.*).

(b) *Request for other records.* A request for any record which does not fall within the ambit of paragraph (a) of this section, or a request for any record the location of which is unknown to the person making the request, shall be submitted in writing to the Assistant Legal Counsel, FOIA Programs, U.S. Equal Employment Opportunity Commission, by mail to 131 M Street NE., Suite 5NW02E, Washington, DC 20507, by fax to (202) 653–6034, by email to *FOIA@eeoc.gov,* or by Internet to *https://publicportalfoiapal.eeoc.gov/palMain.aspx.*

(c) *Authority to grant or deny requests.* The Commission has granted this authority to the Legal Counsel. The Legal Counsel is authorized to grant or to deny any requests for records that are maintained by the Commission.

(d) *Re-routing of misdirected requests.* Where the Commission determines that a request was misdirected within the agency, the receiving component's FOIA office must route the request to the FOIA office of the proper component(s) within the Commission.

(e) *Consultation, referral, and coordination.* When reviewing records located by the Commission in response to a request, the Commission will determine whether another agency of the Federal Government is better able to determine whether the record is exempt

from disclosure under the FOIA. As to any such record, the Commission must proceed in one of the following ways:

(1) *Consultation.* When records originated with the Commission, but contain within them information of interest to another agency or other Federal Government office, the Commission will typically consult with that other entity prior to making a release determination.

(2) *Referral.* (i) When the Commission believes that a different agency or component is best able to determine whether to disclose the record, the Commission typically will refer the responsibility for responding to the request regarding that record to that agency. Ordinarily, the agency that originated the record is presumed to be the best agency to make the disclosure determination. However, if the Commission is processing the request and the originating agency agrees that the Commission is in the best position to respond regarding the record, then the record may be handled as a consultation.

(ii) Whenever the Commission refers any part of the responsibility for responding to a request to another agency, it must document the referral, maintain a copy of the record that it refers, and notify the requester of the referral, informing the requester of the name(s) of the agency to which the record was referred, including that agency's FOIA contact information.

(3) *Coordination.* The standard referral procedure is not appropriate where disclosure of the identity of the agency to which the referral would be made could harm an interest protected by an applicable exemption, such as the exemptions that protect personal privacy or national security interests. For example, if a non-law enforcement agency responding to a request for records on a living third party locates within its files records originating with a law enforcement agency, and if the existence of that law enforcement interest in the third party was not publicly known, then to disclose that law enforcement interest could cause an unwarranted invasion of the personal privacy of the third party. Similarly, if the Commission locates within its files material originating with an Intelligence Community agency and the involvement of that agency in the matter is classified and not publicly acknowledged, then to disclose or give attribution to the involvement of that Intelligence Community agency could cause national security harms. In such instances, in order to avoid harm to an interest protected by an applicable exemption, the Commission will coordinate with the originating agency to seek its views on the disclosability of the record. The release determination for the record that is the subject of the coordination will then be conveyed to the requester by the Commission.

(e) *Classified information.* On receipt of any request involving information that is marked classified, the Commission must determine whether the information is currently and properly classified in accordance with applicable classification rules. Whenever a request involves a record containing information that has been marked as classified or may be appropriate for classification by another agency under any applicable executive order concerning the classification of records, the Commission must refer the responsibility for responding to the request regarding that information to the agency that classified the information, or that should consider the information for classification. Whenever an agency's record contains information that has been derivatively classified (for example, when it contains information classified by another agency), the Commission must refer the responsibility for responding to that portion of the request to the agency that classified the underlying information.

(f) *Timing of responses to consultations and referrals.* All consultations and referrals received by the Commission will be handled according to the date that the referring agency received the perfected FOIA request.

(g) *Agreements regarding consultations and referrals.* The Commission may establish agreements with other agencies to eliminate the need for consultations or referrals with respect to particular types of records.

■ 9. Revise § 1610.9 to read as follows:

§ 1610.9 Responses: Timing.

(a) *In general.* The Commission ordinarily will respond to requests according to their order of receipt. The various ways in which to submit a request to, or check on the status of a request with, EEOC are listed at: *https://www.eeoc.gov/eeoc/foia/index.cfm.* The information located at *www.foia.gov/report-makerequest.html* contains a list of all agencies and components that are designated to accept requests. In instances involving misdirected requests that are re-routed pursuant to § 1610.7(d), the response time will commence on the date that the request is received by the proper component office that is designated to receive requests, but in any event not later than 10 working days after the request is first received by the component office that is designated by these regulations to receive requests.

(b) *Multitrack processing.* The Commission designates a specific track for requests that are granted expedited processing, in accordance with the standards set forth in paragraph (f) of this section. The Commission also designates additional processing tracks that distinguish between simple and more complex requests based on the estimated amount of work or time needed to process the request. Among the factors considered are the number of records requested, the number of pages involved in processing the request and the need for consultations or referrals. The Commission must advise requesters of the track into which their request falls and, when appropriate, will offer the requesters an opportunity to narrow or modify their request so that it can be placed in a different processing track.

(c) *Acknowledgment.* The Assistant Legal Counsel, FOIA Programs, the District Director, or the District Director's designee shall, within 10 days from receipt of a request, notify the requester in writing of the date the Commission received the request, the expected date of issuance of the determination, the individualized FOIA tracking number assigned to the request, and the telephone number or Internet site where requesters may inquire about the status of their request.

(d) *Unusual circumstances.* Whenever the Commission cannot meet the statutory time limit for processing a request because of ''unusual circumstances,'' as defined in the FOIA, and the Commission extends the time limit on that basis, the Commission must, before expiration of the 20-day period to respond, notify the requester in writing of the unusual circumstances involved and of the date by which the agency estimates processing of the request will be completed. Where the extension exceeds 10 working days, the agency must, as described by the FOIA, provide the requester with an opportunity to modify the request or arrange an alternative time period for processing the original or modified request. The Commission must make available its designated FOIA contact or its FOIA Public Liaison for this purpose. The contact information for the EEOC FOIA Public Liaison is located at: *https://www.eeoc.gov/eeoc/foia/index.cfm.* A list of agency FOIA Public Liaisons is available at: *http://www.foia.gov/report-makerequest.html.* The Commission must also alert requesters to the availability of the Office of Government Information Services (OGIS) to provide dispute resolution services.

(e) *Aggregating requests.* To satisfy unusual circumstances under the FOIA, the Commission may aggregate requests in cases where it reasonably appears that multiple requests, submitted either by a requester or by a group of requesters acting in concert, constitute a single request that would otherwise involve unusual circumstances. The Commission cannot aggregate multiple requests that involve unrelated matters.

(f) *Expedited processing.* (1) The Commission must process requests and appeals on an expedited basis whenever it is determined that they involve:

(i) Circumstances in which the lack of expedited processing could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(ii) An urgency to inform the public about an actual or alleged Federal Government activity, if made by a person who is primarily engaged in disseminating information.

(2) A request for expedited processing may be made at any time. Requests based on paragraphs (f)(1)(i) and (ii) of this section must be submitted to the Commission or component of the Commission that maintains the records requested. When making a request for expedited processing of an administrative appeal, the request should be submitted to the Commission's Office of Legal Counsel, the office that adjudicates appeals.

(3) A requester who seeks expedited processing must submit a statement, certified to be true and correct, explaining in detail the basis for making the request for expedited processing. For example, under paragraph (f)(1)(ii) of this section, a requester who is not a full-time member of the news media must establish that the requester is a person whose primary professional activity or occupation is information dissemination, though it need not be the requester's sole occupation. Such a requester also must establish a particular urgency to inform the public about the government activity involved in the request—one that extends beyond the public's right to know about government activity generally. Depending on the circumstances, the existence of numerous recently published articles on a given subject may be helpful in establishing the requirement that there be an ''urgency to inform'' the public on the topic. This factor is not dispositive. As a matter of administrative discretion, the Commission may waive the formal certification requirement.

(4) The Commission must notify the requester within 10 calendar days of the receipt of a request for expedited processing of its decision whether to grant or deny expedited processing. If expedited processing is granted, the request must be given priority, placed in the processing track for expedited requests, and must be processed as soon as practicable. If a request for expedited processing is denied, the Commission must act on any appeal of that decision expeditiously.

(g) *Tolling.* The Commission may toll the statutory time period to issue its determination on a FOIA request one time during the processing of the request to obtain clarification from the requester. The statutory time period to issue the determination on disclosure is tolled until EEOC receives the information reasonably requested from the requester. The agency may also toll the statutory time period to issue the determination to clarify with the requester issues regarding fees. There is no limit on the number of times the agency may request clarifying fee information from the requester.

■ 10. Revise § 1610.10 to read as follows:

§ 1610.10 Responses: Form and content.

(a) *In general.* The Commission, to the extent practicable, will communicate with requesters having access to the Internet electronically, such as email or web portal.

(b) *Acknowledgments of requests.* The Commission must acknowledge the request in writing and assign it an individualized tracking number if it will take longer than 10 working days to process. The Commission must include in the acknowledgment a brief description of the records sought to allow requesters to more easily keep track of their requests.

(c) *Estimated dates of completion and interim responses.* Upon request, the Commission will provide an estimated date by which it expects to provide a response to the requester. If a request involves a voluminous amount of material, or searches in multiple locations, the Commission may provide interim responses, releasing the records on a rolling basis.

(d) *Grants of requests.* Once the Commission determines it will grant a request in full or in part, it must notify the requester in writing. The agency must also inform the requester of any fees charged under § 1610.15 of this part and must disclose the requested records to the requester promptly upon payment of any applicable fees. The Commission must inform the requester of the availability of its FOIA Public Liaison to offer assistance.

(e) *Adverse determinations of requests.* If the Commission makes an adverse determination denying a request in any respect, it must notify the requester of that determination in writing. Adverse determinations, or denials of requests, include decisions that: The requested record is exempt, in whole or in part; the request does not reasonably describe the records sought; the information requested is not a record subject to the FOIA; the requested record does not exist, cannot be located, or has been destroyed; or the requested record is not readily reproducible in the form or format sought by the requester. Adverse determinations also include denials involving fees or fee waiver matters or denials of requests for expedited processing.

(f) *Content of denial.* The denial must be signed by the head of the Commission or designee and must include:

(1) The name and title or position of the person responsible for the denial;

(2) A brief statement of the reasons for the denial, including any FOIA exemption applied by the Commission in denying the request;

(3) An estimate of the volume of any records or information withheld, such as the number of pages or some other reasonable form of estimation (such an estimate is not required if the volume is otherwise indicated by deletions marked on records that are disclosed in part or if providing an estimate would harm an interest protected by an applicable exemption);

(4) A statement that the denial may be appealed under paragraph 1610.11 of this section, and a description of the appeal requirements; and

(5) A statement notifying the requester of the assistance available from the Commission's FOIA Public Liaison and the dispute resolution services offered by OGIS.

(g) *Markings on released documents.* Records disclosed in part must be marked clearly to show the amount of information deleted and the exemption under which the deletion was made unless doing so would harm an interest protected by an applicable exemption. The location of the information deleted must also be indicated on the record, if technically feasible.

■ 11. Amend § 1610.11 as follows:

■ a. Revise paragraphs (a) through (c);

■ b. Remove paragraph (g);

■ c. Redesignate paragraphs (d) through (f) as paragraphs (f) through (h); and

■ d. Add new paragraphs (d) and (e).

The revisions and additions read as follows:

§ 1610.11 Appeals to the legal counsel from initial denials.

(a) *Requirements for making an appeal.* A requester may appeal any adverse determination to the Legal Counsel, or the Assistant Legal Counsel, FOIA Programs. Any appeal of a determination issued by a District Director or the District Director's designee must include a copy of the District Director's or the District Director's designee's determination. If a FOIA appeal is misdirected to a District Office, the District Office shall forward the appeal to the Legal Counsel, or the Assistant Legal Counsel, FOIA Programs, as appropriate, within 10 business days. Examples of adverse determinations are provided in § 1610.10(e). Requesters can submit appeals by mail, by fax to (202) 653–6034, by email to *FOIA@eeoc.gov,* or online at *https://publicportalfoiapal.eeoc.gov/palMain.aspx.* The requester must make the appeal in writing and to be considered timely it must be postmarked, or in the case of electronic submissions, transmitted, within 90 calendar days after the date of the response. The appeal should clearly identify the Commission determination that is being appealed and the assigned request number. To facilitate handling, the requester should mark both the appeal letter and envelope, or subject line of the electronic transmission, ''Freedom of Information Act Appeal.''

(b) *Adjudication of appeals.* (1) The Legal Counsel or designee, or the Assistant Legal Counsel, FOIA Programs, as appropriate, will decide all appeals under this section.

(2) An appeal ordinarily will not be adjudicated if the request becomes a matter of FOIA litigation.

(c) *Decisions on appeals.* The Commission must provide its decision on an appeal in writing. A decision that upholds the Commission's determination in whole or in part must contain a statement that identifies the reasons for the affirmance, including any FOIA exemptions applied. The decision must provide the requester with notification of the statutory right to file a lawsuit and will inform the requester of the mediation services offered by the Office of Government Information Services of the National Archives and Records Administration as a non-exclusive alternative to litigation. If the Commission's decision is remanded or modified on appeal, the Commission will notify the requester of that determination in writing. The Commission will then further process the request in accordance with that appeal determination and will respond directly to the requester.

(d) *Engaging in dispute resolution services provided by OGIS.* Mediation is a voluntary process. If the Commission agrees to participate in the mediation services provided by OGIS, it will actively engage as a partner to the process in an attempt to resolve the dispute.

(e) *When appeal is required.* Before seeking review by a court of the Commission's adverse determination, a requester generally must first submit a timely administrative appeal.

* * * * *

■ 12. Revise § 1610.13 to read as follows:

§ 1610.13 Maintenance of files.

The Commission must preserve all correspondence pertaining to the requests that it receives under this subpart, as well as copies of all requested records, until disposition or destruction is authorized pursuant to Title 44 of the United States Code or the General Records Schedule 14 of the National Archives and Records Administration. The Commission must not dispose of or destroy records while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

■ 13. Revise § 1610.15 to read as follows:

§ 1610.15 Schedule of fees and method of payment for services rendered.

(a) *In general.* (1) The Commission will charge for processing requests under the FOIA in accordance with the provisions of this section and with the OMB Guidelines. For purposes of assessing fees, the FOIA establishes three categories of requesters:

(i) Commercial use requesters;

(ii) Non-commercial scientific or educational institutions or news media requesters; and

(iii) All other requesters.

(2) Different fees are assessed depending on the category. Requesters may seek a fee waiver. The Commission must consider requests for fee waiver in accordance with the requirements in paragraph (k) of this section. To resolve any fee issues that arise under this section, the Commission may contact a requester for additional information. The Commission must ensure that searches, review, and duplication are conducted in the most efficient and the least expensive manner. The Commission ordinarily will collect all applicable fees before sending copies of records to a requester. Requesters must pay fees by check or money order made payable to the Treasury of the United States, or through *Pay.gov.*

(b) *Definitions.* For purposes of this section:

(1) Commercial use request refers to a request that asks for information for a use or a purpose that furthers a commercial, trade, or profit interest, which can include furthering those interests through litigation. An agency's decision to place a requester in the commercial use category will be made on a case-by-case basis based on the requester's intended use of the information. The Commission will notify requesters of their placement in this category.

(2) Direct costs refers to those expenses that the Commission incurs in searching for and duplicating (and, in the case of commercial use requests, reviewing) records in order to respond to a FOIA request. For example, direct costs include the salary of the employee performing the work (for example, the basic rate of pay for the employee, plus 16 percent of that rate to cover benefits) and the cost of operating computers and other electronic equipment, such as photocopiers and scanners. Direct costs do not include overhead expenses such as the costs of space, and of heating or lighting a facility.

(3) Duplication refers to reproducing a copy of a record, or of the information contained in it, necessary to respond to a FOIA request. Copies can take the form of paper, audiovisual materials, or electronic records, among others.

(4) Educational institution refers to any school that operates a program of scholarly research. A requester in this fee category must show that the request is made in connection with his or her role at the educational institution. The Commission may seek verification from the requester that the request is in furtherance of scholarly research, and the Commission will advise requesters of their placement in this category.

Example 1. A request from a professor of sociology at a university for records relating to women in the workplace, written on letterhead of the Department of Sociology, would be presumed to be from an educational institution.

Example 2. A request from the same professor of sociology seeking candidate correspondence from the Commission in furtherance of a mystery book she is writing would not be presumed to be an institutional request, regardless of whether it was written on institutional stationery.

Example 3. A student who makes a request in furtherance of her coursework or other school-sponsored activities and provides a copy of a course syllabus or other reasonable documentation to indicate the research purpose for the request, would qualify as part of this fee category.

(5) Noncommercial scientific institution is an institution that is not operated on a ''commercial basis,'' as defined in paragraph (b)(1) of this section, and that is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. A requester in this category must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are sought to further scientific research and are not for a commercial use. The Commission will advise requesters of their placement in this category.

(6) Representative of the news media is any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The term ''news'' means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations that broadcast ''news'' to the public at large and publishers of periodicals that disseminate ''news'' and make their products available through a variety of means to the general public, including news organizations that disseminate solely on the Internet. A request for records supporting the news-dissemination function of the requester will not be considered to be for a commercial use. ''Freelance journalists'' who demonstrate a solid basis for expecting publication through a news media entity will be considered representatives of the news media. A publishing contract would provide the clearest evidence that publication is expected; however, the Commission can also consider a requester's past publication record in making this determination. The Commission will advise requesters of their placement in this category.

(7) Review is the examination of a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. Review time includes processing any record for disclosure, such as doing all that is necessary to prepare the record for disclosure, including the process of redacting the record and marking the appropriate exemptions. Review costs are properly charged even if a record ultimately is not disclosed. Review time also includes time spent both obtaining and considering any formal objection to disclosure made by a confidential commercial information submitter under § 1610.19, but it does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(8) Search is the process of looking for and retrieving records or information responsive to a request. Search time includes page-by-page or line-by-line identification of information within records and the reasonable efforts expended to locate and retrieve information from electronic records.

(c) *Charging fees.* In responding to FOIA requests, the Commission will charge the following fees unless a waiver or reduction of fees has been granted under paragraph (k) of this section. Because the fee amounts provided below already account for the direct costs associated with a given fee type, the Commission will not add any additional costs to charges calculated under this section.

(1) *Search.* (i) Requests made by educational institutions, noncommercial scientific institutions, or representatives of the news media are not subject to search fees. The Commission will charge search fees for all other requesters, subject to the restrictions of paragraph (d) of this section. The Commission may properly charge for time spent searching even if it does not locate any responsive records or if it determines that the records are entirely exempt from disclosure.

(ii) For each quarter hour spent by personnel searching for requested records, including electronic searches that do not require new programming, the fees will be charged as follows:

(A) By clerical personnel—at the rate of $5.00 per quarter hour.

(B) By paralegals—at the rate of $9.00 per quarter hour.

(C) By professional personnel—at the rate of $10.00 per quarter hour.

(D) By managers—at the rate of $17.50 per quarter hour.

(E) By SES employees—at the rate of $20.00 per quarter hour.

(iii) The Commission will charge the direct costs associated with conducting any search that requires the creation of a new computer program to locate the requested records. The Commission must notify the requester of the costs associated with creating such a program, and the requester must agree to pay the associated costs before the costs may be incurred.

(iv) For requests that require the retrieval of records stored by the Commission at a Federal Records Center operated by the National Archives and Records Administration (NARA), the Commission will charge additional costs in accordance with the Transactional Billing Rate Schedule established by NARA: *http://www.archives.gov/dc-metro/suitland/delivery-fees.html.*

(2) *Duplication.* The Commission will charge duplication fees to all requesters, subject to the restrictions of paragraph (d) of this section. The Commission must honor a requester's preference for receiving a record in a particular form or format where the Commission can readily reproduce it in the form or format requested. Where photocopies are supplied, the Commission will provide one copy per request at the cost of $.15/page. For copies of records produced on tapes, disks, or other media, agencies will charge the direct costs of producing the copy, including operator time. Where paper documents must be scanned in order to comply with a requester's preference to receive the records in an electronic format, the requester must also pay the direct costs associated with scanning those materials. For other forms of duplication, the Commission will charge the direct costs.

(3) *Review.* The Commission will charge review fees to requesters who make commercial use requests. Review fees will be assessed in connection with the initial review of the record, for example, the review conducted by an agency to determine whether an exemption applies to a particular record or portion of a record. No charge will be made for review at the administrative appeal stage of exemptions applied at the initial review stage. However, if a particular exemption is deemed to no longer apply, any costs associated with an agency's re-review of the records in order to consider the use of other exemptions may be assessed as review fees. Review fees will be charged at the same rates as those charged for a search under paragraph (c)(1)(ii) of this section.

(d) *Restrictions on charging fees.* (1) When the Commission determines that a requester is an educational institution, non-commercial scientific institution, or representative of the news media, and the records are not sought for commercial use, it will not charge search fees.

(2)(i) If the Commission fails to comply with the FOIA's time limits in which to respond to a request, it may not charge search fees, or, in instances of requests from requesters described in paragraph (d)(1) of this section, may not charge duplication fees, except as described in paragraphs (d)(2)(ii) through (iv) of this section.

(ii) If the Commission has determined that unusual circumstances as defined by the FOIA apply and the Commission provided timely written notice to the requester in accordance with the FOIA, a failure to comply with the time limit shall be excused for an additional 10 days.

(iii) If the Commission has determined that unusual circumstances, as defined by the FOIA, apply and more than 5,000 pages are necessary to respond to the request, the Commission may charge search fees, or, in the case of requesters described in paragraph (d)(1) of this section, may charge duplication fees, if the following steps are taken. The Commission must have provided timely written notice of unusual circumstances to the requester in accordance with the FOIA, and the Commission must have discussed with the requester via written mail, email or telephone (or not made less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5 U.S.C 552(a)(6)(B)(ii). If this exception is satisfied, the Commission may charge all applicable fees incurred in the processing of the request.

(iv) If a court has determined that exceptional circumstances exist, as defined by the FOIA, a failure to comply with the time limits shall be excused for the length of time provided by the court order.

(3) No search or review fees will be charged for a quarter-hour period unless more than half of that period is required for search or review.

(4) Except for requesters seeking records for a commercial use, the Commission must provide without charge:

(i) The first 100 pages of duplication (or the cost equivalent for other media); and

(ii) The first two hours of search.

(5) No fee will be charged when the total fee, after deducting the 100 free pages (or its cost equivalent) and the first two hours of search, is equal to or less than $25.00.

(e) *Notice of anticipated fees in excess of $25.00.* (1) When the Commission determines or estimates that the fees to be assessed in accordance with this section will exceed $25.00, the Commission must notify the requester of the actual or estimated amount of the fees, including a breakdown of the fees for search, review, or duplication, unless the requester has indicated a willingness to pay fees as high as those anticipated. If only a portion of the fee can be estimated readily, the Commission will advise the requester accordingly. If the request is not for noncommercial use, the notice will specify that the requester is entitled to the statutory entitlements of 100 pages of duplication at no charge and, if the requester is charged search fees, two hours of search time at no charge, and will advise the requester whether those entitlements have been provided.

(2) If the agency notifies the requester that the actual or estimated fees are in excess of $25.00, the request will not be considered received and further work will not be completed until the requester commits in writing to pay the actual or estimated total fee, or designates some amount of fees the requester is willing to pay, or in the case of a noncommercial use requester who has not yet been provided with the requester's statutory entitlements, designates that the requester seeks only that which can be provided by the statutory entitlements. The requester must provide the commitment or designation in writing, and must, when applicable, designate an exact dollar amount the requester is willing to pay. The Commission is not required to accept payments in installments.

(3) If the requester has indicated a willingness to pay some designated amount of fees, but the Commission estimates that the total fee will exceed that amount, the Commission will toll the processing of the request when it notifies the requester of the estimated fees in excess of the amount the requester has indicated a willingness to pay. The Commission will inquire whether the requester wishes to revise the amount of fees the requester is willing to pay or modify the request. Once the requester responds, the time to respond will resume from where it was at the date of the notification.

(4) The Commission must make available its FOIA Public Liaison or other FOIA professional to assist any requester in reformulating a request to meet the requester's needs at a lower cost.

(f) *Charges for other services.* Although not required to provide special services, if the Commission chooses to do so as a matter of administrative discretion, the direct costs of providing the service will be charged. Examples of such services include certifying that records are true copies, providing multiple copies of the same document, or sending records by means other than first class mail. The Commission charges for the following special services:

(1) For attestation of documents—$25.00 per authenticating affidavit or declaration. Additionally, there may be search and review charges assessed in accordance with the rates listed in paragraph (c)(1) of this section.

(2) For certification of document—$50.00 per authenticating affidavit or declaration. Additionally, there may be search and review charges assessed in accordance with the rates listed in paragraph (c)(1) of this section.

(g) *Charging interest.* The Commission may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. Interest charges will be assessed at the rate provided in 31 U.S.C. 3717 and will accrue from the billing date until payment is received by the agency. Agencies must follow the provisions of the Debt Collection Act of 1982, 5 U.S.C. 5514, as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(h) *Aggregating requests.* When the Commission reasonably believes that a requester or a group of requesters acting in concert is attempting to divide a single request into a series of requests for the purpose of avoiding fees, the Commission may aggregate those requests and charge accordingly. The Commission may presume that multiple requests of this type made within a 30-day period have been made in order to avoid fees. For requests separated by a longer period, the Commission will aggregate them only where there is a reasonable basis for determining that aggregation is warranted in view of all the circumstances involved. Multiple requests involving unrelated matters cannot be aggregated.

(i) *Advance payments.* (1) For requests other than those described in paragraph (i)(2) or (3) of this section, the Commission cannot require the requester to make an advance payment before work is commenced or continued on a request. Payment owed for work already completed (for example, payment before copies are sent to a requester) is not an advance payment.

(2) When the Commission determines or estimates that a total fee to be charged under this section will exceed $250.00, it may require that the requester make an advance payment up to the amount of the entire anticipated fee before beginning to process the request. The Commission may elect to process the request prior to collecting fees when it receives a satisfactory assurance of full payment from a requester with a history of prompt payment.

(3) Where a requester has previously failed to pay a properly charged FOIA fee to the Commission within 30 calendar days of the billing date, the Commission may require that the requester pay the full amount due, plus any applicable interest on that prior request, and the Commission may require that the requester make an advance payment of the full amount of any anticipated fee before the Commission begins to process a new request or continues to process a pending request or any pending appeal.

Where the Commission has a reasonable basis to believe that a requester has misrepresented the requester's identity in order to avoid paying outstanding fees, it may require that the requester provide proof of identity.

(4) In cases in which the Commission requires advance payment, the request will not be considered received and further work will not be completed until the required payment is received. If the requester does not pay the advance payment within 30 calendar days after the date of the Commission's fee determination, the request will be closed.

(j) *Other statutes specifically providing for fees.* The fee schedule of this section does not apply to fees charged under any statute that specifically requires an agency to set and collect fees for particular types of records. In instances where records responsive to a request are subject to a statutorily-based fee schedule program, the Commission must inform the requester of the contact information for that program.

(k) *Requirements for waiver or reduction of fees.* (1) Requesters may seek a waiver of fees by submitting a written application demonstrating how disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(2) The Commission must furnish records responsive to a request without charge or at a reduced rate when it determines, based on all available information, that the factors described in paragraphs (k)(2)(i) through (iii) of this section are satisfied.

(i) Disclosure of the requested information would shed light on the operations or activities of the government. The subject of the request must concern identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated.

(ii) Disclosure of the requested information would be likely to contribute significantly to public understanding of those operations or activities. This factor is satisfied when the following criteria are met:

(A) Disclosure of the requested records must be meaningfully informative about government operations or activities. The disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not be meaningfully informative if nothing new would be added to the public's understanding.

(B) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area as well as the requester's ability and intention to effectively convey information to the public must be considered. The Commission will presume that a representative of the news media will satisfy this consideration.

(iii) The disclosure must not be primarily in the commercial interest of the requester. To determine whether disclosure of the requested information is primarily in the commercial interest of the requester, the Commission will consider the following criteria:

(A) The Commission must identify whether the requester has any commercial interest that would be furthered by the requested disclosure. A commercial interest includes any commercial, trade, or profit interest. Requesters must be given an opportunity to provide explanatory information regarding this consideration.

(B) If there is an identified commercial interest, the Commission must determine whether that is the primary interest furthered by the request. A waiver or reduction of fees is justified when the requirements of paragraphs (k)(2)(i) and (ii) of this section are satisfied and any commercial interest is not the primary interest furthered by the request. The Commission ordinarily will presume that when a news media requester has satisfied factors set forth in paragraphs (k)(2)(i) and (ii) of this section, the request is not primarily in the commercial interest of the requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

(3) Where only some of the records to be released satisfy the requirements for a waiver of fees, a waiver must be granted for those records.

(4) Requests for a waiver or reduction of fees should be made when the request is first submitted to the Commission and should address the criteria referenced above. A requester may submit a fee waiver request at a later time so long as the underlying record request is pending or on administrative appeal. When a requester who has committed to pay fees subsequently asks for a waiver of those fees and that waiver is denied, the requester must pay any costs incurred up to the date the fee waiver request was received.

§ 1610.16 [Removed and Reserved]

■ 14. Remove and reserve § 1610.16.

■ 15. In § 1610.17, redesignate paragraphs (b) through (h) as paragraphs (e) through (k) and add new paragraphs (b) through (d) and paragraph (l) to read as follows:

§ 1610.17 Exemptions.

* * * * *

(b) The Commission shall withhold information under the FOIA only if:

(1) It reasonably foresees that disclosure would harm an interest protected by an exemption; or

(2) Disclosure is prohibited by law.

(c)(1) The Commission shall consider whether partial disclosure of information is possible whenever it determines that a full disclosure of a requested record is not possible; and

(2) Take reasonable steps necessary to segregate and release nonexempt information.

(d) Paragraph (c) of this section does not require disclosure of information that is otherwise prohibited from disclosure by law, or otherwise exempted from disclosure under Exemption 3.

* * * * *

(l) The deliberative process privilege attached to Exemption 5 shall not apply to records created 25 years or more before the date on which the records were requested.

■ 16. Revise § 1610.19 to read as follows:

§ 1610.19 Predisclosure notification procedures for confidential commercial information.

(a) *Definitions.* (1) Confidential commercial information means commercial or financial information obtained by the agency from a submitter that may be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).

(2) Submitter means any person or entity, including a corporation, State, or foreign government, but not including another Federal Government entity, that provides confidential commercial information, either directly or indirectly to the Federal Government.

(b) *Designation of confidential commercial information.* A submitter of confidential commercial information must use good faith efforts to designate by appropriate markings, at the time of submission, any portion of its submission that it considers to be protected from disclosure under Exemption 4. These designations expire 10 years after the date of the submission

unless the submitter requests and provides justification for a longer designation period.

(c) *When notice to submitters is required.* (1) The Commission must promptly provide written notice to the submitter of confidential commercial information whenever records containing such information are requested under the FOIA if the Commission determines that it may be required to disclose the records, provided—

(i) The requested information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4; or

(ii) The Commission has a reason to believe that the requested information may be protected from disclosure under Exemption 4, but has not yet determined whether the information is protected from disclosure.

(2) The notice must either describe the commercial information requested or include a copy of the requested records or portions of records containing the information. In cases involving a voluminous number of submitters, the Commission may post or publish a notice in a place or manner reasonably likely to inform the submitters of the proposed disclosure, instead of sending individual notifications.

(d) *Exceptions to submitter notice requirements.* The notice requirements of this section do not apply if:

(1) The Commission determines that the information is exempt under the FOIA, and therefore will not be disclosed;

(2) The information has been lawfully published or has been officially made available to the public;

(3) Disclosure of the information is required by a statute other than the FOIA or by a regulation issued in accordance with the requirements of Executive Order 12600 of June 23, 1987; or

(4) The designation made by the submitter under paragraph (b) of this section appears obviously frivolous. In such case, the Commission must give the submitter written notice of any final decision to disclose the information within 10 days prior to a specified disclosure date.

(e) *Opportunity to object to disclosure.* (1) The Commission must specify a reasonable time period within which the submitter must respond to the notice referenced above.

(2) If a submitter has any objections to disclosure, it should provide the agency a detailed written statement that specifies all grounds for withholding the particular information under any exemption of the FOIA. In order to rely on Exemption 4 as basis for nondisclosure, the submitter must explain why the information constitutes a trade secret or commercial or financial information that is confidential.

(3) A submitter who fails to respond within the time period specified in the notice will be considered to have no objection to disclosure of the information. The Commission is not required to consider any information received after the date of any disclosure decision. Any information provided by a submitter under this subpart may itself be subject to disclosure under the FOIA.

(f) *Analysis of objections.* The Commission must consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose the requested information.

(g) *Notice of intent to disclose.* Whenever the Commission decides to disclose information over the objection of a submitter, the Commission must provide the submitter written notice, which must include:

(1) A statement of the reasons why each of the submitter's disclosure objections was not sustained;

(2) A description of the information to be disclosed or copies of the records as the Commission intends to release them; and

(3) A specified disclosure date, which must be 10 days after the notice.

(h) *Notice of FOIA lawsuit.* Whenever a requester files a lawsuit seeking to compel the disclosure of confidential commercial information, the Commission must promptly notify the submitter.

(i) *Requester notification.* The Commission must notify the requester whenever it provides the submitter with notice and an opportunity to object to disclosure; whenever it notifies the submitter of its intent to disclose the requested information; and whenever a submitter files a lawsuit to prevent the disclosure of the information.

■ 17. Amend § 1610.21 as follows:

■ a. Revise the first sentence of paragraph (a);

■ b. Redesignate paragraph (b) as paragraph (c); and

■ c. Add new paragraph (b).

The revision and addition read as follows:

§ 1610.21 Annual report.

(a) The Legal Counsel shall, on or before February 1, submit individual Freedom of Information Act reports for each principal agency FOIA component and one for the entire agency covering the preceding fiscal year to the Attorney General of the United States and to the director of the Office of Information Government Services. * * *

(b) The Commission will make each such report available for public inspection in an electronic format. In addition, the Commission will make the raw statistical data used in each report available in a timely manner for public inspection in an electronic format, which will be available—

(1) Without charge, license, or registration requirement;

(2) In an aggregated, searchable format; and

(3) In a format that may be downloaded in bulk.

* * * * *

Dated: December 22, 2016.

For the Commission.

Jenny R. Yang,

Chair.

[FR Doc. 2016–31388 Filed 12–28–16; 8:45 am]

BILLING CODE 6570–01–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2509

RIN 1210–AB78

Interpretive Bulletin Relating to the Exercise of Shareholder Rights and Written Statements of Investment Policy, Including Proxy Voting Policies or Guidelines

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Interpretive bulletin.

SUMMARY: This document sets forth supplemental views of the Department of Labor (Department) concerning the legal standards imposed by sections 402, 403 and 404 of Part 4 of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) with respect to voting of proxies on securities held in employee benefit plan investment portfolios, the maintenance of and compliance with statements of investment policy, including proxy voting policy, and the exercise of other legal rights of a shareholder. In this document, the Department withdraws Interpretive Bulletin 2008–2 and replaces it with Interpretive Bulletin 2016–1, which reinstates the language of Interpretive Bulletin 94–2 with certain modifications.

DATES: This interpretive bulletin is effective on December 29, 2016.

FOR FURTHER INFORMATION CONTACT: Office of Regulations and

Interpretations, Employee Benefits Security Administration, (202) 693–8500. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

Background

Title I of the Employee Retirement Income Security Act of 1974 (ERISA) establishes minimum standards for the operation of private-sector employee benefit plans and includes fiduciary responsibility rules governing the conduct of plan fiduciaries. The Department's longstanding position is that the fiduciary act of managing plan assets which are shares of corporate stock includes decisions on the voting of proxies and other exercises of shareholder rights. To assist plan fiduciaries in understanding their obligations under ERISA, the Department issued Interpretive Bulletin 94–2 (IB 94–2) in 1994 and updated that guidance in 2008 in Interpretive Bulletin 2008–2 (IB 2008–2).[1]

IB 94–2 noted that the duty to vote proxies lies exclusively with the plan trustee unless ''the power to manage, acquire or dispose of the relevant assets has been delegated by a named fiduciary to one or more investment managers'' pursuant to section 403(a)(2) of ERISA. IB 94–2 also explained that when the authority to manage plan assets has been delegated to an investment manager, ''no person other than the investment manager has authority to vote proxies appurtenant to such plan assets except to the extent that the named fiduciary has reserved to itself (or to another named fiduciary so authorized by the plan document) the right to direct a plan trustee regarding the voting of proxies.'' In addition, if the plan document or the investment management agreement does not expressly preclude the investment manager from voting proxies, the investment manager has the exclusive responsibility for proxy voting. An investment manager is not relieved of its own fiduciary responsibilities by following directions of some other person regarding the voting of proxies, or by delegating such responsibility to another person. IB 94–2 pointed out that the maintenance of written statements of investment policy, including guidelines on voting proxies on securities held in plan investment portfolios, is consistent with Title I of ERISA and that compliance with such a policy would be required under ERISA to the extent that such compliance with respect to any given investment decision is consistent with the provisions of Title I and Title IV of ERISA.

IB 94–2 also recognized that fiduciaries may engage in other shareholder activities intended to monitor or influence corporate management where the responsible fiduciary concludes that there is a reasonable expectation that such monitoring or communication with management, by the plan alone or together with other shareholders, is likely to enhance the value of the plan's investment in the corporation, after taking into account the costs involved. The bulletin observed that active monitoring and communication may be carried out through a variety of methods including by means of correspondence and meetings with corporate management as well as by exercising the legal rights of a shareholder.

IB 94–2 reiterated the Department's view that ERISA does not permit fiduciaries to subordinate the economic interests of participants and beneficiaries to unrelated objectives in voting proxies or in exercising other shareholder rights, but pointed out that a reasonable expectation of enhancing the value of the plan's investment through shareholder activities may exist in various circumstances, for example, where plan investments in corporate stock are held as long-term investments or where a plan may not be able to easily dispose of such an investment. IB 94–2 explained that active monitoring and communication activities could concern such issues as the independence and expertise of candidates for the corporation's board of directors and assuring that the board has sufficient information to carry out its responsibility to monitor management. Other issues identified in the bulletin included such matters as consideration of the appropriateness of executive compensation, the corporation's policy regarding mergers and acquisitions, the extent of debt financing and capitalization, the nature of long-term business plans, the corporation's investment in training to develop its work force, other workplace practices and financial and non-financial measures of corporate performance.[2]

On October 17, 2008, the Department replaced IB 94–2 with Interpretive Bulletin 2008–2 codified at 29 CFR 2509.08–2.[3] The Department's intent was to clarify and update the guidance in IB 94–2 and to reflect interpretive positions issued by the Department after 1994 on shareholder activism and socially-directed proxy voting initiatives. On the same date, the Department published Interpretive Bulletin 2008–1 (IB 2008–1) to update Interpretive Bulletin 94–1 (IB 94–1), which addressed issues regarding fiduciary consideration of investments and investment strategies that take into account environmental, social and governance (ESG) factors.

The Department believes that in the eight years since its publication, the changes made to IB 94–2 by IB 2008–2 have been misunderstood and may have worked to discourage ERISA plan fiduciaries who are responsible for the management of shares of corporate stock from voting proxies and engaging in other prudent exercises of shareholder rights.[4] In particular, the Department is concerned that IB 2008–2 has been read by some stakeholders to articulate a general rule that broadly prohibits ERISA plans from exercising shareholder rights, including voting of proxies, unless the plan has performed a cost-benefit analysis and concluded in the case of each particular proxy vote or exercise of shareholder rights that the action is more likely than not to result in a quantifiable increase in the

[1] IB 94–2 was codified at 29 CFR 2509.94–2 and published with an explanatory preamble in the **Federal Register** at 59 FR 38863 (July 29, 1994). The IB was presented as a restatement of views the Department had expressed in two letters addressing questions that arose concerning the voting of proxies on shares of corporate stock held by plans. The first letter was addressed to Helmuth Fandl, Chairman of the Retirement Board of Avon Products Inc. and dated February 23, 1988, and the second letter was addressed to Robert A.G. Monks of Institutional Shareholder Services, Inc. and dated January 23, 1990.

[2] The Department has not been alone in emphasizing the significance of proxy voting to the value of investments. *See* SEC Final Rule, Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies, Release Nos. 33–8188; 34–47304; IC–25922 (Jan. 31, 2003) and SEC Final Rule, Proxy Voting by Investment Advisers, Release No. IA–2106 (Jan. 31, 2003). In addition, the SEC also adopted a rule requiring corporations to provide additional disclosure in proxy materials associated with the election of directors. *See* SEC Final Rule, Proxy Disclosure Enhancements, Release Nos. 33–9089; 34–61175 (Dec. 16, 2009).

[3] Also published in the **Federal Register** at 73 FR 61731 (Oct. 17, 2008).

[4] The Department reached a similar conclusion in rescinding IB 2008–1 on economically targeted investments (ETIs) and reinstating the language from its original 1994 guidance in IB 94–1. See Interpretive Bulletin 2015–1, 80 FR 65135 (Oct. 26, 2015). The Department noted that the ETI market which considers ESG factors had grown internationally as new tools and measures were developed leaving investors better equipped to evaluate the question of whether a given investment could both benefit the plan in financial terms *and* advance environmental, social or corporate governance goals. In fact, the new tools and measures have revealed that environmental, social and governance impacts can be intrinsic to the market value of an investment. Based on those developments, the Department concluded that its attempt to update IB 94–1 in 2008, rather than clarifying permissible ESG considerations, had in practice had a chilling effect on ERISA plans participating in the growth of economically targeted investing.

economic value of the plan's investment.

The essential point of IB 94–2, however, was to articulate a general principle that a fiduciary's obligation to manage plan assets prudently extends to proxy voting. As such, IB 94–2 properly read was meant to express the view that proxies should be voted as part of the process of managing the plan's investment in company stock unless a responsible plan fiduciary determined that the time and costs associated with voting proxies with respect to certain types of proposals or issuers may not be in the plan's best interest. IB 94–2 was also intended to make it clear that fiduciary duties associated with voting proxies encompass the monitoring of decisions made and actions taken with regard to proxy voting, and that it was appropriate for a plan fiduciary to incur reasonable expenses in fulfilling those fiduciary obligations. While there may be special circumstances that might warrant a discrete analysis of the cost of the shareholder activity versus the economic benefit associated with the outcome of the activity, the Department did not intend to imply that such an analysis should be conducted in most cases. In most cases, proxy voting and other shareholder engagement does not involve a significant expenditure of funds by individual plan investors because the activities are engaged in by institutional investment managers appointed as the responsible plan fiduciary pursuant to sections 402(c)(3), 403(a)(2) and 3(38) of ERISA. Those investment managers often engage consultants, including proxy advisory firms, in an attempt to further reduce the costs of researching proxy matters and exercising shareholder rights.[5] Thus, such a conclusion ignores the fact that many proxy votes involve very little, if any, additional expense to the individual plan shareholders to arrive at a prudent result and that, depending on the particular resolution and the extent of the plan's holdings, not voting, in fact, may in effect count one way or another.

The pervasiveness of US publicly-traded stock in ERISA plan investment portfolios, both direct holdings and through pooled investment funds, including index funds, is another factor that contributes to the importance of proxy voting and shareholder engagement practices. If there is a problem identified with a portfolio company's management, selling the stock and finding a replacement investment may not be a prudent solution for a plan fiduciary. As Vanguard founder John Bogle put it in the context of index funds, ''the only weapon [index funds] have, if we don't like the management, is to get a new management or to force the management to reform.'' [6]

The Department is also concerned that despite the guidance on ESG issues the Department recently provided in IB 2015–1, statements in IB 2008–2 may cause confusion as to whether or how a plan fiduciary may consider ESG issues in connection with proxy voting or undertaking other shareholder engagement activities. The Department has rejected a construction of ERISA that would render ERISA's tight limits on the use of plan assets illusory and that would permit plan fiduciaries to expend trust assets to promote myriad public policy preferences. Rather, plan fiduciaries may not increase expenses, sacrifice investment returns, or reduce the security of plan benefits in order to promote collateral goals. However, by focusing on a ''cost-benefit analysis'' demonstrating a ''more likely than not'' enhancement in the economic value of the investment, the Department believes that IB 2008–2 may be read as discouraging fiduciaries from recognizing the long-term financial benefits that, although difficult to quantify, can result from thoughtful shareholder engagement when voting proxies, establishing a proxy voting policy, or otherwise exercising rights as shareholders.

The existence of financial benefits associated with shareholder engagement is suggested by the fact that a growing number of institutional investors are now engaging companies on ESG issues. According to a 2014 survey by the US SIF Foundation, 202 institutional investors or money managers representing $1.72 trillion in US-domiciled assets filed or co-filed shareholder resolutions on ESG issues at publicly traded companies from 2012 through 2014.[7] The members of the Investor Network on Climate Risk (INCR), a network of institutions representing more than $14 trillion in assets, engage with companies in their portfolios on climate and sustainability issues. Members include BlackRock, California Public Employees' Retirement System, Deutsche Asset & Wealth Management, Prudential Investment Management, State Street Global Advisors and TIAA Global Asset Management.[8] Globally, over 1300 asset managers and asset owners have signed the Principles for Responsible Investment, the second principle of which states that the managers and owners will be active owners and incorporate ESG issues into ownership policies and practices.[9] Companies are also being required to be more transparent in the way they address ESG issues. For example, in 2010, the Dodd-Frank Act required publicly traded companies to allow shareholders an advisory vote on executive pay plans at least once every three years.[10] Similarly, in 2009 the SEC issued rules which required companies to disclose in proxy statements relating to the election of directors, among other things, their policy for consideration of diversity in the process by which candidates for director are considered for nomination by a company's nominating committee.[11]

Other market developments further substantiate the financial benefits from shareholder engagement. Companies themselves are seeking more engagement as a way of understanding and responding to their shareholders'

[5] In selecting an investment manager for a plan, the responsible plan fiduciary should include a review of any voting policies or guidelines that would be followed in the management of plan assets to ensure consistency with ERISA. Further, as plan fiduciaries, investment managers who utilize proxy advisory firms should engage in an objective process that is designed to elicit information necessary to assess the provider's qualifications, quality of services offered, and reasonableness of fees charged for the service. The process also must avoid self-dealing, conflicts of interest or other improper influence. The investment manager in considering any proxy recommendation should assure that it is fully informed of potential conflicts of proxy advisory firms and the steps the firm has taken to address them. *See generally* ''Proxy Voting: Proxy Voting Responsibilities of Investment Advisers and Availability of Exemptions from the Proxy Rules for Proxy Advisory Firms,'' SEC Staff Legal Bulletin No. 20 (IM/CF) (June 30, 2014) (discussing issues that may arise under the federal securities laws for registered investment advisers in connection with selection and monitoring of proxy advisory firms, among other things).

[6] Interview by Christine Benz with John Bogle, Founder, Vanguard (Oct. 10, 2010) (*available at www.morningstar.com/videos/359002/bogle-index-funds-power-in-corporate-governance.aspx*).

[7] US SIF FOUNDATION, Report on US Sustainable, Responsible and Impact Investing Trends 2014.

[8] See INCR membership list at *www.ceres.org/investor-network/incr/member-directory*.

[9] The Principles for Responsible Investment (PRI) has been supported by the United Nations since its launch. The PRI has two UN partners, the United Nations Environment Programme Finance Initiative and the United Nations Global Compact, which play an important role in delivering the PRI's strategy. See ''About the PRI'' for further explanation of PRI and their responsible investment effort at *www.unpri.org/about*.

[10] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law No. 111–203, 124 Stat. 1376 (2010), for section 951 requirements. *See also* SEC Final Rule, Shareholder Approval of Executive Compensation and Golden Parachute Compensation, Release Nos. 33–9178; 34–63768 (Jan. 25, 2011).

[11] SEC Final Rule, Proxy Disclosure Enhancements, Release Nos. 33–9089; 34–61175 (Dec. 16, 2009).

views.[12] There have also been market events that were catalysts for the growth of shareholder engagement. The financial crisis of 2008 exposed some of the pitfalls of shareholder inattention to corporate governance and highlighted the merits of shareholders taking a more engaged role with the companies.

This is not a trend unique to the United States. Other countries have recognized these developments and taken steps to provide guidance on proxy voting and shareholder engagement in the form of ''stewardship codes.'' The first stewardship code was published in 2010 by the UK's Financial Reporting Council, which traces its origins to principles published by the UK's Institutional Shareholders Committee in 2002 and later the International Corporate Governance Network Principles on Institutional Investor Responsibilities in 2007.[13] Other such codes have followed, including in Canada, Italy, Japan, Singapore, South Africa, Switzerland, the Netherlands, and Malaysia.[14]

For all the above reasons, the Department is concerned that the changes to IB 94–2 in IB 2008–2 are out of step with important domestic and international trends in investment management and have the potential to dissuade ERISA fiduciaries from exercising shareholder rights, including the voting of proxies, in areas that are increasingly being recognized as important to long-term shareholder value. In fact, the Department believes the principles originally articulated in IB 94–2, with certain updates to reflect the trends on shareholder engagement discussed above, are a better expression of a fiduciary's obligations under sections 402(c)(3), 403(a) and 404(a)(1)(A) of ERISA on these issues. The Department therefore has decided to withdraw IB 2008–2 and replace it with Interpretive Bulletin 2016–1 which reinstates the language of IB 94–2 with minor updates.

The following Interpretive Bulletin deals solely with the applicability of the prudence and exclusive purpose requirements of ERISA as applied to fiduciary decisions with respect to voting of proxies on securities held in employee benefit plan investment portfolios, the maintenance of and compliance with statements of investment policy, including proxy voting policy, and the appropriateness under ERISA of shareholder engagement with corporate management by plan fiduciaries. The bulletin does not supersede the regulatory standard contained at 29 CFR 2550.404a–1, nor does it address any issues which may arise in connection with the prohibited transaction provisions under ERISA section 406 or the statutory exemptions under ERISA section 408 from those provisions. This Interpretative Bulletin is a restatement of IB 94–2 with certain updates to the examples of areas where monitoring or communication with management is likely to enhance the value of the plan's investment in the corporation.

List of Subjects in 29 CFR Part 2509

Employee benefit plans, Pensions.

For the reasons set forth in the preamble, the Department is amending part 2509 of title 29 of the Code of Federal Regulations as follows:

PART 2509—INTERPRETIVE BULLETINS RELATING TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

■ 1. The authority citation for part 2509 continues to read as follows:

Authority: 29 U.S.C. 1135. Secretary of Labor's Order 1–2003, 68 FR 5374 (Feb. 3, 2003). Sections 2509.75–10 and 2509.75–2 issued under 29 U.S.C. 1052, 1053, 1054. Sec. 2509.75–5 also issued under 29 U.S.C. 1002. Sec. 2509.95–1 also issued under sec. 625, Public Law 109–280, 120 Stat. 780.

§ 2509.08–2 [Removed]

■ 2. Remove § 2509.08–2.

■ 3. Add § 2509.2016–01 to read as follows:

§ 2509.2016–01 Interpretive Bulletin relating to the exercise of shareholder rights and written statements of investment policy, including proxy voting policies or guidelines.

This interpretive bulletin sets forth the Department of Labor's (the Department) interpretation of sections 402, 403 and 404 of the Employee Retirement Income Security Act of 1974 (ERISA) as those sections apply to voting of proxies on securities held in employee benefit plan investment portfolios and the maintenance of and compliance with statements of investment policy, including proxy voting policy. In addition, this interpretive bulletin provides guidance on the appropriateness under ERISA of active engagement with corporate management by plan fiduciaries.

(1) Proxy Voting

The fiduciary act of managing plan assets that are shares of corporate stock includes the voting of proxies appurtenant to those shares of stock. As a result, the responsibility for voting proxies lies exclusively with the plan trustee except to the extent that either (1) the trustee is subject to the directions of a named fiduciary pursuant to ERISA section 403(a)(1), or (2) the power to manage, acquire or dispose of the relevant assets has been delegated by a named fiduciary to one or more investment managers pursuant to ERISA section 403(a)(2). Where the authority to manage plan assets has been delegated to an investment manager pursuant to section 403(a)(2), no person other than the investment manager has authority to vote proxies appurtenant to such plan assets except to the extent that the named fiduciary has reserved to itself (or to another named fiduciary so authorized by the plan document) the right to direct a plan trustee regarding the voting of proxies. In this regard, a named fiduciary, in delegating investment management authority to an investment manager, could reserve to itself the right to direct a trustee with respect to the voting of all proxies or reserve to itself the right to direct a trustee as to the voting of only those proxies relating to specified assets or issues.

If the plan document or investment management agreement provides that the investment manager is not required to vote proxies, but does not expressly preclude the investment manager from voting proxies, the investment manager would have exclusive responsibility for voting proxies. Moreover, an investment manager would not be relieved of its own fiduciary responsibilities by following directions of some other person regarding the voting of proxies, or by delegating such responsibility to another person. If, however, the plan document or the investment management contract expressly precludes the investment manager from voting proxies, the responsibility for voting proxies would lie exclusively with the trustee. The trustee, however, consistent with the requirements of ERISA section 403(a)(1), may be subject to the directions of a named fiduciary if the plan so provides.

The fiduciary duties described at ERISA section 404(a)(1)(A) and(B), require that, in voting proxies, the responsible fiduciary consider those factors that may affect the value of the plan's investment and not subordinate the interests of the participants and beneficiaries in their retirement income

[12] Blackrock and Ceres, 21st Century Engagement: Investor Strategies for Incorporating ESG Considerations into Corporate Interactions (2015). *See also* Joseph McCahery, Zacharias Sautner & Laura T. Starks, *Behind the Scenes The Corporate Governance Preferences of Institutional Investors,* 71 The Journal of Finance 2905–2932 (Dec. 2016).

[13] BLACKROCK AND CERES, *supra* footnote 12, at 34.

[14] *Id.*

to unrelated objectives. These duties also require that the named fiduciary appointing an investment manager periodically monitor the activities of the investment manager with respect to the management of plan assets, including decisions made and actions taken by the investment manager with regard to proxy voting decisions. The named fiduciary must carry out this responsibility solely in the interest of the participants and beneficiaries and without regard to its relationship to the plan sponsor.

It is the view of the Department that compliance with the duty to monitor necessitates proper documentation of the activities that are subject to monitoring. Thus, the investment manager or other responsible fiduciary would be required to maintain accurate records as to proxy voting. Moreover, if the named fiduciary is to be able to carry out its responsibilities under ERISA section 404(a) in determining whether the investment manager is fulfilling its fiduciary obligations in investing plans assets in a manner that justifies the continuation of the management appointment, the proxy voting records must enable the named fiduciary to review not only the investment manager's voting procedure with respect to plan-owned stock, but also to review the actions taken in individual proxy voting situations.

The fiduciary obligations of prudence and loyalty to plan participants and beneficiaries require the responsible fiduciary to vote proxies on issues that may affect the value of the plan's investment. This principle applies broadly. However, the Department recognizes that in some special cases voting proxies may involve out of the ordinary costs or unusual requirements, for example in the case of voting proxies on shares of certain foreign corporations. Thus, in such cases, a fiduciary should consider whether the plan's vote, either by itself or together with the votes of other shareholders, is expected to have an effect on the value of the plan's investment that warrants the additional cost of voting. Moreover, a fiduciary, in deciding whether to purchase shares for which this may be the case, should consider whether the difficulty and expense in voting the shares is reflected in their market price.

(2) Statements of Investment Policy

The maintenance by an employee benefit plan of a statement of investment policy designed to further the purposes of the plan and its funding policy is consistent with the fiduciary obligations set forth in ERISA section 404(a)(1)(A) and (B). Since the fiduciary act of managing plan assets that are shares of corporate stock includes the voting of proxies appurtenant to those shares of stock, a statement of proxy voting policy would be an important part of any comprehensive statement of investment policy. For purposes of this document, the term ''statement of investment policy'' means a written statement that provides the fiduciaries who are responsible for plan investments with guidelines or general instructions concerning various types or categories of investment management decisions, which may include proxy voting decisions as well as policies concerning economically targeted investments or incorporating environmental, social or governance (ESG) factors in investment policy statements or integrating ESG-related tools, metrics and analyses to evaluate an investment's risk or return or choose among equivalent investments. A statement of investment policy is distinguished from directions as to the purchase or sale of a specific investment at a specific time or as to voting specific plan proxies.

In plans where investment management responsibility is delegated to one or more investment managers appointed by the named fiduciary pursuant to ERISA section 402(c)(3), the named fiduciary responsible for appointment of investment managers has the authority to condition the appointment on acceptance of a statement of investment policy. Thus, such a named fiduciary may expressly require, as a condition of the investment management agreement, that an investment manager comply with the terms of a statement of investment policy which sets forth guidelines concerning investments and investment courses of action which the investment manager is authorized or is not authorized to make. Such investment policy may include a policy or guidelines on the voting of proxies on shares of stock for which the investment manager is responsible. In the absence of such an express requirement to comply with an investment policy, the authority to manage the plan assets placed under the control of the investment manager would lie exclusively with the investment manager. Although a trustee may be subject to the directions of a named fiduciary pursuant to ERISA section 403(a)(1), an investment manager who has authority to make investment decisions, including proxy voting decisions, would never be relieved of its fiduciary responsibility if it followed directions as to specific investment decisions from the named fiduciary or any other person.

Statements of investment policy issued by a named fiduciary authorized to appoint investment managers would be part of the ''documents and instruments governing the plan'' within the meaning of ERISA section 404(a)(1)(D). An investment manager to whom such investment policy applies would be required to comply with such policy, pursuant to ERISA section 404(a)(1)(D) insofar as the policy directives or guidelines are consistent with titles I and IV of ERISA. Therefore, if, for example, compliance with the guidelines in a given instance would be imprudent, then the investment manager's failure to follow the guidelines would not violate ERISA section 404(a)(1)(D). Moreover, ERISA section 404(a)(1)(D) does not shield the investment manager from liability for imprudent actions taken in compliance with a statement of investment policy.

The plan document or trust agreement may expressly provide a statement of investment policy to guide the trustee or may authorize a named fiduciary to issue a statement of investment policy applicable to a trustee. Where a plan trustee is subject to an investment policy, the trustee's duty to comply with such investment policy would also be analyzed under ERISA section 404(a)(1)(D). Thus, the trustee would be required to comply with the statement of investment policy unless, for example, it would be imprudent to do so in a given instance.

Maintenance of a statement of investment policy by a named fiduciary does not relieve the named fiduciary of its obligations under ERISA section 404(a) with respect to the appointment and monitoring of an investment manager or trustee. In this regard, the named fiduciary appointing an investment manager must periodically monitor the investment manager's activities with respect to management of the plan assets. Moreover, compliance with ERISA section 404(a)(1)(B) would require maintenance of proper documentation of the activities of the investment manager and of the named fiduciary of the plan in monitoring the activities of the investment manager. In addition, in the view of the Department, a named fiduciary's determination of the terms of a statement of investment policy is an exercise of fiduciary responsibility and, as such, statements may need to take into account factors such as the plan's funding policy and its liquidity needs as well as issues of prudence, diversification and other fiduciary requirements of ERISA.

An investment manager of a pooled investment vehicle that holds assets of more than one employee benefit plan may be subject to a proxy voting policy of one plan that conflicts with the proxy voting policy of another plan. Compliance with ERISA section 404(a)(1)(D) would require the investment manager to reconcile, insofar as possible, the conflicting policies (assuming compliance with each policy would be consistent with ERISA section 404(a)(1)(D)) and, if necessary and to the extent permitted by applicable law, vote the relevant proxies to reflect such policies in proportion to each plan's interest in the pooled investment vehicle. If, however, the investment manager determines that compliance with conflicting voting policies would violate ERISA section 404(a)(1)(D) in a particular instance, for example, by being imprudent or not solely in the interest of plan participants, the investment manager would be required to ignore the voting policy that would violate ERISA section 404(a)(1)(D) in that instance. Such an investment manager may, however, require participating investors to accept the investment manager's own investment policy statement, including any statement of proxy voting policy, before they are allowed to invest. As with investment policies originating from named fiduciaries, a policy initiated by an investment manager and adopted by the participating plans would be regarded as an instrument governing the participating plans, and the investment manager's compliance with such a policy would be governed by ERISA section 404(a)(1)(D).

(3) Shareholder Engagement

An investment policy that contemplates activities intended to monitor or influence the management of corporations in which the plan owns stock is consistent with a fiduciary's obligations under ERISA where the responsible fiduciary concludes that there is a reasonable expectation that such monitoring or communication with management, by the plan alone or together with other shareholders, is likely to enhance the value of the plan's investment in the corporation, after taking into account the costs involved. Such a reasonable expectation may exist in various circumstances, for example, where plan investments in corporate stock are held as long-term investments, where a plan may not be able to easily dispose of such an investment, or where the same shareholder engagement issue is likely to exist in the case of available alternative investments. Active monitoring and communication activities would generally concern such issues as the independence and expertise of candidates for the corporation's board of directors and assuring that the board has sufficient information to carry out its responsibility to monitor management. Other issues may include such matters as governance structures and practices, particularly those involving board composition, executive compensation, transparency and accountability in corporate decision-making, responsiveness to shareholders, the corporation's policy regarding mergers and acquisitions, the extent of debt financing and capitalization, the nature of long-term business plans including plans on climate change preparedness and sustainability, governance and compliance policies and practices for avoiding criminal liability and ensuring employees comply with applicable laws and regulations, the corporation's workforce practices (*e.g.,* investment in training to develop its work force, diversity, equal employment opportunity), policies and practices to address environmental or social factors that have an impact on shareholder value, and other financial and non-financial measures of corporate performance. Active monitoring and communication may be carried out through a variety of methods including by means of correspondence and meetings with corporate management as well as by exercising the legal rights of a shareholder.

Phyllis C. Borzi,

Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–HQ–OAR–2016–0691; FRL–9957–28–OAR]

Extension of Deadline for Action on the November 2016 Section 126 Petition From Delaware

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: In this action, the Environmental Protection Agency (EPA) is determining that 60 days is insufficient time to complete the technical and other analyses and public notice-and-comment process required for our review of a petition submitted by the state of Delaware pursuant to section 126 of the Clean Air Act (CAA). The petition requests that the EPA make a finding that Homer City Generating Station, located in Indiana County, Pennsylvania, emits air pollution that significantly contributes to nonattainment and interferes with maintenance of the 2008 and 2015 ozone national ambient air quality standards (NAAQS) in the state of Delaware. Under section 307(d)(10) of CAA, the EPA is authorized to grant a time extension for responding to a petition if the EPA determines that the extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of the section 307(d) notice-and-comment rulemaking requirements. By this action, the EPA is making that determination. The EPA is therefore extending the deadline for acting on the petition to no later than July 9, 2017.

DATES: This final rule is effective on December 29, 2016.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2016–0691. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information 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 electronically through *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Benjamin Gibson, Office of Air Quality Planning and Standards (C545–E), U.S. EPA, Research Triangle Park, North Carolina 27709, telephone number (919) 541–3277, email: *gibson.benjamin@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background and Legal Requirements for Interstate Air Pollution

This is a procedural action to extend the deadline for the EPA to respond to a petition from the state of Delaware filed pursuant to CAA section 126(b). The EPA received the petition on November 10, 2016. The petition requests that the EPA make a finding under section 126(b) of the CAA that the Homer City Generating Station, located in Indiana County, Pennsylvania, is operating in a manner that emits air pollutants in violation of the provisions of section 110(a)(2)(D)(i)(I) of the CAA

with respect to the 2008 and 2015 ozone NAAQS.

Section 126(b) of the CAA authorizes states to petition the EPA to find that a major source or group of stationary sources in upwind states emits or would emit any air pollutant in violation of the prohibition of CAA section 110(a)(2)(D)(i) [1] by contributing significantly to nonattainment or maintenance problems in downwind states. Section 110(a)(2)(D)(i)(I) of the CAA prohibits emissions of any air pollutant in amounts which will contribute significantly to nonattainment in, or interfere with maintenance by, any other state with respect to any NAAQS. The petition asserts that emissions from Homer City Generating Station's three electric generating units emit air pollutants in violation of CAA section 110(a)(2)(D)(i)(I) with respect to the 2008 8-hour ozone NAAQS, set at 0.075 parts per million (ppm), and the revised 2015 8-hour ozone NAAQS, set at 0.070 ppm.[2]

Pursuant to CAA section 126(b), the EPA must make the finding requested in the petition, or must deny the petition within 60 days of its receipt. Under CAA section 126(c), any existing sources for which the EPA makes the requested finding must cease operations within 3 months of the finding, except that the source may continue to operate if it complies with emission limitations and compliance schedules (containing increments of progress) that the EPA may provide to bring about compliance with the applicable requirements as expeditiously as practical but no later than 3 years from the date of the finding.

CAA section 126(b) further provides that the EPA must hold a public hearing on the petition. The EPA's action under section 126 is also subject to the procedural requirements of CAA section 307(d). *See* CAA section 307(d)(1)(N). One of these requirements is notice-and-comment rulemaking, under section 307(d)(3)–(6).

In addition, CAA section 307(d)(10) provides for a time extension, under certain circumstances, for a rulemaking subject to CAA section 307(d). Specifically, CAA section 307(d)(10) provides:

> Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of the subsection.

CAA section 307(d)(10) may be applied to section 126 rulemakings because the 60-day time limit under CAA section 126(b) necessarily limits the period for promulgation of a final rule after proposal to less than 6 months.

II. Final Rule

A. Rule

In accordance with CAA section 307(d)(10), the EPA is determining that the 60-day period afforded by CAA section 126(b) for responding to the petition from the state of Delaware is not adequate to allow the public and the agency the opportunity to carry out the purposes of CAA section 307(d). Specifically, the 60-day period is insufficient for the EPA to complete the necessary technical review, develop an adequate proposal, and allow time for notice and comment, including an opportunity for public hearing, on a proposed finding regarding whether the Homer City Generating Station identified in the CAA section 126 petition contributes significantly to nonattainment or interferes with maintenance of the 2008 ozone NAAQS or the 2015 ozone NAAQS in Delaware. Moreover, the 60-day period is insufficient for the EPA to review and develop response to any public comments on a proposed finding, or testimony supplied at a public hearing, and to develop and promulgate a final finding in response to the petition. The EPA is in the process of determining an appropriate schedule for action on the CAA section 126 petition. This schedule must afford the EPA adequate time to prepare a proposal that clearly elucidates the issues to facilitate public comment, and must provide adequate time for the public to comment and for the EPA to review and develop responses to those comments prior to issuing the final rule. As a result of this extension, the deadline for the EPA to act on the petition is July 9, 2017.

B. Notice and Comment Under the Administrative Procedure Act (APA)

This document is a final agency action, but may not be subject to the notice-and-comment requirements of the APA, 5 U.S.C. 553(b). The EPA believes that, because of the limited time provided to make a determination, the deadline for action on the CAA section 126 petition should be extended. Congress may not have intended such a determination to be subject to notice-and-comment rulemaking. However, to the extent that this determination otherwise would require notice and opportunity for public comment, there is good cause within the meaning of 5 U.S.C. 553(b)(3)(B) not to apply those requirements here. Providing for notice and comment would be impracticable because of the limited time provided for making this determination, and would be contrary to the public interest because it would divert agency resources from the substantive review of the CAA section 126 petition.

C. Effective Date Under the APA

This action is effective on December 29, 2016. Under the APA, 5 U.S.C. 553(d)(3), agency rulemaking may take effect before 30 days after the date of publication in the **Federal Register** if the agency has good cause to mandate an earlier effective date. This action—a deadline extension—must take effect immediately because its purpose is to extend by 6 months the deadline for action on the petition. As discussed earlier, the EPA intends to use the 6-month extension period to develop a proposal on the petition and provide time for public comment before issuing the final rule. It would not be possible for the EPA to complete the required notice and comment and public hearing process within the original 60-day period noted in the statute. These reasons support an immediate effective date.

III. Statutory and Executive Order Reviews

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

This action is exempt from review by the Office of Management and Budget because it simply extends the date for the EPA to take action on a petition.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA. This good cause final action simply extends the date for the EPA to take action on a petition and does not impose any new obligations or enforceable duties on any state, local or tribal governments or the private sector. It does not contain any recordkeeping or reporting requirements.

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[1] The text of CAA section 126 codified in the United States Code cross references CAA section 110(a)(2)(D)(ii) instead of CAA section 110(a)(2)(D)(i). The courts have confirmed that this is a scrivener's error and the correct cross reference is to CAA section 110(a)(2)(D)(i). *See Appalachian Power Co.* v. *EPA, 249 F.3d 1032, 1040–44 (D.C. Cir. 2001).*

[2] On October 1, 2015, the EPA strengthened the ground-level ozone NAAQS, based on extensive scientific evidence about ozone's effects on public health and welfare. *See* 80 FR 65291 (October 26, 2015).

C. Regulatory Flexibility Act (RFA)

This action is not subject to the RFA. The RFA applies only to rules subject to notice-and-comment rulemaking requirements under the APA, 5 U.S.C. 553, or any other statute. This rule is not subject to notice-and-comment requirements because the agency has invoked the APA ''good cause'' exemption under 5 U.S.C. 553(b).

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

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.

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

This action does not have tribal implications, as specified in Executive Order 13175. This good cause final action simply extends the date for the EPA to take action on a petition. Thus, Executive Order 13175 does not apply to this rule.

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

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

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

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

The EPA believes that this action is not subject to Executive Order 12898 (59 FR 7629, February 16, 1994) because it does not establish an environmental health or safety standard. This good cause final action simply extends the date for the EPA to take action on a petition and does not have any impact on human health or the environment.

K. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. The CRA allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice-and-comment rulemaking procedures are impracticable, unnecessary or contrary to the public interest (5 U.S.C. 808(2)). The EPA has made a good cause finding for this rule as discussed in Section II.B of this document, including the basis for that finding.

IV. Statutory Authority

The statutory authority for this action is provided by sections 110, 126 and 307 of the CAA as amended (42 U.S.C. 7410, 7426 and 7607).

V. Judicial Review

Under section 307(b)(1) of the CAA, judicial review of this final rule is available only by the filing of a petition for review in the U.S. Court of Appeals for the appropriate circuit by February 27, 2017. Under section 307(b)(2) of the CAA, the requirements that are the subject of this final rule may not be challenged later in civil or criminal proceedings brought by us to enforce these requirements.

List of Subjects in 40 CFR Part 52

Environmental protection, Administrative practices and procedures, Air pollution control, Electric utilities, Incorporation by reference, Intergovernmental relations, Nitrogen oxides, Ozone.

Dated: December 15, 2016.

Gina McCarthy,

Administrator.

[FR Doc. 2016–31256 Filed 12–28–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2016–0007 and EPA–HQ–OPP–2016–0008; FRL–9950–40]

Isobutyl Acetate and Isobutyric Acid; Exemption From the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes exemptions from the requirement of a tolerance for residues of isobutyl acetate (CAS Reg. No. 110–19–0) and isobutyric acid (CAS Reg. No. 79–31–2) when used as inert ingredients (solvent) in pesticide formulations applied to growing crops and raw agricultural commodities after harvest. Technology Sciences Group Inc. on behalf of Jeneil Biosurfactant Company submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting establishment of these exemptions from the requirement of a tolerance. This regulation eliminates the need to establish maximum permissible levels for residues of isobutyl acetate and isobutyric acid.

DATES: This regulation is effective December 29, 2016. Objections and requests for hearings must be received on or before February 27, 2017, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The dockets for this action, identified by docket identification (ID) numbers EPA–HQ–OPP–2016–0007 and EPA–HQ–OPP–2016–0008, are available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Michael Goodis, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington,

DC 20460–0001; main telephone number: (703) 305–7090; email address: *RDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

You may access a frequently updated electronic version of 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://www.ecfr.gov/cgi-bin/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

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

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2016–0007 or EPA–HQ–OPP–2016–0008 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before February 27, 2017. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2016–0007 or EPA–HQ–OPP–2016–0008, by one of the following methods:

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

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

II. Petition for Exemption

In the **Federal Register** of April 25, 2016 (81 FR 24044) (FRL–9944–86), EPA issued a document pursuant to FFDCA section 408, 21 U.S.C. 346a, announcing the filing of a pesticide petition (IN–10846 for isobutyl acetate; IN–10852 for isobutyric acetate) by Technology Sciences Group Inc., (1150 18th Street NW., Suite 1000, Washington, DC 20036) on behalf of Jeneil Biosurfactant Company (400 N. Dekora Woods Blvd. Saukville, WI 53080). The petition requested that 40 CFR 180.910 be amended by establishing exemptions from the requirement of a tolerance for residues of isobutyl acetate (CAS Reg. No. 110–19–0) and isobutyric acid (CAS Reg. No. 79–31–2) when used as inert ingredients (solvent) in pesticide formulations applied to growing crops and to raw agricultural commodities after harvest. That document referenced the summaries of the petitions prepared by Technology Sciences Group Inc. on behalf of Jeneil Biosurfactant Company, the petitioner, which is available in the docket, *http://www.regulations.gov.* A comment was received on the notice of filing concerning petition #IN–10846. EPA's response to this comment is discussed in Unit V.B.

III. Inert Ingredient Definition

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

IV. Aggregate Risk Assessment and Determination of Safety

Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .''

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

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

A. Toxicological Profile

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

Only acute toxicity data are available on isobutyric acid and no data are available on isobutyl acetate. However, upon ingestion, isobutyl acetate is rapidly and completely hydrolyzed to isobutanol and acetic acid. Isobutyric acid is a metabolic product of isobutanol.

Isobutanol is metabolized by alcohol dehydrogenase to form isobutyric acid via conversion to isobutyraldehyde. Therefore, toxicity data on isobutanol are considered suitable to assess repeated exposure to isobutyl acetate and isobutyric acid. Since acetic acid is currently exempted from tolerance under 40 CFR 180.910 without limitation, this risk assessment focuses on toxicity data available on isobutanol.

The acute oral and dermal toxicities are low for isobutyric acid. Isobutyric acid has an acute oral lethal dose (LD_{50}) ≥ 2,230 milligram/kilogram (mg/kg) in rats and rabbits. The acute dermal LD_{50} = 475 mg/kg in rabbits. The acute inhalation LC_{50} > 9.59 milligram/liter (mg/L) in rats. It is corrosive to the eye and skin in rabbits. Isobutyric acid is not a dermal sensitizer in rabbits. Isobutanol has an acute oral LD_{50} ≥ 2,830 mg/kg in rats. The acute dermal acute LD_{50} ≥ 2,000 mg/kg in rabbits. The acute inhalation LC_{50} > 6,000 parts per million (ppm) (approximately equivalent to 6,000 mg/L) in rats. Isobutanol is severely irritating to the eye and minimally to moderately irritating to the skin in rabbits.

Based on the subchronic data available, isobutanol is not toxic up to the limit dose of 1,000 milligram/kilogram/day (mg/kg/day). In a 90-day oral toxicity study via gavage in rats, hypo-activity, ataxia and salivation were observed at 1,000 mg/kg/day of isobutanol. In another 90-day oral toxicity study with isobutanol via drinking water in rats, no adverse effects were observed at doses up to 16,000 ppm (approximately 1,450 mg/kg/day), the highest dose tested (HDT). The study conducted via drinking water in rats is considered more relevant to human exposure and therefore more reflective of potential human toxicity.

In developmental toxicity studies with isobutanol via inhalation in rats and rabbits, neither maternal nor developmental toxicity is seen at doses up to 10,000 mg/m^3 (approximately 3,060 mg/kg/day), the HDT in both studies and above the limit dose of 1,000 mg/kg/day.

Similarly, no adverse effects are observed in a two-generation reproductive study with isobutanol via inhalation in rats at doses up to 2,500 ppm (approximately 2,326 mg/kg/day).

Carcinogenicity studies with isobutyl acetate, isobutyric acid or isobutanol are not available. However, a chronic toxicity study in rats treated with isobutantol in drinking water for 53–56 weeks did not show any evidence of toxicity or tumors at doses as high as 200 mg/kg/day. In addition, no toxicity is observed in other studies at doses below 1,450 mg/kg/day with isobutanol. Moreover, mutagenicity studies are negative with isobutanol and isobutyric acid. An Ames test, unscheduled DNA synthesis and mouse lymphoma assay are negative when tested with isobutyric acid. The Ames test, mouse lymphoma, Comet and micronucleus assays are negative when tested with isobutanol. Therefore, isobutyl acetate and isobutyric acid are not expected to be carcinogenic.

A neurotoxicity screening battery with isobutanol via the inhalation route of exposure in rats was available for review. Also, neurotoxicity endpoints were evaluated in an acute toxicity study in rats with isobutanol via the inhalation route of exposure. No adverse effects were observed in the functional observational battery, motor activity, schedule control operant behavior or neuropathology at doses up to 1,500 ppm (approximately 1,408 mg/kg/day) and 2,500 ppm (approximately 2,326 mg/kg/day) in rats in the neurotoxicity screening battery and acute toxicity studies, respectively. EPA concluded that isobutyl acetate and isobutyric acid are not expected to be neurotoxic.

Immunotoxicity studies with isobutyric acid and isobutanol are available for review. Mouse cell-mediated immune response is not modulated by isobutyric acid in a host-resistant assay using *Listeria* monocytogenes. Humoral immunity is unaffected in mice as measured by the antibody plaque-forming cell response to sheep erythrocytes. Also, a lymphocyte mitogenesis test with isobutanol showed mitogenic activity is not inhibited in stimulated B and T cells from mouse spleen. Therefore, isobutyl acetate and isobutyric acid are not expected to be immunotoxic.

Metabolism studies are not available for isobutyl acetate. Limited data are available on isobutyric acid and isobutanol. A metabolism study with a single dose of isobutyric acid via gavage in rats showed that it is rapidly metabolized and the majority eliminated as expired CO_2. Less than 1.0% of the dose is found in feces and 3.21–4.61% in urine. A metabolism study with isobutanol via gavage in rabbits showed that it is rapidly metabolized. 0.5% is excreted in the urine or exhaled air. Identified metabolites are isobutyraldehyde, isobutyric acid, and isovaleric acid. There is no concern for the metabolites isobutyraldehyde and isovaleric acid as they will be conjungated and excreted.

B. Toxicological Points of Departure/Levels of Concern

The available toxicity studies indicate that isobutanol has very low toxicity. The lowest NOAEL (316 mg/kg/day) in the database occurred in a 90-day oral toxicity study with isobutanol via gavage in rats. Hypo-activity, ataxia and salivation were seen at 1,000 mg/kg/day. In a second study conducted for 90 days with isobutanol via drinking water in rats, the aforementioned effects weren't seen at doses as high 1,450 mg/kg/day. The drinking water study in rats represents a more realistic route for human exposure to isobutyric acid and isobutyl acetate, and is considered more reflective of potential toxicity. Therefore, since no signs of toxicity were observed at doses up to the limit dose in oral and inhalation toxicity studies, an endpoint of concern for risk assessment purposes was not identified. Since no endpoint of concern was identified for the acute and chronic dietary exposure assessment and short and intermediate dermal and inhalation exposure, a quantitative risk assessment

for isobutyric acid and isobutyl acetate is not necessary.

C. Exposure Assessment

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

Under this exemption from the requirement of a tolerance, residues of isobutyl acetate and isobutyric acid may be found on foods from crops that were treated with pesticide formulations containing isobutyl acetate and isobutyric acid. However, a quantitative dietary exposure assessment was not conducted since a toxicological endpoint for risk assessment was not identified.

2. *Dietary exposure from drinking water.* Since a hazard endpoint of concern was not identified for the acute and chronic dietary assessment, a quantitative dietary exposure risk assessment for drinking water was not conducted, although exposures may be expected from use on food crops.

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

Isobutyl acetate and isobutyric acid may be used in pesticide products and non-pesticide products that may be used in and around the home. Based on the discussion in Unit IV.B., a quantitative residential exposure assessment for isobutyl acetate and isobutyric acid was not conducted.

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

Based on the available data, isobutyl acetate and isobutyric acid do not have a toxic mechanism; therefore, section 408(b)(2)(D)(v) does not apply.

D. Safety Factor for Infants and Children

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

As part of its qualitative assessment, the Agency did not use safety factors for assessing risk, and no additional safety factor is needed for assessing risk to infants and children. Based on an assessment of isobutyl acetate and isobutyric acid, EPA has concluded that there are no toxicological endpoints of concern for the U.S. population, including infants and children.

E. Aggregate Risks and Determination of Safety

Because no toxicological endpoints of concern were identified, EPA concludes that aggregate exposure to residues of isobutyl acetate and isobutyric acid will not pose a risk to the U.S. population, including infants and children, and that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to isobutyl acetate and isobutyric acid residues.

V. Other Considerations

A. Analytical Enforcement Methodology

An analytical method is not required for enforcement purposes since the Agency is establishing an exemption from the requirement of a tolerance without any numerical limitation.

B. Response to Comments

A comment was received from a private citizen who was concerned about the safety and impact pesticides on food on human health. The Agency understands the commenter's concerns and recognizes that some individuals believe that no residue of pesticides should be allowed. However, under the existing legal framework provided by section 408 of the Federal Food, Drug and Cosmetic Act (FFDCA), EPA is authorized to establish pesticide tolerances or exemptions where persons seeking such tolerances or exemptions have demonstrated that the pesticide meets the safety standard imposed by the statute, which EPA has determined here.

VI. Conclusions

Therefore, exemptions from the requirement of a tolerance are established under 40 CFR 180.910 for residues of isobutyl acetate (CAS Reg. No. 110–19–0) and isobutyric acid (CAS Reg. No. 79–31–2) when used as inert ingredients (solvent) in pesticide formulations applied to growing crops and raw agricultural commodities after harvest.

VII. Statutory and Executive Order Reviews

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

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

This action directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the

various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*).

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

VIII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: December 16, 2016.

Daniel J. Rosenblatt,

Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

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

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

■ 2. In § 180.910, add alphabetically the inert ingredients to the table to read as follows:

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

Inert ingredients	Limits	Uses
* * * * * * *		
Isobutyl Acetate (CAS Reg. No. 110–19–0)		Solvent.
Isobutyric Acid (CAS Reg. No. 79–31–2)		Solvent.
* * * * * * *		

[FR Doc. 2016–31211 Filed 12–28–16; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 405, 410, 411, 414, 417, 422, 423, 424, 425, and 460

[CMS–1654–CN3]

RIN 0938–AS81

Medicare Program; Revisions to Payment Policies Under the Physician Fee Schedule and Other Revisions to Part B for CY 2017; Medicare Advantage Bid Pricing Data Release; Medicare Advantage and Part D Medical Loss Ratio Data Release; Medicare Advantage Provider Network Requirements; Expansion of Medicare Diabetes Prevention Program Model; Medicare Shared Savings Program Requirements; Corrections

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Final rule; correction.

SUMMARY: This document corrects technical and typographical errors that appeared in the final rule published in the November 15, 2016 **Federal Register** (81 FR 80170). That rule is entitled, ''Medicare Program; Revisions to Payment Policies under the Physician Fee Schedule and Other Revisions to Part B for CY 2017; Medicare Advantage Bid Pricing Data Release; Medicare Advantage and Part D Medical Loss Ratio Data Release; Medicare Advantage Provider Network Requirements; Expansion of Medicare Diabetes Prevention Program Model; Medicare Shared Savings Program Requirements.''

DATES: This correcting document is effective January 1, 2017.

FOR FURTHER INFORMATION CONTACT: Jessica Bruton (410) 786–5991.

SUPPLEMENTARY INFORMATION:

I. Background

In FR Doc 2016–26668 (81 FR 80170 through 80562), the final rule entitled, ''Medicare Program; Revisions to Payment Policies under the Physician Fee Schedule and Other Revisions to Part B for CY 2017; Medicare Advantage Bid Pricing Data Release; Medicare Advantage and Part D Medical Loss Ratio Data Release; Medicare Advantage Provider Network Requirements; Expansion of Medicare Diabetes Prevention Program Model; Medicare Shared Savings Program Requirements'' there were a number of technical and typographical errors that are identified and corrected in this correcting document. These corrections are effective as if they had been included in the document published November 15, 2016. Accordingly, the corrections are effective January 1, 2017.

II. Summary of Errors

A. Summary of Errors in the Preamble

On page 80252, in our discussion of certain primary care services, we made typographical errors and referenced the final HCPCS G-codes incorrectly.

On page 80268, we made a typographical error in the new locality number for Stockton-Lodi-CA.

On page 80330, due to a drafting error, we inadvertently stated that we did not receive any comments on our proposals for the Electroencephalogram (EEG) family of codes, CPT Codes 95812, 95813, and 95957.

On page 80540, we inadvertently included language in our discussion of ICRs regarding payment to organizations that provide Medicare Diabetes Prevention Program Services.

On page 80543, due to a drafting error, in our discussion of RVUs relative to 2016, we inadvertently used the result descriptors incorrectly.

On page 80543, due to typographical errors the title of Table 51 and the CY 2017 RVU Budget Neutrality Adjustment are incorrect.

B. Summary and Correction of Errors in the Addenda on the CMS Web Site

Due to a data error, the incorrect CY 2017 PE RVUs are included in Addendum B for HCPCS codes G0422

and G0423. The corrected CY 2017 PE RVUs for these codes are reflected in the corrected Addendum B available on the CMS Web site at *www.cms.gov//PhysicianFeeSched/.*

III. Waiver of Proposed Rulemaking

Under 5 U.S.C. 553(b) of the Administrative Procedure Act (APA), the agency is required to publish a notice of the proposed rule in the **Federal Register** before the provisions of a rule take effect. Similarly, section 1871(b)(1) of the Act requires the Secretary to provide for notice of the proposed rule in the **Federal Register** and provide a period of not less than 60 days for public comment. In addition, section 553(d) of the APA and section 1871(e)(1)(B)(i) of the Act mandate a 30-day delay in effective date after issuance or publication of a rule. Sections 553(b)(B) and 553(d)(3) of the APA provide for exceptions from the APA notice and comment, and delay in effective date requirements; in cases in which these exceptions apply, sections 1871(b)(2)(C) and 1871(e)(1)(B)(ii) of the Act provide exceptions from the notice and 60-day comment period and delay in effective date requirements of the Act as well. Section 553(b)(B) of the APA and section 1871(b)(2)(C) of the Act authorize an agency to dispense with normal notice and comment rulemaking procedures for good cause if the agency makes a finding that the notice and comment process is impracticable, unnecessary, or contrary to the public interest; and includes a statement of the finding and the reasons for it in the rule. In addition, section 553(d)(3) of the APA and section 1871(e)(1)(B)(ii) allow the agency to avoid the 30-day delay in effective date where such delay is contrary to the public interest and the agency includes in the rule a statement of the finding and the reasons for it.

In our view, this correcting document does not constitute a rulemaking that would be subject to these requirements. This document merely corrects technical errors in the CY 2017 PFS final rule. The corrections contained in this document are consistent with, and do not make substantive changes to, the policies and payment methodologies that were proposed subject to notice and comment procedures and adopted in the CY 2017 PFS final rule. As a result, the corrections made through this correcting document are intended to resolve inadvertent errors so that the rule accurately reflects the policies adopted in the final rule.

Even if this were a rulemaking to which the notice and comment and delayed effective date requirements applied, we find that there is good cause to waive such requirements. Undertaking further notice and comment procedures to incorporate the corrections in this document into the CY 2017 PFS final rule or delaying the effective date of the corrections would be contrary to the public interest because it is in the public interest to ensure that the rule accurately reflects our policies as of the date they take effect. Further, such procedures would be unnecessary because we are not making any substantive revisions to the final rule, but rather, we are simply correcting the **Federal Register** document to reflect the policies that we previously proposed, received public comment on, and subsequently finalized in the final rule. For these reasons, we believe there is good cause to waive the requirements for notice and comment and delay in effective date.

IV. Correction of Errors

In FR Doc. 2016–26668 of November 15, 2016 (81 FR 80170–80562), make the following corrections:

1. On page 80252,

a. First column; in the section heading, 5. Assessment and Care Planning for Patients with Cognitive Impairment (GPPP6); line 3, the code ''(GPPP6)'' is corrected to read ''(G0505)''.

b. Third column; first partial paragraph, line 6, the codes ''GPPP1, GPPP2, GPPP3, GPPPX).'' are corrected to read ''G0502, G0503, G0504, G0507).''.

c. Third column; first partial paragraph, line 12 and 13, the codes ''GPPP1, GPPP2, GPPP3, and GPPPX'' are corrected to read ''G0502, G0503, G0504 and G0507''.

3. On page 80268, top third of the page; in Table 15, MSA-Based Fee Schedule Areas in California—Continued, the list entry:

Current locality No.	New locality No.	Fee schedule area (MSA name)	Counties	Transition area
99	73	Stockton-Lodi, CA	San Joaquin	YES.

is corrected to read:

Current locality No.	New locality No.	Fee schedule area (MSA name)	Counties	Transition area
99	68	Stockton-Lodi, CA	San Joaquin	YES.

4. On page 80330, second column, third full paragraph; lines 1 and 2 the sentence ''We did not receive any comments on our proposals for this family of codes.'' is corrected to read ''We received comments on the clinical labor task ''perform procedure'' for CPT codes 95812 and 95813, but these comments did not address the information contained in the RUC's PE summary of recommendations, which served as the primary rationale for our proposal. Instead, the commenters stated that the clinical labor task is not temporally equivalent to the services performed by the physician.''

5. On page 80540, third column; first full paragraph,

a. Lines 2 through 4, the phrase ''Security Act exempts the Center for Medicare and Medicaid Innovation (CMMI) model tests and expansion,'' is corrected to read ''Security Act exempts models tested and expanded under section 1115A of the Act,''.

b. Line 11, the phrase ''evaluation of CMMI models or'' is corrected to read ''evaluation of models or''.

6. On page 80543,

a. Third column, first full paragraph, line 10, the phrase ''an overall decrease'' is corrected to read ''an overall increase''.

b. Third column, first full paragraph, line 12, the phrase ''neutrality adjustment that is positive.'' is corrected to read ''neutrality adjustment that is negative.''

c. Bottom third of the page in Table 51, Calculation of the Final CY 2017 Anesthesia Conversion Factor (CM Estimate);

(1) The parenthetical in the table heading ''(CM Estimate)'' is removed.

(2) The list entry:

CY 2016 National Average Ansthesia Conversion Factor		21,9935
CY 2017 RVU Budget Neutrality Adjustment	0.013 percent (0.99987).	

is corrected to read:

CY 2016 National Average Anesthesia Conversion Factor		21.9935
CY 2017 RVU Budget Neutrality Adjustment	−0.013 percent (0.99987).	

Dated: December 22, 2016.

Wilma M. Robinson,

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

[FR Doc. 2016–31649 Filed 12–28–16; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

RIN 0648–XE860

Fraser River Sockeye Salmon Fisheries; Inseason Orders

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

ACTION: Temporary orders; inseason orders.

SUMMARY: NMFS publishes Fraser River salmon inseason orders to regulate treaty and non-treaty (all citizen) commercial salmon fisheries in U.S. waters. The orders were issued by the Fraser River Panel (Panel) of the Pacific Salmon Commission (Commission) and subsequently approved and issued by NMFS during the 2016 salmon fisheries within the U.S. Fraser River Panel Area. These orders established fishing dates, times, and areas for the gear types of U.S. treaty Indian and all citizen commercial fisheries during the period the Panel exercised jurisdiction over these fisheries. In 2016, only treaty Indian fisheries were affected by these orders.

DATES: The effective dates for the inseason orders are set out in this document under the heading Inseason Orders.

FOR FURTHER INFORMATION CONTACT: Peggy Mundy at 206–526–4323.

SUPPLEMENTARY INFORMATION: The Treaty between the Government of the United States of America and the Government of Canada concerning Pacific Salmon was signed at Ottawa on January 28, 1985, and subsequently was given effect in the United States by the Pacific Salmon Treaty Act (Act) at 16 U.S.C. 3631–3644.

Under authority of the Act, Federal regulations at 50 CFR part 300, subpart F, provide a framework for the implementation of certain regulations of the Commission and inseason orders of the Commission's Fraser River Panel for U.S. sockeye and pink salmon fisheries in the Fraser River Panel Area.

The regulations close the U.S. portion of the Fraser River Panel Area to U.S. sockeye and pink salmon tribal and non-tribal commercial fishing unless opened by Panel orders that are given effect by inseason regulations published by NMFS. During the fishing season, NMFS may issue regulations that establish fishing times and areas consistent with the Commission agreements and inseason orders of the Panel. Such orders must be consistent with domestic legal obligations and are issued by the Regional Administrator, West Coast Region, NMFS. Official notification of these inseason actions is provided by two telephone hotline numbers described at 50 CFR 300.97(b)(1) and in 81 FR 26157 (May 2, 2016). The inseason orders are published in the **Federal Register** as soon as practicable after they are issued. Due to the frequency with which inseason orders are issued, publication of individual orders is impractical.

Inseason Orders

The following inseason orders were adopted by the Panel and issued for U.S. fisheries by NMFS during the 2016 fishing season. Each of the following inseason actions were effective upon announcement on telephone hotline numbers as specified at 50 CFR 300.97(b)(1) and in 81 FR 26157 (May 2, 2016); those dates and times are listed herein. The times listed are local times, and the areas designated are Puget Sound Management and Catch Reporting Areas as defined in the Washington State Administrative Code at Chapter 220–22.

Fraser River Panel Order Number 2016–01: Issued 12:32 p.m., July 22, 2016

Treaty Indian Fishery

Areas 4B, 5, and 6C: Open to drift gillnets 12 p.m. (noon), Saturday, July 23, 2016, to 12 p.m. (noon), Wednesday, July 27, 2016.

Fraser River Panel Order Number 2016–02: Issued 11:46 a.m., July 26, 2016

Treaty Indian Fishery

Areas 4B, 5, and 6C: Extend for drift gillnets from 12 p.m. (noon), Wednesday, July 27, 2016, to 12 p.m. (noon), Saturday, July 30, 2016.

Fraser River Panel Order Number 2016–03: Issued 12:52 p.m., July 29, 2016

Treaty Indian Fishery

Areas 4B, 5, and 6C: Extend for drift gillnets from 12 p.m. (noon), Saturday, July 30, 2016, to 12 p.m. (noon), Wednesday, August 3, 2016.

Fraser River Panel Order Number 2016–04: Issued 11:47 a.m., August 2, 2016

Treaty Indian Fishery

Areas 4B, 5, and 6C: Extend for drift gillnets from 12 p.m. (noon), Wednesday, August 3, 2016, to 12 p.m. (noon), Saturday, August 6, 2016.

Fraser River Panel Order Number 2016–05: Issued 2:32 p.m., August 26, 2016

Treaty Indian and All Citizen Fisheries

Areas 4B, 5, 6, 6C, 7, and 7A, excluding the Apex: Relinquish regulatory control effective 11:59 p.m. (midnight), Saturday, September 3, 2016. The Apex is those waters north and west of the Area 7A ''East Point Line,'' defined as a line projected from the low water range marker in Boundary Bay on the U.S./Canada border through the east tip of Point Roberts, WA, to the East Point Light on Saturna Island in the Canadian Province of British Columbia.

Classification

The Assistant Administrator for Fisheries NOAA (AA), finds that good cause exists for the inseason orders to be issued without affording the public prior notice and opportunity for comment under 5 U.S.C. 553(b)(B) as such prior notice and opportunity for comments is impracticable and contrary to the public interest. Prior notice and opportunity for public comment is impracticable because NMFS has insufficient time to allow for prior notice and opportunity for public comment between the time the stock abundance information is available to determine how much fishing can be allowed and the time the fishery must open and close in order to harvest the appropriate amount of fish while they are available.

The AA also finds good cause to waive the 30-day delay in the effective date, required under 5 U.S.C. 553(d)(3), of the inseason orders. A delay in the effective date of the inseason orders would not allow fishers appropriately controlled access to the available fish at that time they are available.

This action is authorized by 50 CFR 300.97, and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 3636(b).

Dated: December 22, 2016.

Alan D. Risenhoover,

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

[FR Doc. 2016–31526 Filed 12–28–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 131113952–6999–02]

RIN 0648–BD78

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Fishery Off the Southern Atlantic States; Regulatory Amendment 16

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

ACTION: Final rule.

SUMMARY: NMFS issues regulations to implement Regulatory Amendment 16 to the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP), as prepared and submitted by the South Atlantic Fishery Management Council (Council). This final rule revises the current seasonal prohibition on the use of black sea bass pot gear in the South Atlantic and adds an additional gear marking requirement for black sea bass pot gear. The purpose of this final rule is to reduce the adverse socioeconomic impacts from the current seasonal black sea bass pot gear prohibition while continuing to protect Endangered Species Act (ESA) listed North Atlantic right whales (NARW)in the South Atlantic. This final rule also helps to better identify black sea bass pot gear in the South Atlantic.

DATES: This rule is effective January 30, 2017, except for the amendments to § 622.183(b)(6) that are effective December 29, 2016.

ADDRESSES: Electronic copies of Regulatory Amendment 16, which includes an environmental impact statement (EIS), a Regulatory Flexibility Act (RFA) analysis, and a regulatory impact review, may be obtained from the Southeast Regional Office Web site at *https://sero.nmfs.noaa.gov/sustainable_fisheries/s_atl/sg/2013/reg_am16/index.html.*

Comments regarding the burden-hour estimates, clarity of the instructions, or other aspects of the collection of information requirements contained in this final rule (see the Classification section of the preamble) may be submitted in writing to Adam Bailey, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701; or the Office of Management and Budget (OMB), by email at *OIRA_submission@omb.eop.gov,* or by fax to 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Nikhil Mehta, telephone: 727–824–5305, email: *nikhil.mehta@noaa.gov.*

SUPPLEMENTARY INFORMATION: Black sea bass is in the snapper-grouper fishery and 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).

On December 4, 2013, NMFS published a notice of intent to prepare a draft EIS for Regulatory Amendment 16 and requested public comment (78 FR 72968). On October 23, 2015, the notice of availability for the draft EIS was published and public comment was also requested (80 FR 64409). The notice of availability for the final EIS for Regulatory Amendment 16 published on July 1, 2016 (81 FR 43198). On August 11, 2016, NMFS published a proposed rule for Regulatory Amendment 16 and requested public comment (81 FR 53109). The proposed rule and Regulatory Amendment 16 outline the rationale for the actions contained in this final rule. A summary of the actions implemented by Regulatory Amendment 16 and this final rule is provided below.

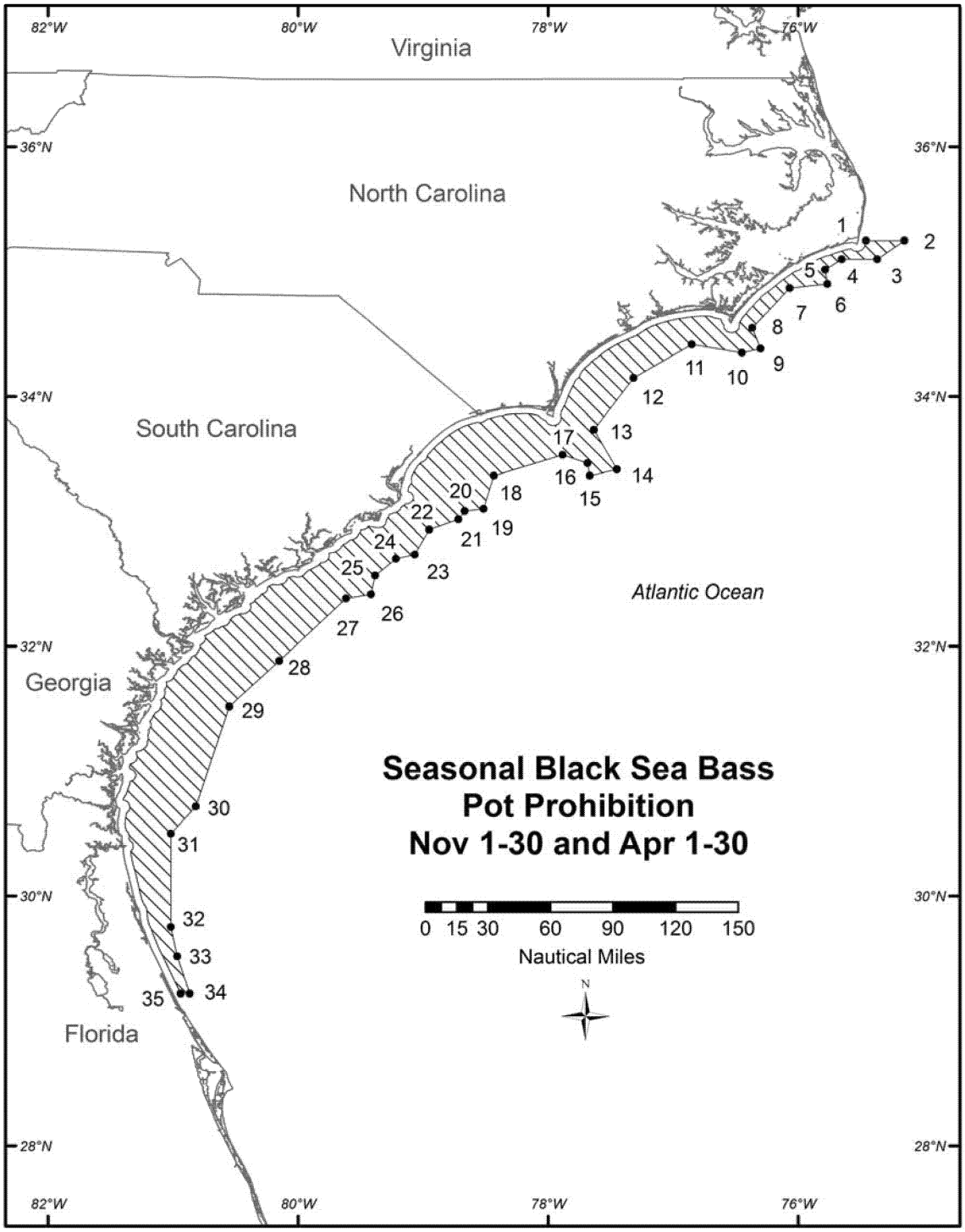
Management Measures Contained in this Final Rule

This final rule implements modifications to the current black sea bass pot seasonal closure. This final rule also modifies the buoy line rope marking requirements for black sea bass pots.

Black Sea Bass Pot Gear Seasonal Prohibition

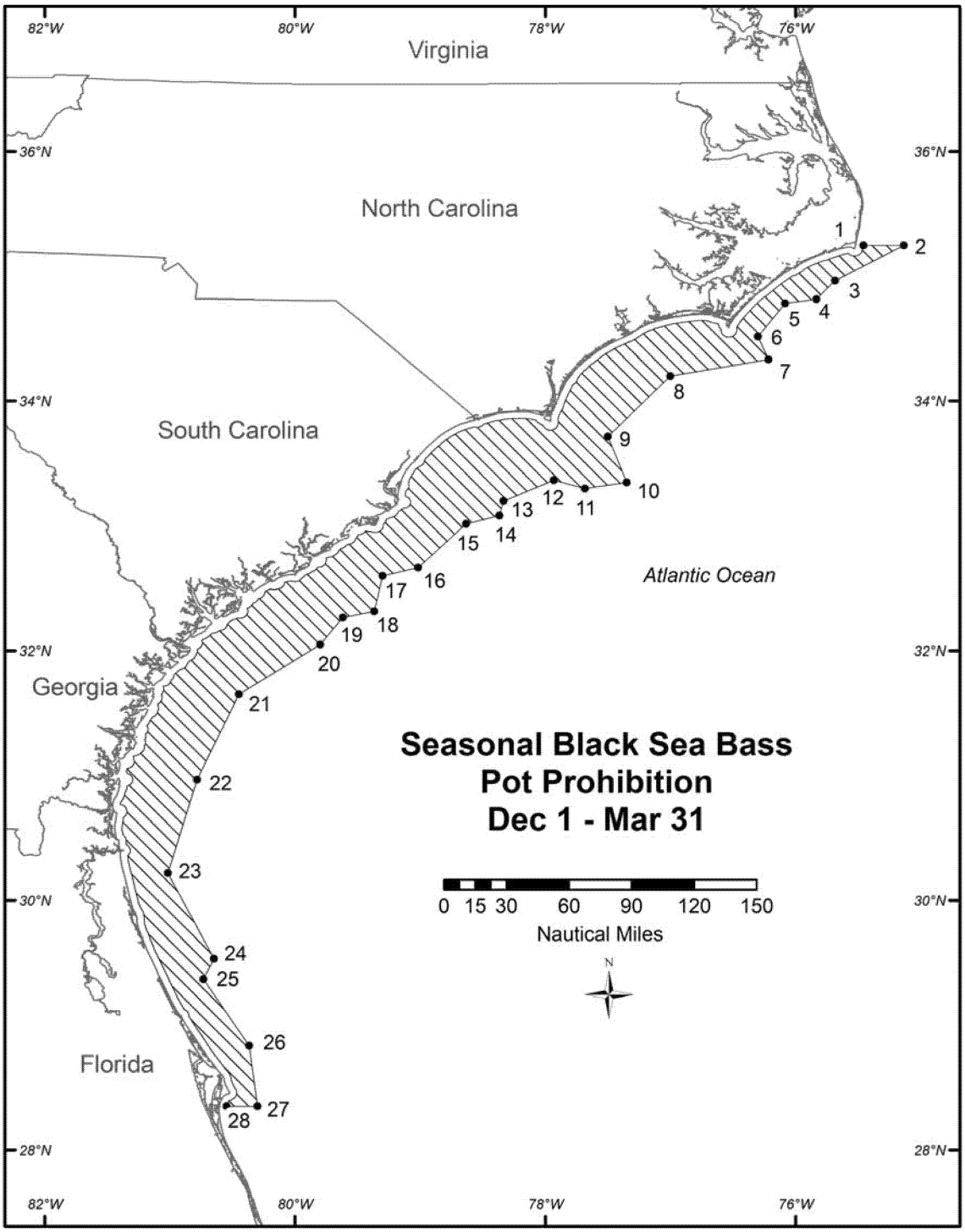
As established through Regulatory Amendment 19 to the FMP, black sea bass pot gear is prohibited in the South Atlantic exclusive economic zone (EEZ) annually from November 1 through April 30 (78 FR 58249, September 23, 2013). This final rule retains the November 1 through April 30 prohibition on the use of black sea bass pots but modifies the boundaries of the prohibition. This rule revises the South Atlantic EEZ-wide seasonal closure to a closure with two temporal and spatial components. The first closure period is for the months of November and April and the second closure period is for the months of December through March, each year. The first closure period is illustrated by Figure 1 below. During the November and April seasonal prohibition, the eastern boundary of the sea bass pot closed area off North and South Carolina is closer to shore than during the months of December through March.

Figure 1. Black Sea Bass Pot Seasonal Prohibition During November and April.



During the black sea bass pot seasonal prohibition from December through March, each year, the closure area is larger than during the seasonal prohibition during November and April, particularly off Georgia and Florida. Waters off the coast of Georgia and Florida represent the primary right whale calving grounds in the South Atlantic EEZ. The black sea bass pot seasonal closure for December through March is illustrated in Figure 2 below.

Figure 2. Black Sea Bass Pot Seasonal Prohibition During December Through March.



The alternatives considered in Regulatory Amendment 16 for the black sea bass pot seasonal prohibition were developed considering spatial, temporal, and environmental variables. Spatial variation in the distribution of right whales is influenced by environmental variables such as water temperature, depth, and distance to shore. The closed areas in this final rule incorporate these environmental variables and spatial distribution patterns to minimize the risk of interactions of NARWs with black sea bass pot gear.

During the months of November and April, the area closed through this rule prohibits black sea bass pots inshore of an area which represents 91 percent of historical right whale sightings off Florida and Georgia; and off North Carolina and South Carolina, the black sea bass pot prohibition would apply to

Federal waters shallower than 25 meters (m) in depth. During December through March, the area closed through this final rule prohibits black sea bass pots shallower than 25 m in depth off Florida and Georgia; and from the Georgia/South Carolina border to Cape Hatteras, North Carolina, the prohibition applies to Federal waters that are shallower than 30 m in depth. The bathymetric area closed during December through March is based on right whale sightings by depth and captures 97 percent and 96 percent of right whale sightings off the North Carolina/South Carolina area, and Florida/Georgia area, respectively.

The reduction in the closure areas described in this final rule are expected to minimize adverse socioeconomic effects of the current November through April black sea bass pot prohibition by increasing the area available to fish using black sea bass pots. In addition, the changes are expected to increase the flexibility of black sea bass pot endorsement holders to fish with this gear while maintaining an appropriate level of protection for NARWs.

On December 1, 2016, NMFS completed a new ESA consultation and biological opinion on the South Atlantic snapper-grouper fishery. The biological opinion concluded that the continued authorization of the South Atlantic snapper-grouper fishery, including the black sea bass component, is not likely to jeopardize the continued existence of North Atlantic right whales, the only listed whale species in the South Atlantic region that may be adversely affected by the fishery.

This final rule also allows for vessel transit through the black sea bass pot closed areas, providing that the black sea bass pot gear is appropriately stowed on the vessel. Transit is defined as non-stop progression through the closed area; fishing gear appropriately stowed means all black sea bass pot gear must be out of the water and on board the deck of the vessel. All buoys must either be disconnected from the gear or stowed within the sea bass pot. The disconnected buoys may remain on deck.

Gear Marking Requirements

Fish traps and pot buoy lines, including black sea bass pots, are currently required to have specific line marking requirements during certain times of the year and in the locations described in the Atlantic Large Whale Take Reduction Plan (ALWTRP)(see 50 CFR 229.32(b)). The ALWTRP includes at least three areas where black sea bass pots are regulated and fished. This includes the Offshore Trap/Pot Waters Area, Southern Nearshore Trap/Pot Waters Area, and the U.S. Southeast Restricted Area North.

Additionally, the FMP contains separate gear requirements, and Regulatory Amendment 16 modifies the current gear marking requirements under the FMP by requiring additional markings for black sea bass pot buoy lines. This final rule requires that an additional 12-inch (30.5 cm) wide purple band be added onto the buoy line at the end of, and directly adjacent to, each of the currently required 12-inch (30.5 cm) colored marks that are required through the ALWTRP, described in 50 CFR 229.32(b). Within the area of the Council's jurisdiction for managing black sea bass, the additional black sea bass gear marking requirements are required to be in place in Federal waters from September 1 through May 31 in the Offshore Trap/Pot Waters Area and the Southern Nearshore Trap/Pot Waters Area, and from November 15 through May 31 in the Southeast U.S. Restricted Area North. The Council's requirement that sea bass pot gear have additional gear-specific marking will help distinguish black sea bass pots from other fishing gear that could be encountered by whales.

Comments and Responses

A total of 13 comment submissions were received on the proposed rule from individuals, a Federal agency, a commercial fishing organization, and non-governmental organizations (NGOs). Eight comments were in favor of the preferred actions in Regulatory Amendment 16 and three comments were opposed to the use of black sea bass pots in general in the South Atlantic EEZ. Two comment submissions received from the Federal agency and the NGOs expressed concerns over the actions in Regulatory Amendment 16. Specific comments related to the actions in Regulatory Amendment 16 and the proposed rule, as well as NMFS' respective responses, are summarized below.

Comment 1: Black sea bass pot gear marking should be a year-round requirement for all black sea bass pot buoy lines rather than just a seasonal measure as required in Regulatory Amendment 16.

Response: There currently are gear marking requirements for black sea bass pots as required through the ALWTRP, and separate gear marking requirements as required through the FMP. This final rule requires buoy line marking for black sea bass pots in addition to those already required through the ALWTRP. These additional markings are required in areas and during times similar to the existing ALWTRP gear marking requirements. The additional buoy line markings are required from September 1 through May 31, in the ALWTRP Offshore Trap/Pot Waters Area and Southern Nearshore Trap/Pot Waters Area, and from November 15 through May 31, in the ALWTRP Southeast U.S. Restricted Area North. NMFS and the Council determined that the new requirement for black sea bass pot gear marking, together with existing requirements, provides a mechanism to adequately identify the black sea bass pot component of the snapper-grouper commercial sector, given the timing and location of right whale expected occurrence. In addition, black sea bass pot fishers have reported that they will likely leave the newly required gear markings on their buoy lines year-round since it would require additional effort for them to remove it for a limited season. Therefore, the Paperwork Reduction Act (PRA) burden estimates assume that the required gear markings would stay on the buoy lines as long as the marking is clearly visible as required by the rule (50 CFR 622.189(g)), and not be applied and removed from the buoy lines each season.

Comment 2: NMFS should monitor and enforce the requirement for additional black sea bass pot gear marking required in this final rule.

Response: NMFS agrees that monitoring and enforcement of fishing gear marking requirements increases the effectiveness of these measures and intends to do that for the specific measures in Regulatory Amendment 16 upon implementation of this final rule. NMFS's Office of Law Enforcement (NOAA/OLE) and the United States Coast Guard (USCG) have the authority and the responsibility to enforce regulations implementing FMPs. NOAA/OLE special agents and officers specialize in living marine resource violations and provide fisheries expertise and investigative support for the overall fisheries mission, while the USCG provides at-sea patrol services for the fisheries mission.

To increase the effectiveness of fishing regulations, NOAA supplements at-sea and dockside inspections of fishing vessels through Cooperative Enforcement Agreements and Joint Enforcement Agreements with most of the states in the South Atlantic region. These agreements can include granting authority to state officers to also enforce the laws for which NOAA/OLE has jurisdiction. Additionally, all of the states in the South Atlantic region have their own law enforcement officers that routinely patrol and enforce fisheries regulations in state waters.

Comment 3: Several commenters stated that NMFS neglected to consider whether gear restrictions more stringent than those required by ALWTRP are needed in an area with juveniles and calves. In particular, the commenters stated that line breaking strength of greater than 2,200 lb (998 kg) is risk prone to the whales, and vertical lines heavier than 1,700 lb (771 kg) should not be allowed. The commenters were disappointed that the Agency has proposed to re-open a closed area and yet apparently failed to address the need to reduce risk beyond the status quo in the ALWTRP. The commenters noted that a recent peer-reviewed paper by Knowlton *et al.* (2015), though largely referencing the entanglement of adults, indicates that line breaking strengths of less than 1,700 lb (771 kg) would reduce the likelihood of life-threatening entanglements, and they noted that adult right whales have been found dead, entangled in gear with unbroken 600 lb (272 kg) weak links.

Response: While the Council considered a measure in the amendment to require a breaking strength lower than that required under the ALWTRP, they did not choose that measure because they changed their preferred alternative during the development of the black sea bass pot seasonal closure to require fishers to travel further offshore to fish for black sea bass during November 1 through April 30, when the weather is likely to be more inclement (such as increased currents) than at other times of the year. The Council concluded that fishing in these areas during the winter would likely put greater stress on the fishing gear in the water, and a breaking strength that is lower than is currently required under the ALWTRP could increase the number of lost black sea bass pots. NMFS agrees that if fishermen used vertical lines with a breaking strength less than 1,700 lb (771 kg), the risk of life-threatening entanglements to right whales would be reduced from current levels, however, with the Council's choice of closures for the black sea bass pot sector, the risk of potential right whale entanglement with black sea bass pot gear is low (Farmer *et al.* 2016). The recently completed ESA biological opinion on this fishery addresses vertical line breaking strength and contains a conservation recommendation that promotes the use of ropes with breaking strengths equal to or less than 1,700 lb (771 kg) for the black sea bass pot sector (50 CFR 402.2). NMFS is currently evaluating the implementation of this recommendation.

Comment 4: Passive acoustic recording arrays have been deployed off Georgia, South Carolina, and southern North Carolina since 2015; however, data from those arrays have yet to be published in a scientific journal describing the frequency of call rates at different distances from shore. Data on right whale call rates from these arrays should be analyzed to assess the probabilities of right whales encountering black sea bass pot buoy lines seaward of the offshore of the closure boundaries in Regulatory Amendment 16.

Response: National Standard 2 of the Magnuson-Stevens Act requires that conservation and management measures shall be based upon the best scientific information available, and NMFS has determined that the actions in Amendment 16 and this final rule are based on the best scientific information available. Based on NMFS's review of whale sightings, the models used for this rulemaking have performed well in predicting right whale distribution, and NMFS disagrees that unpublished data from these acoustic arrays should be included as part of Regulatory Amendment 16.

Comment 5: One commenter agrees that the modified seasonal closures from November 1 through April 30 for the black sea bass pot component would substantially reduce the entanglement risk to right whales but suggests that the minimum distance from shore for the seaward boundaries of the black sea bass pot closure should be revised to extend to at least 30 nautical miles (nm) from shore between Cape Hatteras and the Florida-Georgia border and at least 20 nm from shore in Duval and St. Johns Counties in Florida.

Response: NMFS disagrees that the boundaries of the black sea bass pot closure should be revised from those being implemented in this final rule. During the months of November and April, the area closed through this rule prohibits black sea bass pots inshore of an area which represents 91 percent of historical right whale sightings off Florida and Georgia; and off North Carolina and South Carolina, the black sea bass pot prohibition applies to Federal waters shallower than 25 m in depth. During December through March, the area closed through this final rule prohibits black sea bass pots shallower than 25 m in depth off Florida and Georgia; and from the Georgia/South Carolina border to Cape Hatteras, North Carolina, the prohibition applies to Federal waters that are shallower than 30 m in depth. This bathymetric area is based on right whale sightings by depth and captures 97 percent and 96 percent of right whale sightings off the North Carolina/South Carolina area, and Florida/Georgia area, respectively.

Right whales are likely to be most abundant offshore of Duval and St. Johns Counties in Florida from December through March. In Regulatory Amendment 16, for December through March off Duval and St. Johns Counties, the distance of the black sea bass pot gear offshore boundary to the shoreline is greater than 20 nm from shore, except for an approximately 15 square nm area off the boundary that separates Duval and St. Johns Counties. NMFS has determined that changing the boundary for that 15 nm area, as the commenter requests, would not result in a significant change in the predicted relative risk to right whales from black sea bass pot gear.

The analysis used in Regulatory Amendment 16 estimated that the area prohibition for black sea bass pots chosen by the Council has a low relative risk of entanglement of whales in black sea bass pot lines when compared with the other areas considered, and NMFS has determined that the analysis is based on the best scientific information available.

Comment 6: The proposed depth thresholds for the offshore boundaries do not adequately capture all areas likely to be used by right whales during the peak months of right whale occurrence. The analysis used to evaluate the alternatives in Regulatory Amendment 16 is based almost entirely on right whale sightings from aerial surveys. Aerial surveys under-represent right whale occurrence and entanglement risks for areas farther offshore. Other analyses of sighting data (*e.g.,* Knowlton *et al.* 2002, Schick *et al.* 2009) indicate that a large majority of sightings have occurred within approximately 10 or 15 nm of shore, but conclude that habitat extending 30 nm from shore should be considered important to migrating and calving whales off the southeastern United States.

Response: NMFS disagrees. In Regulatory Amendment 16, right whale occurrence was predicted from two spatial distribution models that were based on a robust data set: Survey data for Florida-South Carolina during the calving season from 2003–2004 to 2012–2013 (Gowan and Ortega-Ortiz 2014) and surveys off North Carolina from October 2005–April 2006, December 2006–April 2007, and February 2008–April 2008 (Farmer *et al.* 2016). These two models allowed for extrapolation of predicted right whale occurrence in areas that were not surveyed (*i.e.,* the models controlled for bias created by shore-based search effort).

The commenter cited Knowlton *et al.* (2002) and Schick *et al.* (2009) to support extending the black sea bass pot closure 30 nm from shore. However, Knowlton *et al.* (2002) summarized sightings data in the mid-Atlantic, but did not correct those sightings for survey effort as was done in the models used in the development of Regulatory Amendment 16. Schick *et al.* (2009) modeled right whale spatial distribution in the mid-Atlantic, but the results have a high degree of uncertainty as the study only used data from two female right whales, one tagged in 1996 and the other tagged in 2000. NMFS has determined that the analysis in Regulatory Amendment 16 represents the best scientific information available.

Comment 7: Limited telemetry and recent acoustic monitoring suggest that waters beyond 15 or 20 nm from shore are used by right whales more frequently than aerial survey data indicate. For example, data on right whales tagged with telemetry devices to document northbound migration routes from the southeastern U.S. calving grounds (Andrews 2016, Slay *et al.* 2002) indicate that they regularly use waters out to 30 nm from shore and therefore are not confined to waters shallower than 25 or 30 m in depth.

Response: There are varying levels of error and uncertainty associated with the preliminary telemetry tracks gathered from the two studies referenced (Andrews 2016, Slay *et al.* 2002), and the data have not been processed completely to account for those errors. Andrews (2016) summarizes the results of a right whale tagging study and contains a map that illustrates the estimated tracks of right whales tagged during the study. Slay *et al.* (2002) describes the results of a January 1999 study in which a female right whale accompanied by her calf was tracked via radio off northeast Florida and southeast Georgia. The researchers used telemetry to follow the mother/calf pair for 140 hours. That report overlays the whales' track with that of sea surface temperature and the temperatures associated with the track are consistent with modeled right whale distribution in Gowan and Ortega-Ortiz (2014), which was the basis for the analysis contained in Regulatory Amendment 16. Since the study described in Slay *et al.* (2002) used telemetry data, NMFS believes that the results have a high degree of uncertainty. However, the spatial distribution information learned from the one right whale mother/calf pair in Slay *et al.* (2002) was adequately represented in the model used by Gowan and Ortega-Ortiz (2014) during the development of Regulatory Amendment 16 and this final rule.

Comment 8: A 2016 study by the U.S. Navy shows that right whale call rates detected by an acoustic monitoring array moored perpendicular to the coast off Cape Hatteras, North Carolina, are highest within 15 or 20 nm of shore, but significant numbers of right whale calls also occur between 20 and 40 nm offshore.

Response: The U.S. Navy buoys in the acoustic array appeared to be placed at approximately 5 nm increments from the shoreline (*i.e.,* 5, 10, 15, 20, and 25 nm from the shoreline). The offshore boundary of the black sea bass pot closure area extends nearly 20 nm offshore off North Carolina. From December 2013 through March 2014, the study indicates that the majority of right whale calls were detected at buoys that were located between 10 and 15 nm from the Cape Hatteras, North Carolina, shoreline. Fewer calls were detected 20 nm from the shoreline (when compared to the calls detected at 10 and 15 nm) and even fewer were detected 25 nm from shore. From October 2014 through February 2015, the majority of right whale calls were detected at buoys 5 and 10 nm from the shoreline (the buoy 15 nm from shore was offline from December 2014 through February 2015). Fewer right whale calls were detected 20 and 25 nm from shore. This study did not correlate the number of calls to the number of whales nor did they specify the detection range of the acoustic buoys. The U.S. Navy buoys in the study did not extend out to 40 nm as the commenter suggests, and the buoys were not designed with the intent of detecting whale calls. Therefore, NMFS has determined that the best scientific information available on right whale spatial distribution was used in Regulatory Amendment 16, and serves as the basis for this final rule.

Comment 9: The black sea bass pot seasonal closures should be extended to the shoreline, and black sea bass pot fishing in state waters should be prohibited at the same times that Federal waters are closed. Similar regulations should be in place for fishing gear in both state and Federal waters.

Response: The Council does not manage black sea bass in state waters, because the Magnuson-Stevens Act gives the Council the authority to manage fisheries in the EEZ, off North Carolina, South Carolina, Georgia and Florida (16 U.S.C. 1852(a)(1)(C)). However, NMFS and the Council informed the states of North Carolina, South Carolina, Georgia and Florida of the measures proposed for black sea bass pots during the development and implementation of Regulatory Amendment 16, and NMFS intends to ask each of these states to issue regulations compatible with this final rule.

Comment 10: The prohibition on winter black sea bass pot fishing outside of the right whale critical habitat area should be ended and areas as shown in Alternative 2 of Action 1 (the previous designation of North Atlantic right whale critical habitat) should be closed to fishing with black sea bass pot gear.

Response: NMFS disagrees that the area shown in Alternative 2 of Action 1 to modify the annual November 1 through April 30 prohibition on the use of black sea bass pot gear in Regulatory Amendment 16 should be the only area closed to fishing with black sea bass pot gear. The area shown in Alternative 2 of Action 1 is based on right whale critical habitat that was implemented in 1994, and on January 26, 2016, NMFS issued a final rule that created an expansion of the right whale critical habitat area (81 FR 4838) that was effective February 26, 2016. This recent determination of critical habitat is based on an increased understanding of where North Atlantic right whales occur, or are most likely to occur, off the southeastern United States. The Council did not include an alternative to base the closed area on the revised right whale critical habitat because the Council voted for final approval of Regulatory Amendment 16 in December 2015, which was prior to the publication of the final rule for the North Atlantic right whale critical habitat area expansion.

In addition, the analysis in Regulatory Amendment 16 indicated that Alternative 2 in Action 1 would introduce the greatest amount of entanglement risk to large whales, relative to all alternatives, because predicted North Atlantic right whale presence is higher outside of the geographic boundaries of Alternative 2.

Comment 11: NMFS should not modify the current restrictions on black sea bass pots because this type of fishing gear captures large amounts of fish and reduces the availability of black sea bass to fishermen using hook-and-line gear.

Response: NMFS agrees that commercial fishermen can harvest more black sea bass using pot gear than hook-and-line gear. In addition, NMFS acknowledges that this final rule will likely increase the benefits to fishers using black sea bass pot gear and decrease the benefits to fishers using hook-and-line gear, as described in the Classification section of this final rule. However, NMFS estimates that revenue losses to each vessel using fishing gear

other than black sea bass pots will be relatively small.

Though commercial harvest is greater using black seas bass pot gear, there are only 32 fishers with an endorsement who may harvest black sea bass using pots, and as implemented through Amendment 18A to the FMP, each endorsement holder is limited to a maximum of 35 pots, a commercial trip limit of 1,000 lb (454 kg) gutted weight, and a requirement that pots be brought back to shore after each trip (77 FR 32408, June 1, 2012). The Council determined that modifying the current closure under this final rule will reduce the adverse socioeconomic impacts and increase the flexibility of black sea bass pot endorsement holders to fish with this gear, while continuing to protect ESA-listed whales in the South Atlantic region.

Classification

The Regional Administrator, Southeast Region, NMFS, has determined that this final rule is consistent with Regulatory Amendment 16, the Magnuson-Stevens Act, and other applicable law.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

In compliance with section 604 of the RFA, NMFS prepared a final regulatory flexibility analysis (FRFA) for this final rule. The FRFA incorporates the Initial Regulatory Flexibility Analysis (IRFA), a summary of the significant economic issues raised by public comments, NMFS's responses to those comments, and a summary of the analyses completed to support the action. The FRFA follows.

The preamble to the final rule provides the statement of the need for and objectives of this final rule. The Magnuson-Stevens Act provides the statutory basis for this final rule.

No duplicative, overlapping, or conflicting Federal rules have been identified. In addition, no new reporting or record-keeping requirements are introduced by this final rule. However, the final rule will require that for each black sea bass pot buoy line an additional 12-inch (30.5 cm) wide purple band be added at the end of, and directly adjacent to, each of the currently required 12-inch (30.5 cm) colored marks required under the ALWTRP discussed above. Similar to the current requirements under the ALWTRP, this marking requirement does not need an additional expertise on the part of fishermen. NMFS estimates that this requirement will cost each pot endorsement holder about an additional $5 annually if surveyor's tape is used for line marking, or about an additional $90 annually if paint is used instead. The estimated additional annual time burden associated with the marking requirement is up to approximately 3.5 hours annually.

No comments specific to the IRFA or on the economic impacts of the rule more generally were received from the public or from the Chief Counsel for the Advocacy of the Small Business Administration and, therefore, no public comments are addressed in this FRFA. No changes to the proposed rule were made in response to public comments. NMFS agrees that the Council's choice of preferred alternative will best achieve the Council's objectives for Regulatory Amendment 16 while minimizing, to the extent practicable, the adverse effects on fishers, support industries, and associated communities.

NMFS expects this final rule to directly affect federally permitted commercial fishermen fishing for black sea bass in the South Atlantic. For RFA purposes only, NMFS has established a small business size standard for businesses, including their affiliates, whose primary industry is commercial fishing (see 50 CFR 200.2). A business primarily engaged in commercial fishing (NAICS code 11411) is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including affiliates), and has combined annual receipts not in excess of $11 million for all its affiliated operations worldwide. The $11 million standard became effective on July 1, 2016, and is to be used in place of the U.S. Small Business Administration's (SBA) current standards of $20.5 million, $5.5 million, and $7.5 million for the finfish (NAICS 114111), shellfish (NAICS 114112), and other marine fishing (NAICS 114119) sectors of the U.S. commercial fishing industry in all NMFS rules subject to the RFA after July 1, 2016.

Pursuant to the RFA, and prior to July 1, 2016, an IRFA was developed for this regulatory action using SBA's size standards. NMFS has reviewed the analyses prepared for this regulatory action in light of the new size standard. All of the entities directly affected by this regulatory action are commercial fishing businesses and were considered small under the SBA's size standards, and they all will continue to be considered small under the new NMFS standard. Thus, NMFS has determined that the new size standard does not affect analyses prepared for this regulatory action.

As of December 31, 2014, there were 32 holders of the Federal black sea bass pot endorsement to the snapper-grouper commercial permit. Since that time one endorsement holder has dropped out of the black sea bass pot component of the commercial sector, but the current analysis uses 32 endorsement holders because historical records of these 32 endorsement holders were used in Regulatory Amendment 16. Using the records of 32 endorsement holders for determining the economic effects is not expected to inflate the analytical results because only an average of 31 vessels fished for black sea bass using pots.

From the 2000/2001 through 2013/2014 fishing years, these endorsement holders used an average of 31 vessels fishing for black sea bass using pots. These vessels generated total combined revenues (2014 dollars) of $732,717 from black sea bass, $228,468 from other species jointly landed with black sea bass, and $248,662 from all other species in trips where black sea bass was not caught. The average annual revenue per vessel from all species, including black sea bass, landed by these vessels was $38,715 (2014 dollars). During the same time period, an average of 215 vessels using gear other than sea bass pots landed at least 1 lb (0.45 kg) of black sea bass. These vessels generated dockside total combined revenues (2014 dollars) of $199,574 from black sea bass, $3.838 million from other species jointly landed with black sea bass, and $7.680 million from all other species in trips where black sea bass was not caught. The average annual revenue per vessel from all species, including black sea bass, landed by these vessels was $54,651 (2014 dollars). Vessels that caught and landed black sea bass may also operate in other fisheries, the revenues of which are not known and are not reflected in these totals. Based on revenue information, all commercial vessels directly affected by the final rule may be assumed to be small entities.

Because all entities expected to be directly affected by this final rule are assumed to be small entities, NMFS has determined that this final rule will affect a substantial number of small entities. However, the issue of disproportionate effects on small versus large entities does not arise in the present case.

This final rule modifies the November 1 through April 30 annual prohibition on the use of black sea bass pot gear in the South Atlantic EEZ by allowing black sea bass pot fishing at depths greater than approximately 25 m from November 1 through 30, and April 1 through 30, from approximately Daytona Beach, Florida, to the Georgia/South Carolina border and off North and South Carolina; at depths greater than

approximately 25 m from December 1 through March 31, from approximately Cape Canaveral, Florida, to Savannah, Georgia; and, at depths greater than approximately 30 m from December 1 through March 31 off North and South Carolina. In addition, this final rule requires black sea bass pot endorsement holders to put three 12-inch (30.5 cm) purple markings on each sea bass pot buoy line adjacent to the already required color markings on these lines under the ALWTRP. The marks are commonly made with either paint or surveyor's tape. As described in the codified text to this final rule, other materials may also be used for marking the line.

The modification to the current prohibition on the use of black sea bass pot gear will have contrasting economic effects on the two major groups of participants in the commercial harvest of black sea bass. This action will benefit those using pots for harvesting black sea bass, and given that the commercial annual catch limit (ACL) is predicted to be fully harvested, benefits to users of other fishing gear, such as hook-and-line, will decrease. The combined dockside revenues (2014 dollars) for all sea bass pot gear vessels are estimated to increase annually between $113,964 and $185,068 based on 2000–2013 average black sea bass price, or between $163,606 and $260,355 based on 2011–2013 average black sea bass price. Two price levels are used to provide a limit on the range of revenue effects. The lower limit is based on the 2000–2013 average black sea bass price and the upper limit is based on the 2011–2013 average black sea bass price. In contrast, the combined dockside revenues (2014 dollars) for all non-black seas bass pot gear vessels are estimated to decrease annually between $68,323 and $141,527 based on 2000–2013 average black sea bass price, or between $116,650 and $241,631 based on 2011–2013 the average black sea bass price. The net revenue change for all vessels combined will be between $43,541 and $46,367 based on 2000–2013 average price for black sea bass, or between $43,889 and $46,553 based on 2010–2013 average price for black sea bass. Assuming that revenue increases for users of pot gear will be equally distributed among the 32 endorsement holders, revenues per pot endorsement holder will increase annually between $3,561 and $5,783, or between $5,113 and $8,136. However, revenue per vessel for the 215 users of non-pot gear will decrease between $318 and $658, or between $543 and $1,124. For vessels using black seas bass pot gear, the expected revenue increases will be approximately 9 to 21 percent of their average annual revenue of $38,715 per vessel. However, revenue losses to vessels using fishing gear other than black sea bass pots will be between 1 and 2 percent of their average annual revenue of $54,651 per vessel. Therefore, on a per vessel basis, the revenue gains to the black seas bass pot endorsement holders could potentially be substantial, whereas the revenue losses to the other fishing gear users will be relatively small.

The requirement for black sea bass pot endorsement holders to put three 12-inch (30.5 cm) purple markings on each black sea bass pot buoy line adjacent to the already required colors required under the ALWTRP will cost each endorsement holder about an additional $5 annually if surveyor's tape is used, or about an additional $90 annually if paint is used instead.

The following discussion describes the alternatives that were not selected as preferred by the Council. In this section, the term ''overall revenues'' refers to the sum of revenues from all vessels using black sea bass pots and revenues from all vessels using gear other than black sea bass pots for for harvesting black sea bass.

Twelve alternatives, including the preferred alternative as described above, were considered for modifying the November 1 through April 30 prohibition on the use of black sea bass pot gear. The first alternative, the no action alternative, would maintain the current economic benefits to all participants in the fishery as well as provide the least likelihood of right whales getting entangled with black sea bass pot lines. However, this alternative would not address the need to reduce the adverse socioeconomic effects resulting from the current prohibition on the use of black sea bass pot gear.

The second alternative would apply the black sea bass pot closure to the area previously designated as North Atlantic right whale critical habitat from November 15 through April 15. This alternative would provide slightly more increases in overall revenues to commercial vessels than the preferred alternative, but it would also pose the highest risk of right whale entanglement with black sea bass pot buoy lines.

The third alternative would apply the black sea bass pot closure from approximately Ponce Inlet, Florida, to Cape Hatteras, North Carolina, annually from November 1 through April 30. Relative to the preferred alternative, this alternative would result in higher overall revenue increases but would also decrease protection to right whales from getting entangled with pot buoy lines.

The fourth alternative would apply the black sea bass pot closure from approximately Cape Canaveral, Florida, to Cape Hatteras, North Carolina, annually from November 1 through April 30. Although this alternative would provide increased protection to right whales from entanglement with black sea bass pot buoy lines, it would result in smaller overall revenue increases than the preferred alternative.

The fifth alternative would apply the black sea bass pot closure from approximately Daytona Beach, Florida, to Cape Hatteras, North Carolina, annually from November 1 through April 30. Relative to the preferred alternative, this alternative would provide slightly more increases in overall revenues to commercial vessels but would provide less protection to right whales from entanglement with black sea bass pot buoy lines.

The sixth alternative would apply the black sea bass pot closure from approximately Sebastian Inlet, Florida, to Cape Hatteras, North Carolina, annually from November 1 through April 30. Although this alternative would provide the second greatest protection in comparison with the other alternatives in Regulatory Amendment 16 to right whales from entanglement with pot buoy lines, it would result in lower overall revenue increases than the preferred alternative.

The seventh alternative would apply the black sea bass pot closure from approximately the Altamaha River, Georgia, to Cape Hatteras, North Carolina, with the following sub-alternatives: Annually from November 1 through December 15 and March 15 through April 30; annually from November 1 through December 15 and March 15 through April 30 for the area off North Carolina and South Carolina, and from November 15 through April 15 for the area off Georgia and Florida; and, annually from February 15 through April 30 for the area off North Carolina and South Carolina, and from November 15 through April 15 for the area off Georgia and Florida. Relative to the preferred alternative, this alternative and its sub-alternatives would result in relatively higher overall revenue increases but would provide much reduced protection to right whales from entanglement with sea bass pot buoy lines.

The eighth alternative would apply the black sea bass pot closure from approximately Daytona Beach, Florida, to Cape Hatteras, North Carolina, annually from November 1 through April 15; or annually from November 1

through December 15 and February 15 through April 30 for the area off North Carolina and South Carolina, and from November 15 through April 15 for the area off Georgia and Florida. Relative to the preferred alternative, this alternative and its sub-alternatives would result in higher overall revenue increases but would result in a much reduced protection to right whales from entanglement with pot buoy lines.

The ninth alternative would apply the black sea bass pot closure from approximately Daytona Beach, Florida, to Cape Hatteras, North Carolina, annually from November 1 through April 15; or annually from November 1 through December 15 and February 15 through April 30 for the area off North Carolina and South Carolina, and from November 15 through April 15 for the area off Georgia and Florida. Relative to the preferred alternative, this alternative and its sub-alternatives would result in higher overall revenue increases but would result in much reduced protection to right whales from entanglement with pot buoy lines.

The tenth alternative would apply the black sea bass pot closure from approximately the Georgia/South Carolina border, to Cape Hatteras, North Carolina, annually from November 1 through December 15, with the following provision: From February 15 through April 30, the black sea bass pot closure applies to certain inshore waters from approximately the Georgia/South Carolina border, to Cape Hatteras, North Carolina; from December 16 through February 14, there would be no closure off of the Carolinas; from November 15 through April 15, the black sea bass pot closure applies to certain inshore waters from approximately the Georgia/South Carolina border, to approximately Daytona Beach, Florida. Relative to the preferred alternative, this alternative would result in higher overall revenue increases but would result in much reduced protection to right whales from entanglement with pot buoy lines.

The eleventh alternative would apply the black sea bass pot closure from approximately Cape Canaveral, Florida, to Cape Hatteras, North Carolina, annually from November 1 through April 30. Relative to the preferred alternative, this alternative would result in higher overall revenue increases but would result in slightly reduced protection to right whales from entanglement with black sea bass pot buoy lines.

Four alternatives, including the preferred alternative, were considered in addition to the existing ALWTRP buoy line/weak link gear requirements and buoy line rope marking for black sea bass pots in the South Atlantic. The first alternative, the no action alternative, would not impose any additional cost on fishermen when fishing for black sea bass using pots but it would not meet the need for the action. The second alternative, with two sub-alternatives, would impose requirements in addition to those required under the current ALWTRP for black sea bass pot buoy lines from November 1 through April 30 in Federal waters in the South Atlantic. The first sub-alternative would require that the breaking strength for buoy lines not exceed 2,200 lb (997 kg) and the second sub-alternative would require that the breaking strength for buoy lines not exceed 1,200 lb (544 kg). The first sub-alternative is what is currently required under the ALWTRP in the Southeast U.S. Restricted Area North and would affect only about 17 pot endorsement holders in North Carolina. The estimated cost to each of these 17 fishermen is a maximum of $716. The second sub-alternative would impose the same cost per fisherman of $716 but would affect all 32 pot endorsement holders. The third alternative would require that the breaking strength of the weak links of the buoy lines must not exceed 400 lb (181 kg) for black sea bass pots in the South Atlantic EEZ. This alternative is a decrease from the current requirement of 600 lb (272 kg) breaking strength of the weak links under the ALWTRP, and is estimated to cost each of the 32 pot endorsement holders $65. Relative to the preferred alternative, all these alternatives, except the no action alternative, would impose higher costs upon fishermen using black sea bass pots.

This final rule contains a revised collection-of-information requirements subject to the PRA, which has been approved by OMB under control number 0648–0358. NMFS estimates the public reporting burden for the sea bass pot gear marking will result in an additional annual cost of up to $90 per sea bass pot endorsement holder and require up to an additional 3.5 hours per response per year. Based upon feedback from fishermen, the cost and time burden for the marking requirement may be slightly lower in subsequent years depending on the marking method used. However, NMFS estimates the requirement to endorsement holders will result in the same for cost and time burden for each subsequent year, because different materials used to mark sea bass pot gear are available and the longevity of the markings vary depending on factors such as the length of the fishing season and how often the gear is used. This estimate of the public reporting burden includes the time for reviewing instructions, 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 will 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. All currently approved NOAA collections-of-information may be viewed at *http://www.cio.noaa.gov/services_programs/prasubs.html*.

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as small entity compliance guides. As part of the rulemaking process, NMFS prepared a fishery bulletin, which also serves as a small entity compliance guide. The fishery bulletin will be sent to all interested parties.

There are provisions in this final rule that are exempt from the requirement to delay the effectiveness of a final rule by 30 days after publication in the **Federal Register**, under 5 U.S.C. 553(d)(3). Specifically, NMFS finds good cause under 5 U.S.C. 553(d)(3) to waive the delay in the effective date for the revised time and area closures specific to the use of black sea bass pot gear in the South Atlantic EEZ set forth in § 622.183(b)(6), since these measures increase the allowable area and time available to this fishing gear type for the regulated community during the fishing year. Delaying implementation of these measures for black sea bass could result in snapper-grouper fishermen not having the opportunity to achieve optimum yield from this stock, because the black sea bass pot component of the commercial sector would have less time available during the year to harvest the ACL before the fishing year's end, thereby undermining the intent of the rule. Additionally, a delay in implementation for these measures would not allow fishers using black sea bass pot gear to begin fishing with that gear as soon as possible, which would therefore minimize the potential socioeconomic benefits of this final rule and be contrary to the purpose of Regulatory Amendment 16. Thus, not waiving the 30-day delay of effectiveness for these black sea bass pot

gear closure provisions is unnecessary and contrary to the public interest, as a delay in implementation may negatively impact black sea bass pot fishers and be inconsistent with the purpose of this final rule with respect to reducing the socioeconomic impacts of the current closure. Therefore, a delay in effectiveness would diminish the social and economic benefits for snapper-grouper fishermen this final rule provides, which is part of the purpose of the rule. Thus, the measures applicable to the black sea bass pot gear area and seasonal closure in this final rule are effective upon publication.

List of Subjects in 50 CFR Part 622

Annual catch limits, Black sea bass, Fisheries, Fishing, South Atlantic.

Dated: December 22, 2016.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

■ For the reasons set out in the preamble, 50 CFR part 622 is amended as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF OF MEXICO, AND SOUTH ATLANTIC

■ 1. The authority citation for part 622 continues to read as follows:

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

■ 2. In § 622.183, revise paragraph (b)(6) to read as follows:

§ 622.183 Area and seasonal closures.

* * * * *

(b) * * *

(6) *Seasonal closure of the commercial black sea bass pot component of the snapper-grouper fishery.* The closed area is that area and time period described in paragraphs (b)(6)(i) and (b)(6)(ii) of this section, respectively. During the applicable closure, no person may harvest or possess black sea bass in or from the closed area within the South Atlantic EEZ either with sea bass pots or from a vessel with sea bass pots on board, except that a vessel with a valid commercial permit for snapper-grouper with a sea bass pot endorsement that is in transit and with black sea bass pot gear appropriately stowed as described in paragraph (b)(6)(iii) of this section may possess black sea bass. In addition, sea bass pots must be removed from the water in the applicable closed area within the South Atlantic EEZ before the applicable time period, and may not be on board a vessel in the closed area within the South Atlantic EEZ during the applicable closure, except for such sea bass pot gear appropriately stowed on board a vessel in transit through the closed area. See paragraph (b)(6)(iii) of this section for black sea bass pot transit and gear stowage requirements through the closed areas.

(i) From November 1 through November 30 and from April 1 through April 30, no person may harvest or possess black sea bass in or from the closed area within the South Atlantic EEZ either with sea bass pots or from a vessel with sea bass pots on board in the South Atlantic EEZ inshore of the rhumb lines connecting, in order, the following points:

Point	North lat.	West long.
1	35°15′	State/EEZ boundary.
2	35°15′	75°09′.
3	35°06′	75°22′.
4	35°06′	75°39′.
5	35°01′	75°47′.
6	34°54′	75°46′.
7	34°52′	76°04′.
8	34°33′	76°22′.
9	34°23′	76°18′.
10	34°21′	76°27′.
11	34°25′	76°51′.
12	34°09′	77°19′.
13	33°44′	77°38′.
14	33°25′	77°27′.
15	33°22′	77°40′.
16	33°28′	77°41′.
17	33°32′	77°53′.
18	33°22′	78°26′.
19	33°06′	78°31′.
20	33°05′	78°40′.
21	33°01′	78°43′.
22	32°56′	78°57′.
23	32°44′	79°04′.
24	32°42′	79°13′.
25	32°34′	79°23′.
26	32°25′	79°25′.
27	32°23′	79°37′.
28	31°53′	80°09′.
29	31°31′	80°33′.
30	30°43′	80°49′.
31	30°30′	81°01′.
32	29°45′	81°01′.
33	29°31′	80°58′.
34	29°13′	80°52′.
35	29°13′	State/EEZ boundary.

(ii) From December 1 through March 31, no person may harvest or possess black sea bass in or from the closed area within the South Atlantic EEZ either with sea bass pots or from a vessel with sea bass pots on board in the South Atlantic EEZ inshore of the rhumb lines connecting, in order, the following points:

Point	North lat.	West long.
1	35°15′	State/EEZ boundary.
2	35°15′	75°08′.
3	34°58′	75°41′.
4	34°49′	75°50′.
5	34°47′	76°05′.
6	34°31′	76°18′.
7	34°20′	76°13′.
8	34°12′	77°00′.
9	33°43′	77°30′.
10	33°21′	77°21′.
11	33°18′	77°41′.
12	33°22′	77°56′.
13	33°12′	78°20′.
14	33°05′	78°22′.
15	33°01′	78°38′.
16	32°40′	79°01′.
17	32°36′	79°18′.
18	32°19′	79°22′.
19	32°16′	79°37′.
20	32°03′	79°48′.
21	31°39′	80°27′.
22	30°58′	80°47′.
23	30°13′	81°01′.
24	29°32′	80°39′.
25	29°22′	80°44′.
26	28°50′	80°22′.
27	28°21′	80°18′.
28	28°21′	State/EEZ boundary.

(iii) For the purpose of paragraph (b)(6) of this section, transit means non-stop progression through the area; fishing gear appropriately stowed means all black sea bass pot gear must be out of the water and on board the deck of the vessel. All buoys must either be disconnected from the gear or stowed within the sea bass pot. Disconnected buoys may remain on deck.

* * * * *

■ 3. § 622.189, add paragraph (g) to read as follows:

§ 622.189 Restrictions and requirements for sea bass pots.

* * * * *

(g) *Sea bass pot buoy line marking requirement.* In addition to the gear marking requirements specified in 50 CFR 229.32(b), from November 15 through April 15, each year, in the Southeast U.S. Restricted Area North as described in 50 CFR 229.32(f) and from September 1 through May 31, each year in the Offshore Trap/Pot Waters Area and the Southern Nearshore Trap/Pot Waters Area, as described in 50 CFR 229.32(c)(6) and (9), respectively, the buoy line must be marked with a purple color band. The colored band must be clearly visible when the gear is hauled or removed from the water, including if the color of the rope is the same as, or similar, to the colored band. The purple band must be marked directly onto the line and adjacent to the buoy line markings specified in 50 CFR 229.32(b), that is, at the top, middle, and bottom of each buoy line deployed by, or on board, the vessel. Each of the three purple bands must be a 12-inch (30.5

cm) color mark. In marking or affixing the purple band, the line may be dyed, painted, or marked with thin colored whipping line, thin colored plastic, or heat-shrink tubing, or other material.

[FR Doc. 2016–31363 Filed 12–28–16; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 160527473–6999–02]

RIN 0648–BG09

Atlantic Highly Migratory Species; Individual Bluefin Quota Program; Inseason Transfers

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

ACTION: Final rule.

SUMMARY: NMFS modifies the Atlantic highly migratory species (HMS) regulations regarding the distribution of inseason Atlantic bluefin tuna (BFT) quota transfers to the Longline category. This final rule provides NMFS the ability to distribute quota inseason either to all qualified Individual Bluefin Quota (IBQ) share recipients (*i.e.,* share recipients who have associated their permit with a vessel) or only to permitted Atlantic Tunas Longline vessels with recent fishing activity, whether or not they are associated with IBQ shares. This action is necessary to optimize fishing opportunity in the directed pelagic longline fishery for target species such as tuna and swordfish and to improve the functioning of the IBQ Program and its leasing provisions consistent with the objectives of Amendment 7 to the 2006 Consolidated HMS Fishery Management Plan (FMP).

DATES: Effective on January 28, 2017.

ADDRESSES: Supporting documents, including the Regulatory Impact Review and Final Regulatory Flexibility Analysis, may be downloaded from the HMS Web site at *www.nmfs.noaa.gov/sfa/hms/.*

FOR FURTHER INFORMATION CONTACT: Thomas Warren or Sarah McLaughlin, 978–281–9260; Carrie Soltanoff, 301–427–8503.

SUPPLEMENTARY INFORMATION: Regulations implemented under the authority of the Atlantic Tunas Convention Act (ATCA; 16 U.S.C. 971 *et seq.*) and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act; 16 U.S.C. 1801 *et seq.*) governing the harvest of BFT by persons and vessels subject to U.S. jurisdiction are found at 50 CFR part 635. Section 635.27 subdivides the U.S. BFT quota recommended by the International Commission for the Conservation of Atlantic Tunas (ICCAT) and implemented by NMFS among the various domestic fishing categories per the allocations established in the 2006 Consolidated Atlantic Highly Migratory Species Fishery Management Plan (2006 Consolidated HMS FMP) (71 FR 58058, October 2, 2006), as amended by Amendment 7 to the 2006 Consolidated HMS FMP (Amendment 7) (79 FR 71510, December 2, 2014), and in accordance with implementing regulations. The current baseline U.S. BFT quota and subquotas were established and analyzed in the BFT quota final rule (80 FR 52198, August 28, 2015). NMFS is required under ATCA and the Magnuson-Stevens Act to provide U.S. fishing vessels with a reasonable opportunity to harvest the ICCAT-recommended quota.

Background

Background information about the need for additional flexibility within the IBQ Program for distribution of BFT quota transferred to the Longline category inseason was provided in the preamble to the proposed rule (81 FR 65988, September 26, 2016) and most of that information is not repeated here.

Vessels fishing with pelagic longline gear, which may only catch BFT incidentally while fishing for target species (primarily swordfish and yellowfin tuna), hold limited access Atlantic Tunas Longline permits and utilize Longline category BFT quota. Through Amendment 7, NMFS established the IBQ Program, a catch share program that identified 136 permit holders as IBQ share recipients based on specified criteria, including historical target species landings and the bluefin catch-to-target species ratios from 2006 through 2012. NMFS currently distributes and manages the Longline category BFT quota via the IBQ Program.

The specific objectives of the IBQ Program are to:

1. Limit the amount of BFT landings and dead discards in the pelagic longline fishery;
2. Provide strong incentives for the vessel owner and operator to avoid BFT interactions, and thus reduce bluefin dead discards;
3. Provide flexibility in the quota system to enable pelagic longline vessels to obtain BFT quota from other vessels with available individual quota in order to enable full accounting for BFT landings and dead discards, and minimize constraints on fishing for target species;
4. Balance the objective of limiting bluefin landings and dead discards with the objective of optimizing fishing opportunities and maintaining profitability; and
5. Balance the above objectives with potential impacts on the directed permit categories that target BFT, and the broader objectives of the 2006 Consolidated HMS FMP and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

IBQ share recipients receive an annual allocation of the Longline category quota based on the percentage share they received through Amendment 7 but only if their permit is associated with a vessel in the subject year (*i.e.,* only ''qualified IBQ share recipients'' receive annual allocations). Permit holders that were not selected to receive IBQ shares through Amendment 7 may still fish, but they are required to lease quota through the IBQ electronic system. Every vessel must have a minimum amount of quota allocation to fish (*e.g.,* 0.25 metric tons (mt) whole weight (ww) (551 lb ww) for a trip in the Gulf of Mexico and 0.125 mt ww (276 lb ww) for a trip in the Atlantic), whether obtained through shares or by leasing, and every vessel must individually account for its BFT landings and dead discards through the IBQ electronic system.

In July 2015 and January 2016, NMFS transferred quota inseason from the Reserve category to the Longline category (80 FR 45098, July 29, 2015; 81 FR 19, January 4, 2016). In these inseason actions, NMFS distributed the transferred quota in equal amounts to 136 qualified IBQ share recipients. During 2015, 36 of these 136 qualified IBQ share recipients had no pelagic longline fishing activity (*i.e.,* they took no fishing trips with pelagic longline gear). Furthermore, 31 of the 36 qualified IBQ share recipients that did not fish also did not lease IBQ to others (*i.e.,* 31 neither fished nor leased and 5 did not fish but leased out their IBQ allocations). As a result, those 31 IBQ allocations went unused for the year and expired at year's end.

NMFS received requests, among other suggestions about the IBQ Program and management of the pelagic longline fishery, that when quota is transferred inseason to the Longline category, NMFS distribute it only to those vessels that are currently fishing (whether

associated with IBQ shares or not) to optimize fishing opportunity and account for dead discards, rather than distributing it equally to all IBQ share recipients, some of whom currently neither fish with pelagic longline gear nor lease quota to other active Longline fishery participants. The proposed rule considered and analyzed that approach and invited public comment.

This final rule modifies the regulations to specify that distribution of quota transferred to the Longline category inseason (*i.e.,* quota beyond the baseline Longline category quota that is distributed to qualified IBQ share recipients according to the three shareholder percentages implemented through Amendment 7) may be *either* to all qualified IBQ share recipients *or* only to permitted Atlantic Tunas Longline vessels with recent fishing activity whether they are associated with IBQ shares or not. NMFS will review information from logbook, vessel monitoring system (VMS), or electronic monitoring data to determine whether any fishing activity has occurred over the course of the subject and previous year thus indicating that there is ''recent fishing activity,'' as discussed in more detail below. For example, for inseason transfers in 2017, NMFS will examine fishing activity data for 2016 and 2017. Providing flexibility in the quota system and maintaining flexibility of the regulations to account for the highly variable nature of the BFT interactions in the pelagic longline fishery was an objective of Amendment 7 (See, *e.g.,* Amendment text at 79 FR 71510 and 71559), and this adjustment to the regulations will further that objective.

In deciding whether to transfer additional quota to the Longline category inseason from the Reserve category, NMFS would first consider the existing 14 regulatory determination criteria for inseason or annual adjustments at 50 CFR 635.27(a)(8), including the need to ''optimize fishing opportunity.''

Next, if NMFS decides to transfer quota to the Longline category inseason, NMFS will then decide whether to distribute that quota to all qualified IBQ share recipients or only to permitted Atlantic Tunas Longline vessels with recent fishing activity whether or not the vessel is associated with IBQ shares. This decision will be based on information for the subject year and previous year, including the number of BFT landings and dead discards, the number of IBQ lease transactions, the average amount of IBQ leased, the average amount of quota debt, the annual amount of IBQ allocation, any previous inseason allocations of IBQ, the amount of BFT quota in the Reserve category, the percentage of BFT quota harvested by the other quota categories, the remaining number of days in the year, the number of active vessels fishing not associated with IBQ share, and the number of vessels that have incurred quota debt or that have low levels of IBQ allocation. NMFS will determine which approach will best meet the specific objectives of the IBQ Program as stated in Amendment 7, including the objective of providing ''flexibility in the quota system to enable pelagic longline vessels to obtain BFT quota from other vessels with available individual quota in order to enable full accounting for BFT landings and dead discards, and minimize constraints on fishing for target species.'' For example, in years where leasing by IBQ share recipients is not occurring as anticipated by Amendment 7, distribution to only active vessels might be appropriate to encourage leasing at levels that ensure appropriate functioning of the IBQ system in future years. In years where the leasing program is functioning well and leasing is occurring as needed and as anticipated by Amendment 7, distribution may be to all of the qualified IBQ share recipients.

If NMFS distributes the inseason quota to all qualified IBQ share recipients, those qualified IBQ share recipients will receive equal amounts of the quota transferred.

If NMFS distributes inseason quota only to those vessels with recent fishing activity, vessels with ''recent fishing activity'' in the pelagic longline fishery will be based upon available information such as logbook, VMS, dealer, or electronic monitoring data for the subject and previous year. Any vessel activity in the pelagic longline fishery during this date range will be sufficient to qualify as ''recent fishing activity.'' The specific data analyzed for this date range in a given inseason action will be those available when the inseason transfer occurs, and will depend on which complete data are available at that time. For example, logbook data for a particular year are typically not available for use until several months into the following year due to the process of data entry and quality control, as well as late reporting. Therefore, early in a year, NMFS may determine vessel activity for the previous and subject year using VMS data, whereas later in the year, it might use both logbook and VMS data.

Whether NMFS distributes quota to all qualified IBQ recipients or to only those permitted vessels with recent fishing activity, quota transferred inseason will be distributed equally to the vessel accounts associated with the relevant vessels via the electronic IBQ system. In either case, when a qualified IBQ share recipient receives inseason quota, the quota will be designated as either Gulf of Mexico (GOM) IBQ, Atlantic (ATL) IBQ, or both GOM and ATL IBQ, according to the share recipient's regional designations. For vessels with recent fishing activity that are not qualified IBQ share recipients, NMFS will assign the distributed quota a regional designation based on where the majority of the vessel's ''recent fishing activity'' occurred for the relevant period analyzed.

Response to Comments

NMFS received five written comments on the proposed rule during the comment period, three of which expressed support for the rule as proposed, particularly the flexibility in distribution of inseason BFT quota and efficient use of quota through inseason distribution to vessels with recent fishing activity, including newly-permitted vessels. Two written comments expressed qualified support for the proposed flexibility but suggested modified approaches to quota disbursement. All written comments can be found at *http://www.regulations.gov/.* The comments are summarized below by topic together with NMFS' responses.

Comment 1: All comments supported the objective of, and rationale for, the proposed regulatory changes to the IBQ Program. Specifically, comments supported the objective of regulations that would allow NMFS to optimize the distributions of inseason Atlantic BFT quota transfers to the Longline category by distributing inseason BFT quota either to all qualified IBQ share recipients or only to those permitted Atlantic Tunas Longline vessels with recent fishing activity, whether or not they are associated with IBQ shares. Comments supported the underlying rationale of the proposed measure, which they expressed as providing reasonable fishing opportunities for pelagic longline vessels in the context of the constraints of the IBQ Program. Some commenters specifically supported the concept of distributing inseason quota only to active vessels in order to increase efficiency of quota use among vessels, allow the distribution of quota to new participants in the fishery, and enable the potential for larger amounts of quota for each permit holder. One comment noted that the proposed regulations contribute to balancing the objective of optimizing fishing opportunity and maintaining

profitability with the objective of limiting BFT landings and dead discards.

Response: NMFS agrees that the regulatory change to the IBQ Program will facilitate accounting for BFT bycatch by permitted Atlantic Tunas Longline vessels actively participating in the HMS pelagic longline fishery and support optimizing the distribution of quota among vessels. When transferring quota from the Reserve category to the Longline category inseason, NMFS will consider specific factors in the fishery and determine whether distribution of inseason quota (in the Longline category) to all qualified IBQ share recipients or only to those permitted Atlantic Tunas Longline vessels with recent fishing activity will best support the objectives of the FMP. Distribution of inseason quota only to active vessels (if the total number of active vessels is a smaller number of vessels than all qualified vessels) may result in a larger amount of quota for each recipient vessel. A larger inseason distribution would help these active vessels to remain fishing longer under fewer quota constraints and would reduce the transaction costs associated with finding additional quota through the leasing program in years where leased quota is not readily available. NMFS agrees that the regulation will be consistent with the objectives of the IBQ Program, which include the objective: ''Balance the objective of limiting BFT landings and dead discards with the objective of optimizing fishing opportunities and maintaining profitability''.

Comment 2: Three comments further supported the specifics of the proposed regulatory changes, including the data and timeframe that will be analyzed to determine whether ''recent fishing activity'' has occurred and equal distribution of inseason BFT quota among the recipients.

One commenter was opposed to the aspect of the proposed rule that considers a vessel to be ''active'' at any level of activity, without any threshold amount of fishing activity specified. The commenter was concerned that a vessel might ''game the system'' and deploy a single longline set on a single trip, with the goal of establishing a minimal level of fishing activity that would subsequently enable the vessel to be a recipient of an inseason distribution of BFT quota. The commenter suggested a meaningful increase in the number of pelagic longline sets required, and suggested that the amount of quota distributed to each vessel should vary depending upon the amount of pelagic longline sets completed. For example, if the vessel completed 1 to 25 sets during the previous year, they would be distributed a 0.25 share of BFT quota, and if the vessel completed 26 to 65 sets during the previous year, they would be distributed a 0.50 share of BFT quota, and so on. The commenter also suggested that inactive IBQ share recipients that have leased the full amount of their allocation to other Atlantic Tunas Longline vessels should receive inseason quota.

Response: NMFS proposed a simple method of defining what an active vessel is and distributing inseason quota equally among active vessels because inseason distributions of quota are likely to be relatively small amounts of quota compared to annual allocations of IBQ to share recipients. The use of formulas such as that proposed by the commenter to distribute quota may result in amounts distributed that are less than the minimum share amount required to fish. Distributing such small amounts of quota to vessels inseason might have little beneficial impact on fishing operations and could render the transfer largely meaningless for many vessels. With respect to setting a threshold number of pelagic longline sets as a criterion for receiving inseason allocation, all vessels fishing with pelagic longline gear must possess the minimum amount of IBQ (0.25 mt ww (551 lb ww) in the Gulf of Mexico and 0.125 mt ww (276 lb ww) in the Atlantic) before they can fish, and this requirement applies regardless of the level of fishing activity. Although it is possible that a vessel could conduct a single longline set with the intention of becoming eligible for a potential small future inseason quota distribution, it is likely that there would be few instances of such behavior because the potential costs and uncertainty of any benefit associated with such behavior should serve as adequate disincentive for ''gaming the system.'' Furthermore, the possibility that active vessels may directly receive quota from the Agency when the leasing system is not functioning effectively, may encourage otherwise-inactive vessel owners to more seriously consider leasing out their quota earlier in the season through the IBQ system, rather than waiting to see if leasing prices increase later in the season. Even if limited instances of such activity occurred, NMFS does not believe that such action would undercut the effectiveness of the regulatory change, which is largely aimed at limiting the amount of quota that could be distributed to vessels that have no fishing activity whatsoever.

The commenter also suggests that the amount of quota distributed inseason should be based on the level of vessel activity, suggesting that the amount of quota distributed to each vessel should vary depending upon the amount of pelagic longline sets completed. At the beginning of the year, IBQ share recipients are allocated different amounts of annual IBQ, based upon one of the three defined share percentages associated with the Atlantic Tunas Longline permit, which was based on a formula that considered many factors through the Amendment 7 process, including indicators of vessel activity. NMFS determined that additional distributions of quota inseason should be in equal amounts largely for simplicity of administration and given the small amounts of quota involved. An inseason quota distribution that is based upon a formula would be more complex to implement than an equal distribution and could diminish the benefits if implementation of the quota transfer and distribution took a prolonged amount of time. Therefore, NMFS finalizes as proposed the provision that will distribute inseason quota equally among selected recipients.

Finally, the commenter suggested that inactive IBQ share recipients that have leased the full amount of their allocation to other Atlantic Tunas Longline vessels should receive inseason quota distributions. Under the conditions at this time, the agency prefers its simpler proposed approach for distributing the small amounts of quota that typically are transferred inseason. By distributing the quota transferred inseason equally to active vessels inseason additional trips may be possible in years that leasing is not occurring as anticipated by Amendment 7. NMFS notes, however, that it will further consider this suggested approach as an incentive for those who fully participate in the leasing program. This could be included in the comprehensive three-year review of the IBQ Program that is required by the Magnuson-Stevens Act and the 2006 Consolidated HMS FMP and that NMFS plans to initiate in 2017.

Comment 3: One commenter sought changes to other aspects of the IBQ Program regulations, such as modifying the IBQ rules to allow the carryover of unused quota from one year to the next, and asked that NMFS consider changes to annual allocation of IBQ (*i.e.,* distribution of the baseline Longline category quota).

Response: The suggested changes to the regulations were not among the specific management measures considered by the proposed rule and are beyond the scope of this rulemaking. The scope of this rulemaking addressed only inseason transfer criteria

regulations; provisions regarding carry-forward and annual allocation of IBQ were established in Amendment 7 and no changes to those provisions were considered in this action. NMFS may consider changes to these provisions and additional topics related to the management of the pelagic longline fishery in future rulemakings and in the comprehensive three-year review of the IBQ Program.

Comment 4: One comment stated that the IBQ Program, as implemented under Amendment 7, is not consistent with several requirements of the Magnuson-Stevens Act including: The IBQ Program does not provide pelagic longline fishermen with a reasonable opportunity to harvest the Longline category BFT quota; the IBQ Program does not minimize disadvantages to U.S. fishermen; utilization of BFT quota under the IBQ Program could result in unfair and inequitable allocation of quota to pelagic longline fishermen; the IBQ Program does not provide fair and equitable distribution of access privileges; and the IBQ Program, as a limited access privilege program (LAPP), does not promote fishing safety, fishery conservation and management, or social and economic benefits.

Response: This comment challenges the implementation of Amendment 7 to the 2006 Consolidated HMS FMP, which was adopted through separate notice and comment rulemaking finalized in December 2014. The issues raised in this comment are beyond the scope of this rulemaking. NMFS notes that in litigation brought against the Secretary of Commerce following issuance of the final rule for Amendment 7, pelagic longline fishermen and dealers alleged that implementation of Amendment 7, including the IBQ Program, failed to comply with provisions of the Magnuson-Stevens Act, similar to the issues raised in this comment. The federal district court for the Eastern District of North Carolina rejected Plaintiffs' claims and upheld Amendment 7 as consistent with the Magnuson-Stevens Act and other applicable law (see *Willie R. Etheridge Seafood Co.* v. *Pritzker,* 2016 WL 1126014 (E.D.N.C., Mar. 21, 2016)).

Classification

The NMFS Assistant Administrator has determined that the final rule is consistent with the 2006 Consolidated HMS FMP and its amendments, the Magnuson-Stevens Act, ATCA, and other applicable law.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

This action is categorically excluded from the requirement to prepare an environmental assessment (EA) in accordance with the National Environmental Policy Act and NOAA administrative order NAO 216–6 (as preserved by NAO 216–6A). This action may be categorically excluded since it is a change to a previously analyzed and approved fishery management plan, and the change will have no substantive effect, individually or cumulatively, on the human environment beyond that already analyzed in the Environmental Impact Statement for Amendment 7 (79 FR 71510, December 2, 2014) and in the EA for the final rule that increased the U.S. BFT quota (for 2015 and until changed) based on the recommendation of the International Commission for the Conservation of Atlantic Tunas (80 FR 52198, August 28, 2015). Inseason quota allocations to the Longline category do not modify the annual U.S. BFT quota nor the fishing mortality associated with that quota. Minor modifications of allocations to vessels may contribute somewhat to determining when fishing mortality occurs but not in any meaningful way that would change the environmental impacts given the small amounts of quota at issue and the fact that such transfers do not alter the overall allowable mortality under the U.S. BFT quota. Furthermore, this action will not directly affect fishing effort, fishing gear, interactions with threatened or endangered species, or other relevant behaviors that could have additional environmental impacts. Thus, there is no environmental or ecological effect different than what was analyzed previously.

NMFS has prepared a Regulatory Impact Review (RIR), and a Final Regulatory Flexibility Analysis (FRFA), which present and analyze anticipated social, and economic impacts of the alternatives contained in this rule. The list of alternatives and their analyses are provided in the RIR and are not repeated here in their entirety. A copy of the RIR prepared for this final rule is available from NMFS (see **ADDRESSES**).

A FRFA was prepared, as required by section 604 of the Regulatory Flexibility Act (RFA, 5 U.S.C. 604 *et seq.*), and is included below. The FRFA describes the economic impact this final rule will have on small entities. A description of the action, why it is being implemented, and the legal basis for this action are contained in the **SUMMARY** section of the preamble.

The goal of the RFA is to minimize the economic burden of federal regulations on small entities. To that end, the RFA directs federal agencies to assess whether the regulation is likely to result in significant economic impacts to a substantial number of small entities, and identify and analyze any significant alternatives to the rule that accomplish the objectives of applicable statutes and minimizes any significant effects on small entities.

Statement of the Need for and Objectives of the Rule

Section 604(a)(1) of the RFA requires a FRFA to contain a statement of the need for and objectives of the rule. The purpose of this rulemaking, consistent with the 2006 Consolidated HMS FMP objectives, the Magnuson-Stevens Act, and other applicable law, is to provide NMFS additional flexibility when distributing quota inseason to the Longline category. Through this final rule, NMFS may distribute quota inseason either to all qualified IBQ share recipients (those who have associated their share with a vessel) or to permitted Atlantic Tunas Longline vessels with recent fishing activity whether or not they are associated with IBQ shares.

Since January 1, 2015, NMFS has received requests (among other suggestions about the IBQ Program and management of the pelagic longline fishery) to distribute quota inseason to those vessels that have recent fishing activity (whether associated with IBQ shares or not) to optimize fishing opportunity and account for dead discards, rather than distributing it equally to all IBQ share recipients, some of whom end up neither using it, nor making it available to other vessel owners through the IBQ leasing program. In advance of and at the March 2016 HMS Advisory Panel meeting, pelagic longline fishery participants expressed concerns about the availability of IBQ allocation as implemented under Amendment 7. Longline fishery participants have stated that, while they were able to obtain sufficient IBQ allocation by leasing it under the conditions that applied in 2015, those conditions were temporary. They are concerned, however, that as additional requirements began to apply in 2016, the IBQ Program could negatively impact vessel operations and finances given the pricing of IBQ, the distribution of quota among permit holders as implemented by Amendment 7, and the behavior of some permit holders who, for example, they say hold on to IBQ for the entire season without participating in the fishery or engaging in leasing. Longline fishery participants requested that NMFS take further steps to provide more access to quota for those vessels with recent fishing activity

to reduce the dependence on qualified IBQ share recipients, some of whom are not participating in the fishery or engaging in leasing.

After looking at the issues raised by the fishery participants and at trends in IBQ leasing and utilization for 2015, it became apparent that additional options are needed regarding the distribution of inseason transfers of BFT quota within the Longline category to assist NMFS in providing reasonable opportunities to fish for target species under the limits imposed by the IBQ Program, to optimize distribution of BFT quota transferred inseason to the Longline category, and to encourage proper functioning of the IBQ leasing program as anticipated under Amendment 7. To account for the highly variable nature of the BFT caught in the pelagic longline fishery and maintain flexibility in the regulations, this action provides NMFS with an additional option when distributing quota inseason to the Longline category.

The objective of this rule is to provide additional flexibility regarding the distribution of inseason Atlantic BFT quota transfers to the Longline category in order to facilitate the management of Atlantic HMS resources in a manner that maximizes resource sustainability and fishing opportunity, while minimizing, to the greatest extent possible, the socioeconomic impacts on affected fisheries.

Summary of the Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis (IRFA), a Summary of the Assessment of the Agency of Such Issues, and a Statement of Any Changes Made in the Rule as a Result of Such Comments

Section 604(a)(2) of the RFA requires a summary of the significant issues raised by the public comments in response to the IRFA, a summary of the Agency's assessment of such issues, and a statement of any changes made in the rule as a result of such comments. NMFS received five written comments on the proposed rule during the comment period, three of which expressed support for the proposed flexibility in distribution of inseason BFT quota and for efficient use of quota through inseason distribution to vessels with recent fishing activity, including new vessels. Two written comments expressed qualified support for the proposed measures but suggested modified approaches to quota disbursement (*i.e.,* a tiered approach based on previous year activity that would not disburse inseason quota equally among recipients but disburse varying amounts based on levels of fishing activity). None of the comments addressed the economic impacts of the proposed measure. No changes were made to the rule as a result of the public comments.

Section 604(a)(3) of the RFA requires the Agency to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA) in response to the proposed rule, and a detailed statement of any change made in the rule as a result of such comments. NMFS did not receive any comments from the Chief Counsel for Advocacy of the SBA in response to the proposed rule.

Description and Estimate of the Number of Small Entities to Which the Rule Will Apply

Section 604(a)(4) of the RFA requires agencies to provide an estimate of the number of small entities to which the rule would apply. The SBA has established size criteria for all major industry sectors in the United States, including fish harvesters. SBA's regulations provide that an agency may develop its own industry-specific size standards after consultation with Advocacy and an opportunity for public comment (see 13 CFR 121.903(c)). Under this provision, NMFS may establish size standards that differ from those established by the SBA Office of Size Standards, but only for use by NMFS and only for the purpose of conducting an analysis of economic effects in fulfillment of the agency's obligations under the RFA. To utilize this provision, NMFS must publish such size standards in the **Federal Register**. In a final rule that became effective on July 1, 2016 (80 FR 81194, December 29, 2015), NMFS established a small business size standard of $11 million or less in annual gross receipts for all businesses in the commercial fishing industry (NAICS 11411) for RFA compliance purposes. NMFS considers all HMS Atlantic Tunas Longline permit holders (280 as of October 2015) to be small entities because these vessels have reported annual gross receipts of less than $11 million for commercial fishing. The average annual gross revenue per active pelagic longline vessel was estimated to be $187,000 based on the 170 active vessels between 2006 and 2012, and that produced an estimated $31.8 million in total revenue annually. The maximum annual revenue for any pelagic longline vessel between 2006 and 2015 was $1.9 million, well below the NMFS small business size threshold of $11 million in gross receipts for commercial fishing.

NMFS has determined that this rule will apply to the small businesses associated with the 136 Atlantic Tunas Longline permits with IBQ shares and the additional permitted Atlantic Tunas Longline vessels that fish with quota leased through the IBQ Program. The impacts on these small businesses are described below in the discussion of alternatives considered. NMFS has determined that this action will not likely directly affect any small organizations or small government jurisdictions defined under the RFA.

Description of the Projected Reporting, Record-Keeping, and Other Compliance Requirements of the Rule, Including an Estimate of the Classes of Small Entities Which Will Be Subject to the Requirements of the Report or Record

Section 604(a)(5) of the RFA requires Agencies to describe any new reporting, record-keeping and other compliance requirements. This rule does not contain any new collection of information, reporting, or record-keeping requirements.

Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes, Including a Statement of the Factual, Policy, and Legal Reasons for Selecting the Alternative Adopted in the Final Rule and the Reason That Each One of the Other Significant Alternatives to the Rule Considered by the Agency Which Affect Small Entities Was Rejected

One of the requirements of a FRFA is to describe any alternatives which accomplish the stated objectives and which minimize any significant economic impacts. These impacts are discussed below. Additionally, the RFA (5 U.S.C. 603(c)(1)–(4)) lists four general categories of ''significant'' alternatives that would assist an agency in the development of significant alternatives. These categories of alternatives are: (1) Establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) use of performance rather than design standards; and (4) exemptions from coverage of the rule, or any part thereof, for small entities.

In order to meet the objectives of this final rule, consistent with the Magnuson-Stevens Act and ATCA, NMFS cannot establish differing compliance requirements for small entities or exempt small entities from compliance requirements. Thus, there

are no alternatives discussed that fall under the first and fourth categories described above. As for the second category, the objective of this rule is to provide additional flexibility regarding the distribution of inseason Atlantic BFT quota transfers to the Longline category, and therefore does not impact or change compliance and reporting requirements for small entities. The IBQ Program was designed to adhere to performance standards, the third category above; modifications to the regulations implementing the IBQ Program simply make adjustments to the administration of those underlying performance standards. NMFS analyzed several different alternatives in this action and the rationale that NMFS used to determine the alternative for achieving the desired objectives is described below.

The first alternative is the ''no action'' (status quo) alternative. The second alternative, the selected alternative, will provide NMFS the flexibility to allocate quota inseason to qualified IBQ share recipients (those who have associated their share with a vessel) or to permitted Atlantic Tunas Longline vessels with any recent fishing activity, whether or not they are associated with IBQ shares. The third alternative would provide NMFS the flexibility to allocate quota inseason to qualified IBQ share recipients with recent fishing activity or IBQ leasing activity. The economic impacts of these three alternatives are detailed below.

Under all three alternatives, NMFS would continue to consider the regulatory determination criteria for inseason or annual adjustments under 50 CFR 635.27(a)(8), and if NMFS decided that inseason allocation to the Longline category was warranted to increase the amount of quota available to pelagic longline vessels, NMFS would allocate additional quota. The difference among the alternatives is the specific Atlantic Tunas Longline permit holders that would receive distribution of inseason BFT quota.

Under the ''no action'' alternative, NMFS would distribute the transferred quota in equal amounts to all 136 qualified IBQ share recipients, which include vessels actively fishing and vessels not actively fishing. This is the manner in which NMFS conducted inseason transfers from the Reserve to the Longline category in July 2015 and January 2016 (80 FR 45098, July 29, 2015; 81 FR 19, January 4, 2016). For each of these 34 mt quota transfers, 0.25 mt (551 lb) of IBQ were distributed equally to each of the 136 qualified IBQ share recipients under Amendment 7. IBQ allocation was distributed via the electronic IBQ system to the vessel accounts with permits with IBQ shares associated with a vessel. For those permits with IBQ shares that were not associated with a vessel at the time of the quota transfer, the IBQ is not usable by the permit holder (*i.e.,* may not be leased or used to account for BFT) until the permit is associated with a vessel. Based on the average 2015 IBQ lease price of $3.34 per pound, the economic value of such an inseason transfer of 551 lb per vessel would be approximately $1,840 per vessel owner under the ''no action'' alternative.

Under the selected alternative, NMFS may allocate quota inseason either to each of the 136 qualified IBQ share recipients or to all permitted Atlantic Tunas Longline vessels with recent fishing activity. In 2015, there were 104 active pelagic longline vessels (based on logbook data). If NMFS assumes, for example, a future inseason transfer of 34 mt distributed equally among vessels with recent fishing activity, each of those 104 active vessels would receive 0.327 mt (721 lb) under the selected alternative. Based on the average 2015 IBQ lease price of $3.34 per pound, the economic value of such an inseason transfers of 721 lb per vessel would be approximately $2,408 per vessel owner under the selected alternative. Active vessel owners would receive $568 more in value (31 percent more quota) than under the ''no action'' (status quo) alternative.

This increased allocation will help these active vessels to remain fishing longer under fewer quota constraints and reduce the transaction costs associated with finding the same amount of additional quota. The qualified IBQ share recipients with no fishing activity (36 in 2015) would not receive the 551 lb of IBQ worth approximately $1,840 per vessel that they could have received under the status quo alternative *if* they were to lease their quota to other permit holders. Thus, the cost of this alternative will mainly be limited to the forgone ability to lease out allocation that they otherwise would have received. Under Amendment 7, the purpose of leasing is to accommodate various levels of unintended catch of BFT and to facilitate directed fishing for Atlantic swordfish, other tunas, and other pelagic species. The few Atlantic Tunas Longline vessels that fished that were not associated with IBQ shares but that leased allocation from qualified IBQ share recipients (four in 2015) will receive quota under the selected alternative worth approximately $2,408 per vessel. Such an inseason transfer will help facilitate participation by new entrants to the fishery by lowering their costs to obtain quota.

Under the third alternative, NMFS would have the flexibility to distribute quota inseason to qualified IBQ share recipients with any recent fishing activity or qualified IBQ share recipients that leased out quota to other Atlantic Tunas Longline permit holders. This differs from the selected alternative in two key ways. First, under the third alternative, only qualified IBQ share recipients with recent activity would receive an inseason transfer, while under the selected alternative all permitted Atlantic Tunas Longline vessels with recent activity would receive an inseason transfer. Secondly, under the third alternative, relevant activity would include IBQ leasing activity in addition to the recent fishing activity required under the selected alternative. In 2015, of the 104 pelagic longline vessels with recent fishing activity, 100 vessels were associated with IBQ shares (four vessels were not associated with IBQ shares in 2015). In addition, 5 vessels were associated with IBQ shares that did not fish but did lease their allocation to other vessels. If NMFS assumes a future inseason transfer of 34 mt, each of those 105 vessels associated with IBQ shares (100 with recent fishing activity and 5 that leased IBQ allocation) would receive 0.324 mt (714 lb) under the third alternative. Based on the average 2015 IBQ lease price of $3.34 per pound, the economic value of such an inseason transfer of 714 lb per vessel would be approximately $2,385 per vessel owner. Vessels associated with IBQ shares with recent fishing activity or IBQ leasing activity would receive $545 more in value (30 percent more quota) than under the ''no action'' (status quo) alternative. This is $23 less per vessel than under the selected alternative. In addition, under the third alternative, fewer vessels with recent fishing activity would receive quota and new entrants would not receive quota. For these reasons, NMFS did not prefer the third alternative.

List of Subjects in 50 CFR Part 635

Fisheries, Fishing, Fishing vessels, Foreign relations, Imports, Penalties, Reporting and recordkeeping requirements, Treaties.

Dated: December 22, 2016.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 635 is amended as follows:

PART 635—ATLANTIC HIGHLY MIGRATORY SPECIES

■ 1. The authority citation for part 635 continues to read as follows:

Authority: 16 U.S.C. 971 *et seq.;* 16 U.S.C. 1801 *et seq.*

■ 2. In § 635.15, revise paragraph (b) introductory text and add paragraph (b)(9) to read as follows:

§ 635.15 Individual bluefin tuna quotas.

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(b) *IBQ allocation and usage.* An initial IBQ quota allocation is the amount of bluefin tuna (whole weight) in metric tons (mt) that a qualified IBQ share recipient (*i.e.,* a share recipient who has associated their permit with a vessel) is allotted to account for incidental catch of bluefin tuna during a specified calendar year. Unless otherwise required under paragraph (b)(5) of this section, an Atlantic Tunas Longline permitted vessel's initial IBQ allocation for a particular year is derived by multiplying its IBQ share (percentage) by the initial Longline category quota for that year. NMFS may transfer additional quota to the Longline category inseason as authorized under § 635.27(a), and in accordance with § 635.27(a)(8) and (9), and may distribute the transferred quota within the Longline category in accordance with paragraph (b)(9) of this section.

* * * * *

(9) *Distribution of additional Longline category quota transferred inseason.* NMFS may distribute the quota that is transferred inseason to the Longline category either to all IBQ share recipients as described under paragraph (k)(1) of this section or to permitted Atlantic Tunas Longline vessels that are determined by NMFS to have any recent fishing activity based on participation in the pelagic longline fishery. In making this determination, NMFS will consider factors for the subject and previous year such as the number of BFT landings and dead discards, the number of IBQ lease transactions, the average amount of IBQ leased, the average amount of quota debt, the annual amount of IBQ allocation, any previous inseason allocations of IBQ, the amount of BFT quota in the Reserve category (at § 635.27(a)(7)(i)), the percentage of BFT quota harvested by the other quota categories, the remaining number of days in the year, the number of active vessels fishing not associated with IBQ share, and the number of vessels that have incurred quota debt or that have low levels of IBQ allocation. NMFS will determine if a vessel has any recent fishing activity based upon the best available information for the subject and previous year, such as logbook, vessel monitoring system, or electronic monitoring data. Any distribution of quota transferred inseason will be equal among selected recipients; when inseason distribution is only to Atlantic Tunas Longline permit holders with IBQ shares, it will therefore not be based on the initial IBQ share determination as specified in paragraph (k)(2) of this section.

(i) Regional designations described in paragraph (b)(2) of this section will be applied to inseason quota distributed to IBQ share recipients.

(ii) For permitted Atlantic Tunas Longline vessels with recent fishing activity that are not qualified IBQ share recipients, regional designations of Atlantic (ATL) or Gulf of Mexico (GOM) will be applied to the distributed quota based on best available information regarding geographic location of sets as reported to NMFS during the period of fishing activity analyzed above in this paragraph, with the designation based on where the majority of that activity occurred.

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[FR Doc. 2016–31357 Filed 12–28–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No: 151215999–6960–02]

RIN 0648–XF071

Fisheries of the Northeastern United States; Atlantic Herring Fishery; Adjustment to the Atlantic Herring Management Area 1A Annual Catch Limit

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

ACTION: Temporary rule; inseason adjustment.

SUMMARY: NMFS adjusts the 2016 fishing year annual catch limit for Atlantic Herring Management Area 1A due to an underharvest in the New Brunswick weir fishery. This action is necessary to comply with the 2016–2018 specifications and management measures for the Atlantic Herring Fishery Management Plan and to ensure that accounting of the annual catch limit is accurate for fishing year 2016.

DATES: Effective December 29, 2016, through December 31, 2016.

FOR FURTHER INFORMATION CONTACT: Daniel Luers, Fishery Management Specialist, 978–282–8457, Fax 978–281–9135.

SUPPLEMENTARY INFORMATION: Regulations governing the Atlantic herring fishery are found at 50 CFR part 648. The regulations require annual specification of the overfishing limit, acceptable biological catch (ABC), annual catch limit (ACL), optimum yield (OY), domestic harvest and processing, U.S. at-sea processing, border transfer, and sub-ACLs for each management area. The 2016 Domestic Annual Harvest was set as 104,800 metric tons; an additional 4,704 mt was added to this total due to an underharvest during the 2014 fishing year, and 3 percent of herring catch was set aside for research in the 2016–2018 specifications (81 FR 75731, November 1, 2016). After these adjustments, the resulting ACL for the 2016 fishing year was 106,360 mt, and the ACL allocated to Area 1A (sub-ACL) was 29,524 mt.

The Area 1A sub-ACL has 295 mt set aside for fixed gear fisheries west of Cutler, ME, until November 1, 2016. Due to the variability of Canadian catch in the New Brunswick weir fishery, a 1,000-mt portion of the 4,000-mt buffer between ABC and OY (the buffer to account for Canadian catch) is allocated to Area 1A, provided New Brunswick weir landings are lower than the amount specified in the buffer.

The NMFS Regional Administrator is required to monitor the fishery landings in the New Brunswick weir fishery each year. If New Brunswick weir fishery herring catch through October 1 is less than 4,000 mt, then 1,000 mt will be subtracted from the management uncertainty buffer and allocated to the ACL and Area 1A Sub-ACL as soon as possible. When such a determination is made, NMFS is required to publish a notification in the **Federal Register** to adjust the Area 1A sub-ACL upward for the remainder of the fishing year.

The Regional Administrator has determined, based on the best available information, that the New Brunswick weir fishery catch for fishing year 2016 through October 1, 2016, was 3,478 mt. Therefore, effective December 29, 2016, 1,000 mt will be allocated to the Area 1A sub-ACL, thereby increasing the fishing year 2016 Area 1A sub-ACL from 29,524 mt to 30,524 mt. Because any increase to a sub-ACL also increases the stock-wide ACL, this allocation increases the 2016 stock-wide ACL from 106,360 mt to 107,360 mt.

The allocation of 1,000 mt will be applied to the quota of Area 1A, which closed on October 18, 2016, before

implementation of the 2016–2018 Atlantic herring specifications and management measures. The New Brunswick weir fishery allocation was delayed until the new specifications became effective (December 1, 2016).

When applied to the 2016 quota for Area 1A, this 1,000 mt increase will drop the catch total from 94.2 percent of the quota to 91.1 percent. NMFS closed Area 1A on October 18 based on the projection that herring catch would reach 92 percent of the quota for that area. In the case where projection falls short of the 92 percent limit, characteristics of the high volume herring fishery make it impracticable to reopen unless the underage is substantial. This is due to the capability of the herring fishing fleet to harvest a large percentage of the quota in only a few days, in which case a reopening would likely result in an overage of the quota before a closure could be imposed. For this reason, NMFS uses discretion in reopening the fishery, and generally would only do so in the case of a large underage. In this case, the allocation of 1,000 mt will only result in an underage of 0.9 percent and thus is not large enough to reopen the herring fishery in Area 1A. This notification principally ensures that the 2018 fishery adjustments for underharvest/overharvest (which are based on 2016 catch) will be accurate.

Classification

This action is required by 50 CFR part 648 and is exempt from review under Executive Order 12866.

The Assistant Administrator for Fisheries, NOAA (AA), finds good cause pursuant to 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment because it is impracticable and contrary to the public interest. This action increases the sub-ACL for Area 1A by 1,000 mt (29,524 mt to 30,524 mt) through December 31, 2016, thereby relieving a more restrictive catch limit. The regulations at § 648.201(f) require such action to help mitigate some of the negative economic effects associated with the reduction in the Area 1A sub-ACL in the 2016–2018 specifications process. The herring fishery extends from January 1 to December 31. Data indicate the New Brunswick weir fishery landed 3,478 mt through October 1, 2016. Allowing for prior notice and public comment on this adjustment is impracticable because regulations require this allocation to occur as quickly as is practicable and for the remainder of the fishing year. NMFS was unable to allocate this quota until the 2016–2018 herring specifications became effective on December 1, 2016. Because of the limited time between December 1 and the end of the U.S. herring fishing year on December 31, the delay associated with soliciting public comment would result in implementation of regulations after the effective end date of the fishing year, which would violate the intent of the regulation and would not benefit the public. Further, this is a nondiscretionary action required by provisions in the 2016–2018 Atlantic Herring Specifications and Management Measures (herring specifications), which previously provided notice to the public that this 1,000 mt allocation would occur if the Canadian catch level was sufficiently low, and offered full opportunity to comment on this. The adjustment required by the regulation is formulaic. This action simply effectuates thesemandatory calculations. NMFS further finds, pursuant to 5 U.S.C. 553(d)(3), good cause to waive the 30-day delayed effectiveness period for the reasons stated above.

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

Dated: December 22, 2016.

Alan Risenhoover,

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

[FR Doc. 2016–31588 Filed 12–28–16; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 81, No. 250
Thursday, December 29, 2016

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 THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–112324–15]

RIN 1545–BM71

Mortality Tables for Determining Present Value Under Defined Benefit Pension Plans

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations prescribing mortality tables to be used by most defined benefit pension plans. The tables specify the probability of survival year-by-year for an individual based on age, gender, and other factors. This information is used (together with other actuarial assumptions) to calculate the present value of a stream of expected future benefit payments for purposes of determining the minimum funding requirements for the plan. These mortality tables are also relevant to determining the minimum required amount of a lump-sum distribution from such a plan. In addition, this document contains proposed regulations to update the requirements that a plan sponsor must meet in order to obtain IRS approval to use mortality tables specific to the plan for minimum funding purposes (instead of the generally applicable mortality tables). These regulations affect participants in, beneficiaries of, employers maintaining, and administrators of certain retirement plans.

DATES: Comments and outlines of topics to be discussed at the public hearing scheduled for April 13, 2017 must be received by March 29, 2017.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–112324–15), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–112324–15), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC 20224, or sent electronically, via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–112324–15). The public hearing will be held in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Thomas Morgan at (202) 317–6700; concerning the construction of the base mortality tables and the static mortality tables for 2018, Michael Spaid at (206) 946–3480; concerning submission of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Regina Johnson at (202) 317–6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

A. Generally applicable mortality tables

Section 412 of the Internal Revenue Code (Code) prescribes minimum funding requirements for defined benefit pension plans. Section 430, which was added to the Code by the Pension Protection Act of 1996, Public Law 109–280 (120 Stat. 780 (2006)), specifies the minimum funding requirements that apply generally to defined benefit plans that are not multiemployer plans.[1] Section 430(a) defines the minimum required contribution by reference to the plan's funding target for the plan year. Under section 430(d)(1), a plan's funding target for a plan year generally is the present value of all benefits accrued or earned under the plan as of the first day of that plan year.

Section 430(h)(3) contains rules regarding the mortality tables to be used under section 430. Under section 430(h)(3)(A), except as provided in section 430(h)(3)(C) or (D), the Secretary is to prescribe by regulation mortality tables to be used in determining any present value or making any computation under section 430. Those mortality tables are to be based on the actual mortality experience of pension plan participants and projected trends in that experience. In prescribing those mortality tables, the Secretary is required to take into account results of available independent studies of mortality of individuals covered by pension plans.[2] Under section 430(h)(3)(B), the Secretary is required to revise any mortality table in effect under section 430(h)(3)(A) at least every 10 years to reflect actual mortality experience of pension plan participants and projected trends in that experience.

Section 430(h)(3)(D) provides for the use of separate mortality tables with respect to certain individuals who are entitled to benefits on account of disability. These separate mortality tables are permitted to be used with respect to disabled individuals in lieu of the generally applicable mortality tables provided pursuant to section 430(h)(3)(A) or the substitute mortality tables under section 430(h)(3)(C). The Secretary is to establish separate tables for individuals with disabilities occurring in plan years beginning before January 1, 1995, and in later plan years, with the mortality tables for individuals with disabilities occurring in those later plan years applying only to individuals who are disabled within the meaning of Title II of the Social Security Act.

Section 417(e)(3) generally provides that the present value of certain benefits under a qualified pension plan (including single-sum distributions) must not be less than the present value of the accrued benefit using applicable interest rates and the applicable mortality table. Section 417(e)(3)(B)

[1] Section 302 of the Employee Retirement Income Security Act of 1974, Public Law 93–406, as amended (ERISA) sets forth funding rules that are parallel to those in section 412 of the Code, and section 303 of ERISA sets forth additional funding rules for defined benefit plans (other than multiemployer plans) that are parallel to those in section 430 of the Code. Under section 101 of Reorganization Plan No. 4 of 1978 (43 FR 47713) and section 302 of ERISA, the Secretary of the Treasury has interpretive jurisdiction over the subject matter addressed in these proposed regulations for purposes of ERISA, as well as the Code. Thus, these proposed Treasury regulations issued under section 430 of the Code apply as well for purposes of section 303 of ERISA.

[2] The standards prescribed for developing these mortality tables are the same as the standards that are prescribed for developing mortality tables for multiemployer plans under section 431(c)(6)(D)(iv)(II) (which are used determine current liability in order to determine the minimum full funding limitation under section 431(c)(6)(B)). These standards also apply for purposes of determining current liability in order to determine the minimum full funding limitation under section 433(c)(2)(C) for a CSEC plan (as defined in section 414(y)).

defines the term ''applicable mortality table'' as the mortality table specified for the plan year for minimum funding purposes under section 430(h)(3)(A) (without regard to the rules for substitute mortality tables under section 430(h)(3)(C) or mortality tables for disabled individuals under section 430(h)(3)(D)), modified as appropriate by the Secretary. The modifications made by the Secretary to the section 430(h)(3)(A) mortality table to determine the section 417(e)(3)(B) applicable mortality table are not addressed in these proposed regulations. Revenue Ruling 2007–67, 2007–2 CB 1047, describes the modifications that are currently applied to determine the section 417(e)(3)(B) applicable mortality table.

Final regulations under section 430(h)(3) were published in the **Federal Register** on July 31, 2008 in TD 9419, 73 FR 44632. The final regulations issued in 2008 include rules regarding generally applicable mortality tables, which are set forth in § 1.430(h)(3)–1 (the 2008 general mortality table regulations). The final regulations issued in 2008 also include rules regarding substitute mortality tables, which are set forth in § 1.430(h)(3)–2 (the 2008 substitute mortality table regulations).

The 2008 general mortality table regulations prescribe a base mortality table and a set of mortality improvement rates, which may be reflected through the use of either generational mortality tables or static mortality tables. Generational mortality tables are a series of mortality tables, one for each year of birth, each of which fully reflects projected trends in mortality rates. The static mortality tables (which are updated annually) use a single mortality table for all years of birth to approximate the present value that would be determined using the generational morality tables. Section 1.430(h)(3)–1 includes static mortality tables for valuation dates occurring in 2008 and provides that static mortality tables for valuation dates occurring in later years are to be published in the Internal Revenue Bulletin.

The mortality tables included in § 1.430(h)(3)–1 are based on the mortality tables included in the RP–2000 Mortality Tables Report (referred to in this preamble as the RP–2000 mortality tables) released by the Society of Actuaries in July 2000 (updated in May 2001) and a set of mortality improvement projection factors (the Scale AA Projection Factors) that was also included in the RP–2000 Mortality Tables Report.

Section 1.431(c)(6)–1 provides that the same mortality assumptions that apply for purposes of section 430(h)(3)(A) and § 1.430(h)(3)–1(a)(2) are used to determine a multiemployer plan's current liability for purposes of applying the full-funding rules of section 431(c)(6). For this purpose, a multiemployer plan is permitted to apply either the annually-adjusted static mortality tables or the generational mortality tables.

Static mortality tables for valuation dates occurring during 2009–2013 were published in Notice 2008–85, 2008–42 IRB 905. Updated static mortality tables for valuation dates occurring during 2014 and 2015 were published in Notice 2013–49, 2013–32 IRB 127. Updated static mortality tables for valuation dates occurring in 2016 were published in Notice 2015–53, 2015–33 IRB 190. Updated static mortality tables for valuation dates occurring in 2017 were published in Notice 2016–50, 2016–38 IRB 371.

Notice 2013–49 requested comments on whether it continues to be necessary to provide multiple alternative versions of the mortality tables in order to accommodate limitations in some actuarial software. Notice 2013–49 also requested comments on whether a separate disability mortality table is still warranted with respect to participants who became disabled before 1995. Finally, Notice 2013–49 noted that the Treasury Department (Treasury) and the IRS were aware that the Society of Actuaries was conducting a mortality study of pension plan participants and specifically requested comments on whether other studies of actual mortality experience of pension plan participants and projected trends of that experience are available that should be considered for use in developing mortality tables for future use under section 430(h)(3).

In October 2014, the Retirement Plans Experience Committee (RPEC) of the Society of Actuaries issued a new mortality study of participants in private pension plans, referred to as the RP–2014 Mortality Tables Report (which sets forth mortality tables that are referred to as the RP–2014 mortality tables). The RP–2014 Mortality Tables Report, as revised November 2014, is available at *www.soa.org/Research/Experience-Study/pension/research-2014-rp.aspx.* At the same time, RPEC issued a companion study of mortality improvement, referred to as the Mortality Improvement Scale MP–2014 Report (which sets forth mortality improvement rates that are referred to as Scale MP–2014 Rates). As described in the Mortality Improvement Scale MP–2014 Report, (available at *www.soa.org/Research/Experience-Study/pension/research-2014-mp.aspx*), the Scale MP–2014 rates were based on mortality improvement experience for the general population through 2009.

In October 2015, RPEC released an update to the Scale MP–2014 Rates. The updated rates, referred to as Scale MP–2015 Rates, were released as part of the Mortality Improvement Scale MP–2015 Report (which is available at *https://www.soa.org/Research/Experience-Study/Pension/research-2015-mp.aspx*). The Scale MP–2015 Rates were created using historical data for mortality improvement for the general population through 2011, and the same model and parameters that were used to produce Scale MP–2014 Rates. In conjunction with the release of the updated rates, RPEC indicated the intent to reflect the latest data available by providing future annual updates to the model as soon as practicable following the public release of updated data upon which the model is constructed.

In October 2016, RPEC released a further update to the Scale MP–2014 Rates, which are referred to as the Scale MP–2016 Rates. The Scale MP–2016 Rates take into account data for mortality improvement for the general population for years 2012 and 2013, along with an estimate of mortality rates for 2014. As described in the Mortality Improvement Scale MP–2016 Report (which is available at *www.soa.org/Research/Experience-Study/Pension/research-2016-mp.aspx*), in developing the Scale MP–2016 rates, RPEC changed some of the parameters from those that were used in developing the Scale MP–2014 Rates.

B. Plan-Specific Substitute Mortality Tables

Section 430(h)(3)(C) prescribes rules for a plan sponsor's use of substitute mortality tables reflecting the specific mortality experience of a plan's population instead of using the generally applicable mortality tables. Under section 430(h)(3)(C), the plan sponsor may request the Secretary's approval to use plan-specific substitute mortality tables that meet requirements specified in the statute. If approved, these substitute mortality tables are used to determine present values and make computations under section 430 during the period of consecutive plan years (not to exceed 10) specified in the request. In order for a plan sponsor to use a substitute mortality table for a plan, the statute requires that: (1) The plan has a sufficient number of plan participants and has been maintained for a sufficient period of time in order

to have credible mortality information necessary to create a substitute mortality table; and (2) the tables reflect the actual mortality experience of the plan's participants and projected trends in general mortality experience of participants in pension plans. Except as provided by the Secretary, a plan sponsor must not use substitute mortality tables for any plan unless substitute mortality tables are established and used for each plan maintained by the plan sponsor and its controlled group.

Regulations issued in 2008 set forth rules regarding the use of substitute mortality tables. Under § 1.430(h)(3)–2(b), in order to use substitute mortality tables with respect to a plan, a plan sponsor must submit a written request to the Commissioner that demonstrates that those substitute mortality tables comply with applicable requirements. A request to use substitute mortality tables must specify the first plan year, and the term of years (not more than 10), for which the tables are requested to be used. In general, substitute mortality tables may not be used for a plan year unless the plan sponsor submits the request at least 7 months prior to the first day of the first plan year for which the substitute mortality tables are to apply.

The Commissioner has a 180-day period to review a request for the use of substitute mortality tables. If the Commissioner does not issue a denial within this 180-day period, the request is deemed to have been approved unless the Commissioner and the plan sponsor have agreed to extend that period. The Commissioner may request additional information with respect to a submission. Failure to provide that information on a timely basis is grounds for denial of the plan sponsor's request. In addition, the Commissioner will deny a request if the request fails to meet the requirements to use substitute mortality tables or if the Commissioner determines that a substitute mortality table does not sufficiently reflect the mortality experience of the applicable plan population.

Under § 1.430(h)(3)–2(c)(1)(i), substitute mortality tables must reflect the actual mortality experience of the pension plan for which the tables are to be used. Separate mortality tables must be established for each gender under the plan, and a substitute mortality table may be established for a gender only if the plan has credible mortality experience with respect to that gender. If the mortality experience for one gender is credible but the mortality experience for the other gender is not credible, the substitute mortality tables are used for the gender that has credible mortality experience, and the mortality tables under § 1.430(h)(3)–1 are used for the gender that does not have credible mortality experience.

Section 1.430(h)(3)–2(c)(1)(ii) provides that, for purposes of determining whether substitute mortality tables may be used, there is credible mortality experience for a gender within a plan if and only if, over the period covered by the experience study, there are at least 1,000 deaths within that gender.[3] Pursuant to § 1.430(h)(3)–2(c)(2)(ii), the minimum length of the experience study period is 2 years and the maximum length of the experience study period is 5 years (and can be lengthened in published guidance). Furthermore, under that provision, the last day of the final year reflected in the experience data must be less than three years before the first day of the first plan year for which the substitute mortality tables are to apply.

Under § 1.430(h)(3)–2(c)(2), development of a substitute mortality table under the regulations requires creation of a base table and identification of a base year, which are then used to determine a substitute mortality table. The base table must be developed from a study of the mortality experience of the plan using amounts-weighted data.

Under § 1.430(h)(3)–2(c)(3), a plan's substitute mortality tables must be generational mortality tables. Substitute mortality tables are determined using the base mortality tables developed from the experience study and the Scale AA Projection Factors, which are also used for the generally applicable mortality tables.

Under § 1.430(h)(3)–2(c)(4), separate substitute mortality tables are permitted (but not required) to be established for separate populations within a gender, such as annuitants and nonannuitants or hourly and salaried individuals. Under that provision, separate substitute mortality tables generally are permitted to be used for a separate population within a gender under a plan only if all individuals of that gender in the plan are divided into separate populations, each separate population has credible mortality experience (determined in the same manner as determining whether a gender has credible mortality experience), and the separate substitute mortality table for each separate population is developed using mortality experience data for that population.

Section 1.430(h)(3)–2(d)(3) prescribes rules for aggregating plans for purposes of using substitute mortality tables. Under § 1.430(h)(3)–2(d)(3), in order to use a set of substitute mortality tables for two or more plans, the rules set forth in the regulations must be applied by treating those plans as a single plan. In such a case, the substitute mortality tables must be used for all such plans and must be based on data collected with respect to all such plans.

Section 1.430(h)(3)–2(d)(4) provides for the early termination of the use of substitute mortality tables in certain specified circumstances, including pursuant to a replacement of the mortality tables specified in § 1.430(h)(3)–1. The early termination pursuant to such a replacement must be effective as of a date specified in guidance published in the Internal Revenue Bulletin.

Rev. Proc. 2008–62, 2008–2 CB 935, sets forth the procedure by which a plan sponsor of a defined benefit plan may request and obtain approval for the use of plan-specific substitute mortality tables in accordance with section 430(h)(3)(C). The revenue procedure specifies the information that must be provided in order to request the use of substitute mortality tables and specifies two alternative acceptable methods of construction for base substitute mortality tables. Under section 11 of Rev. Proc. 2008–62, a base table for a population can be created from the unadjusted base table for the population through the application of a graduation method generally used by the actuarial profession in the United States (for example, the Whittaker-Henderson Type B graduation method or the Karup-King graduation method). Section 12 of Rev. Proc. 2008–62 provides for an alternative method of constructing a base table through the application of a fixed percentage to the mortality rates of a standard mortality table, projected to the base year. This alternative method can be used only if the IRS determines that the resulting base table sufficiently reflects the mortality experience of the applicable plan population. In general, the standard mortality table that is used under this alternative method is a projection of the base mortality table that applies for the population under § 1.430(h)(3)–1; however, the IRS will consider requests for the approval of base tables constructed through the application of a fixed percentage to the

[3] The 1,000-death threshold for credible mortality experience under the regulations was intended to provide a high degree of confidence that the plan's past mortality experience will be predictive of its future mortality, and is consistent with relevant actuarial literature (see, for example, Thomas N. Herzog, Introduction to Credibility Theory (1999); Stuart A. Klugman, *et. al.,* Loss Models: From Data to Decisions (2004)).

mortality rates of other published generally accepted mortality tables.

Section 503 of the Bipartisan Budget Act of 2015, Public Law 114–74, 129 Stat. 584, which was enacted November 2, 2015, provides for changes to the rules on the use of substitute mortality tables. Under that section, the determination of whether a plan has credible information that can be used to develop a substitute mortality table must be made in accordance with established actuarial credibility theory, which (1) is materially different from the rules for using substitute mortality tables (including Revenue Procedure 2007–37) [4] that are in effect on November 2, 2015; and (2) permits the use of mortality tables that reflect adjustments to the generally applicable mortality tables, if those adjustments are based on the actual experience of the pension plan maintained by the plan sponsor. This provision applies to plan years beginning after December 31, 2015.

Explanation of Provisions

These proposed regulations set forth the methodology Treasury and the IRS would use to update the generally applicable mortality tables that are used to determine present value or make any computation under section 430. Pursuant to section 417(e)(3)(B), a modified version of these updated tables would be used for purposes of determining the amount of a single-sum distribution (or another accelerated form of distribution).[5] This methodology for developing updated tables under section 430(h)(3)(A) is being proposed pursuant to the requirement under section 430(h)(3)(B) to revise the mortality tables used under section 430 to reflect the actual mortality experience of pension plan participants and projected trends in that experience. As under the 2008 general mortality table regulations, the methodology involves the separate determination of base tables and the projection of mortality improvement.

These proposed regulations also set forth rules for the use of substitute mortality tables. The rules on substitute mortality tables are being proposed pursuant to section 503 of the Bipartisan Budget Act of 2015, which requires that the determination of whether the plan has credible information be made in accordance with established actuarial credibility theory. Pursuant to that requirement, Treasury and the IRS undertook a review of actuarial literature regarding credibility theory and consulted with experts on that topic from the Society of Actuaries. Based on that review and analysis, the proposed regulations set forth a method for developing substitute mortality tables that is materially different from the method that is required under the 2008 substitute mortality table regulations and the associated revenue procedure.

The method for developing substitute mortality tables that is set forth in the proposed regulations is simpler than the method that applies under the 2008 substitute mortality table regulations, and also accommodates the use of substitute mortality tables by plans with smaller populations that have partially credible mortality experience. Comments are requested regarding additional simplifications that might be appropriate for use in developing substitute mortality tables.

I. Generally Applicable Mortality Tables

A. Base mortality tables

The base mortality tables proposed for use under section 430(h)(3)(A) are derived from the tables contained in the RP–2014 Mortality Tables Report. In response to Notice 2013–49, commentators generally recommended that the RP–2014 mortality tables form the basis for the mortality tables used under section 430.[6] After reviewing the RP–2014 mortality tables, the accompanying report published by the Society of Actuaries, and related public comments, Treasury and the IRS have determined that the experience study used to develop the RP–2014 mortality tables is the best available study of the actual mortality experience of pension plan participants (other than disabled individuals). Accordingly, the RP–2014 mortality tables are the foundation for the base mortality tables used to project the mortality of pension plan participants under these proposed regulations.[7]

Like the mortality tables provided in the 2008 general mortality table regulations, the mortality tables set forth in these proposed regulations are gender-distinct because of significant differences between expected male mortality and expected female mortality. In addition, as under the 2008 general mortality table regulations, these proposed regulations set forth separate mortality rates for annuitants and nonannuitants. This distinction has been made because these two groups have significantly different mortality experience. *See* chapter 3 of the RP–2000 Mortality Tables Report, available at *www.soa.org/research/experience-study/pension/research-rp-2000-mortality-tables.aspx.*

Under these proposed regulations, the annuitant mortality tables are applied to determine the present value of benefits for an annuitant. For a nonannuitant, the nonannuitant mortality tables are applied for the periods before the participant is projected to commence receiving benefits, and the annuitant mortality tables are used for later periods. With respect to a beneficiary of a participant, the annuitant mortality table applies for the period beginning with each assumed commencement of benefits for the participant. If the participant has died (or to the extent the participant is assumed to die before commencing benefits), the annuitant mortality table applies with respect to the beneficiary for the period beginning with each assumed commencement of benefits for the beneficiary.

The proposed regulations set forth base tables that are to be used to develop the mortality tables for future years. These base tables have a base year of 2006 (the central year of the experience study used to develop the mortality tables in the RP–2014 Mortality Tables Report). These base tables generally have the same rates as the RP–2014 mortality tables after factoring out the mortality improvements from 2007 to 2014 (calculated using the Scale MP–2014 Rates). However, these base tables also include nonannuitant rates for ages below age 18 and above age 80 and annuitant rates for ages below age 50. This generally is the same approach that was used to develop the base tables included in the 2008 general mortality table regulations.

The nonannuitant rates for ages above age 80 were developed by (1) using the annuitant rates from the base tables for ages 90 and older and (2) interpolating between the rates for age 80 and age 90 in order to produce a smooth transition between the age 80 rates from the nonannuitant tables to the age 90 rates from the annuitant tables. The interpolation uses increasing fractions

[4] Rev. Proc. 2007–37, 2007–1 CB 1433, was not in effect on November 2, 2015. It was issued in 2007 in conjunction with proposed regulations regarding substitute mortality tables (REG–143601–06, 72 FR 29456), and was replaced by Rev. Proc. 2008–62 when those regulations were finalized in 2008.

[5] After these regulations are finalized, the section 417(e)(3)(B) applicable mortality table will be specified in guidance published in the Internal Revenue Bulletin. See § 601.601(d)(2)(ii)(b) of this chapter.

[6] These proposed regulations also apply the new generally applicable mortality tables under section 430 for purposes of determining the current liability of a multiemployer plan pursuant to section 431(c)(6)(D)(iv)(II) or a CSEC plan pursuant to section 433(h)(3).

[7] Mortality tables that may be used as an alternative to the tables provided in these regulations with respect to certain disabled individuals are provided in Rev. Rul. 96–7, 1996–1 CB 59.

with a denominator of 55 to allocate the total difference between the rates at ages 80 and 90 over those 10 years. Thus, the rate at age 81 is set equal to the rate at age 80 plus 1/55 of the total difference, the age 82 rate is equal to the rate at age 81 plus 2/55 of the total difference (so that the age 82 rate is equal to the rate at age 80 plus 3/55 of the total difference), and so on for other ages.

A similar approach was used to develop annuitant rates for ages below age 50. The annuitant rates for ages under age 50 were determined by (1) using the nonannuitant rates from the base tables for ages 18 to 40, and (2) interpolating between the rates for age 40 and age 50, using the same methodology described in the prior paragraph. This method produces a smooth transition between the age 40 rates from the nonannuitant table and the age 50 rates from the annuitant table. For ages below age 18, both the annuitant and nonannuitant rates incorporate the juvenile rates from the RP–2014 Mortality Tables Report, after factoring out the mortality improvements from 2007 to 2014 (calculated using the Scale MP–2014 Rates).

B. Reflection of Mortality Improvement

The proposed regulations provide that expected trends in mortality experience must be taken into account through the use of either generational or annually updated static mortality tables. In accordance with section 430(h)(3)(B), the proposed regulations update the mortality improvement rates from the Scale AA Projection Factors that were set forth under the 2008 general mortality table regulations.

In order to select up-to-date mortality improvement rates, Treasury and the IRS reviewed the Mortality Improvement Scale MP–2014 Report, related public comments, the data sources cited in those comments, the Mortality Improvement Scale MP–2015 Report, the Mortality Improvement Scale MP–2016 Report, and other published data sources.[8] Pursuant to this review, Treasury and the IRS determined that the procedures that RPEC used to develop the Scale MP–2016 Rates generate the most appropriate currently available mortality improvement rates. Accordingly, the proposed regulations provide that, for valuation dates in 2018, the mortality tables for use under section 430(h)(3)(A) must reflect the mortality improvement rates contained in the Mortality Improvement Scale MP–2016 Report.

The Scale MP–2016 Rates are structured as two-dimensional tables that contain mortality improvement rates that vary according to both age and calendar year (so that the mortality improvement rate for someone who is age 72 in 2020 is different than the mortality improvement rate for someone who is age 72 in 2030). RPEC provided for two-dimensional tables of mortality improvement rates in order to reflect differences in mortality improvement at different ages as well as mortality improvement trends that vary for different age cohorts. The proposed regulations include numerical examples illustrating how to apply these two-dimensional mortality improvement rates.

As under the current regulations, the proposed regulations take into account the limitations of some current actuarial software that is not designed to use generational mortality tables. Accordingly, the proposed regulations continue to permit the use of static mortality tables. These static tables consist of a single table for each gender, updated annually, that approximates the effect of projected mortality improvement under the generational mortality tables. The static mortality tables that would be used for 2018 are included in these proposed regulations. For later years, updated static mortality tables will be set forth in guidance published in the Internal Revenue Bulletin. See § 601.601(d)(2)(ii)(b) of this chapter.

The static mortality tables that would be permitted to be used under the proposed regulations are constructed from the base tables that are used for purposes of the generational mortality tables. For each calendar year, the static mortality tables are based on a projection of mortality improvement applied to the mortality rates in the base tables for the period beginning with 2006 and ending with the year of the table, with a further projection from that year for a specified projection period. The rates in the static mortality tables are not the expected mortality rates for the current plan year, nor are they the mortality rates under the generational mortality tables that would apply for any current age. Instead, the projection period has been selected so that the use of the static mortality tables to calculate present values produces approximately the same results as would be calculated using the generational tables. Based on modeling of annuity values at different ages, Treasury and the IRS have selected a projection period of 8 years for males and 9 years for females, with a further adjustment based on age. For ages below 80, the projection period is increased by 1 year for each year below 80. For ages above 80, the projection period is reduced (but not below zero) by 1/3 year for each year above 80.

These proposed regulations provide an option for smaller plans (plans for which the total number of active and inactive participants and beneficiaries of deceased participants is not more than 500 on the valuation date for the plan year) to use gender distinct blended static tables for all participants and beneficiaries—in lieu of the separate static tables for annuitants and nonannuitants—in order to simplify the actuarial valuation for these plans. These blended tables are constructed from the separate nonannuitant and annuitant static mortality tables using the same nonannuitant and annuitant weighting factors as in the 2008 general mortality table regulations.

Treasury and the IRS understand that RPEC expects to issue updated mortality improvement rates that reflect new data for mortality improvement trends for the general population on an annual basis. Treasury and the IRS expect to take those updates into account in determining the mortality rates to be used under section 430(h)(3) for valuation dates in years after 2018. Those rates will be specified in guidance to be published in the Internal Revenue Bulletin. See § 601.601(d)(2)(ii)(b) of this chapter.

II. Plan-Specific Substitute Mortality Tables

A. Overview

These proposed regulations contain a comprehensive set of rules regarding plan-specific substitute mortality tables. The proposed regulations contain many of the rules regarding substitute mortality tables from the 2008 substitute mortality table regulations. However, after analyzing the actuarial literature regarding credibility theory, Treasury and the IRS propose to make a number of changes to the regulations relating to the development of substitute mortality tables. Specifically, the proposed regulations would require a substitute mortality table to be constructed by multiplying the mortality rates from a projected version of the generally applicable base mortality table by a mortality ratio (that is, a ratio of the actual deaths for the plan population to

[8] See the August 2013 Literature Review and Assessment of Mortality Improvement Rates in the U.S. Population: Past Experience and Future Long-Term Trends, available at *www.soa.org/Files/Research/Exp-Study/research-2013-lit-review.pdf;* and the 2015 Technical Panel on Assumptions and Methods Report to the Social Security Advisory Board, available at *www.ssab.gov/Details-Page/ArticleID/656/2015-Technical-Panel-on-Assumptions-and-Methods-A-Report-to-the-Board-September-2015.*

expected deaths determined using the standard mortality tables for that population).

Use of mortality ratios (rather than providing for the graduation of raw mortality rates as under the 2008 substitute mortality table regulations) should make it easier for plan sponsors to develop the substitute tables, because it would eliminate the need to apply a graduation technique. It would also make it easier for the IRS to review applications to use substitute mortality tables. This simplification is particularly important in light of the other major change made in the proposed regulations, which would permit the use of substitute mortality tables for a plan that has only partially credible mortality information. Treasury and the IRS expect significantly more plan sponsors to request the use of substitute mortality tables after this change becomes effective.

B. Development of Substitute Mortality Tables for Plans With Full Credibility

The substitute mortality table for a population with full credibility would be determined by applying projected mortality improvement to a base substitute mortality table which is developed using an experience study of the population. The proposed regulations would use the same requirements for an experience study as under the 2008 substitute mortality table regulations. Specifically, the experience study would have to cover a period of at least 2 years (and no more than 5 years) that ends less than 3 years before the first day of the first plan year for which the substitute mortality tables are to apply. As under the 2008 substitute mortality table regulations, the calendar year that contains the day before the midpoint of the experience study is the base year for the base substitute mortality table. In addition, the proposed regulations include the rule in the 2008 substitute mortality table regulations that requires an additional demonstration that the experience study results are predictive of future mortality for a plan population if the number of individuals in that population has changed by more than 20 percent compared to the average number of individuals in that population during the experience study period.

The base substitute mortality table is determined by multiplying the mortality rates from the standard mortality table (that is, the generally applicable base mortality table projected with mortality improvement to the base year for the base substitute mortality table) by the plan's mortality ratio. For this purpose, the mortality improvement rates that apply for the calendar year during which the plan sponsor submits the request to use substitute mortality tables are used to project the generally applicable base mortality table to the base year for the base substitute mortality table.[9] The mortality ratio is determined as a fraction, the numerator of which is the number of actual deaths during the experience study period (with each death weighted by the amount of benefit) and the denominator of which is the number of expected deaths during that period (determined using the standard mortality table) weighted by the amount of the benefit. For this purpose, the amount of benefit is the accrued benefit (substituting the current periodic payment in the case of individuals in pay status). Consistent with section 503 of the Bipartisan Budget Act of 2015 (and unlike § 1.430(h)(3)–2(c)(2)(ii)(D) of the 2008 substitute mortality table regulations, which provides that the Commissioner may permit the use of other recognized mortality tables to construct the base substitute mortality table), these proposed regulations provide that the standard mortality table that must be used for this purpose is the generally applicable base mortality table projected with mortality improvement to the base year for the base substitute mortality table.

C. Standards for Full Credibility

The proposed regulations revise the standard for full credibility of a population under the 2008 substitute mortality table regulations (which is 1,000 actual deaths for the relevant population during the experience study period). This is because, under established actuarial credibility theory, that threshold (which is a rounding down of the 1,082 actual deaths that would be needed for a 90% confidence level that the measured rate is within 5% of the underlying rate of mortality) should apply to the credibility for a single rate of mortality and not an entire mortality table.[10] Moreover, the 1,000 death threshold did not take into account the well-established actuarial principle that mortality experience within a population will vary predictably based on the amount of the annuity (or life insurance, as applicable). The base tables for the generally applicable mortality tables were constructed on an amounts-weighted basis (under which the individuals with higher benefit amounts have a greater weight in the computation of the mortality rate for a particular age); accordingly, substitute mortality tables should be constructed using the same principle.

The variability of benefit amounts for different individuals in different populations within a plan means that a single 1,000 actual-death standard that would apply to all populations is not appropriate. Instead, established actuarial credibility theory would require a plan-specific calculation of the full-credibility standard that takes into account the dispersion of benefits within the plan.

Under the proposed regulations, the number of deaths that are needed for the population within a plan to have fully credible mortality information is determined as the product of 1,082 and the benefit dispersion factor for the population.[11] The benefit dispersion factor for a population is equal to the number of expected deaths for the population during the experience study period, times the sum of the mortality-weighted square of the benefits, divided by the square of the mortality-weighted benefits.[12]

D. Partial Credibility

The proposed regulations permit substitute mortality tables to be used for a plan that does not have sufficient deaths to have fully credible mortality information. In accordance with established actuarial credibility theory, such a plan would use a weighted average of the standard mortality table (projected with mortality improvement to the base year of the base substitute mortality table) and the mortality table that would be developed for the plan if it were to have fully credible mortality information. The weight for the mortality table that would apply if the plan were to have fully credible mortality information is the square-root of a fraction, the numerator of which is the actual number of deaths for the population within the experience study period and the denominator of which is the number of deaths needed for the

[9] If the plan sponsor submits such a request during 2017, then the cumulative mortality improvement factors are determined using the Scale MP–2016 Rates.

[10] Note, however, the use of a graduation technique set forth in Rev. Proc. 2008–62 enables a plan to have credible mortality experience in order to establish a substitute mortality table even though there are fewer than 1000 deaths at each age.

[11] This is based on the assumption that the distribution of releases from liability due to deaths follows a compound Poisson model. See *www.actuaries.ca/members/publications/2002/202037e.pdf.*

[12] See Gavin Benjamin, Selecting Mortality Tables: A Credibility Approach, available at *www.soa.org/Files/Research/Projects/research-2008-benjamin.pdf.*

plan to have fully credible mortality information.

In order to avoid the need to create a substitute mortality table for a plan with a relatively small population, the proposed regulations provide that a population does not have credible mortality information if the actual number of deaths for that population during the experience study period is less than 100. For this purpose, the length of the experience study period must be the same length as the longest experience study period for any plan in the controlled group.

Treasury and the IRS chose the threshold of 100 deaths as a result of balancing the burdens of developing substitute mortality tables and the benefit of the use of those tables, in light of the requirement under section 430(h)(3)(C)(iv) that substitute mortality tables be used for all plans within a controlled group (and the exception to this requirement for plans that lack fully or partially credible mortality information). Comments are requested regarding whether this is the appropriate threshold or whether a different number of deaths should be used for this purpose.

E. Mortality Improvement Rates

As required under the 2008 substitute mortality table regulations, the proposed regulations provide that substitute mortality tables must be generational mortality tables. These proposed regulations require that the mortality improvement rates that are used for the generally applicable mortality tables also be applied beginning with the base year of the base substitute mortality tables.

F. Other Rules Relating to the Use of Substitute Mortality Tables

1. Use of Separate Subpopulations Within a Gender Under Plan

The proposed regulations continue to apply the rules under the 2008 substitute mortality table regulations regarding the applicability of substitute mortality tables for separate populations within a plan. Specifically, separate substitute mortality tables must be developed for each gender under the plan. In addition, the regulations permit separate substitute mortality tables to be developed for separate subpopulations (such as hourly and salaried participants) within a gender under the plan in certain circumstances.

As under the 2008 substitute mortality table regulations, permission to separate a gender into separate subpopulations is generally limited to situations in which each of the subpopulations have fully credible mortality information. However, that requirement does not apply if the separate subpopulations are annuitants and non-annuitants. Comments are requested on whether there should be other exceptions to this rule. For example:

- Should the regulations allow separate sub-populations to be used if one subpopulation has full credibility while the other one has only partial credibility?
- Should the regulations provide for the use of separate sub-populations based on age, even if those groups have only partial credibility?
- Should there be a rule to ''normalize'' the mortality tables for separate sub-populations (so that the total number of expected deaths for the separate subpopulations is the same as the total number of expected deaths for the entire population without regard to the separation)?

2. Requirement To Use Substitute Mortality Tables for All Plans With Credible Mortality Information

As under the 2008 substitute mortality table regulations, the proposed regulations provide that substitute mortality tables are permitted to be used for a plan for a plan year only if, for that plan year, substitute mortality tables are also approved and used for each other pension plan subject to the requirements of section 430 that is maintained by the plan sponsor or by a member of the sponsor's controlled group. However, this rule does not prohibit the use of substitute mortality tables for one plan if the only other plan or plans maintained by the plan sponsor (or by a member of the plan sponsor's controlled group) for which substitute mortality tables are not used are too small to have fully or partially credible mortality information for the plan year. Thus, if a sponsor's controlled group contains two pension plans that are subject to section 430, each of which has fully or partially credible mortality information for at least one gender, either the plan sponsors of both plans must obtain approval from the Commissioner to use substitute mortality tables or substitute mortality tables may not be used for either plan. In contrast, if for one of those plans neither males nor females have fully or partially credible mortality information, then the plan without credible mortality information will not prevent the use of substitute mortality tables for the plan with credible mortality information.

As under the 2008 substitute mortality table regulations, the proposed regulations provide that the requirement that the plan sponsor demonstrate the lack of credible mortality information for both the male and female populations in other plans maintained by the plan sponsor (and by members of the plan sponsor's controlled group) for which substitute mortality tables are not used must be satisfied for each plan year for which substitute mortality tables are used. This demonstration is made for a plan population by showing that the population has not experienced at least 100 deaths over a time period that satisfies the requirements set forth in the regulations. In general, for each plan year in which substitute mortality tables are used for a plan, in order to demonstrate that a gender within a plan does not have credible mortality information for a plan year, the demonstration that the gender within the plan has fewer than 100 deaths must be made by analyzing the actual number of deaths over a period that is the same length as the period for the experience study on which the substitute mortality tables are based and that ends less than three years before the first day of the plan year.

3. Permitted Aggregation of Plans

The proposed regulations retain the rules contained in the 2008 substitute mortality table regulations regarding aggregation of plans for purposes of using substitute mortality tables. Under these rules, in order for a plan sponsor to use the same substitute mortality tables for two or more plans, the rules set forth in the regulations are applied by treating those plans as a single plan. In such a case, the substitute mortality tables must be used for all such plans and must be based on data collected with respect to all such plans. Although plans generally are not required to be aggregated for purposes of substitute mortality tables, the regulations require a plan to be aggregated with any plan that was previously spun off from that plan if the Commissioner determines that one purpose of the spinoff was to avoid the use of substitute mortality tables for any of the plans involved in the spinoff.

4. Special Rules for Newly-Acquired Plans

If substitute mortality tables are used for at least one plan within a controlled group, in order for the plan sponsor to continue to use substitute mortality tables for that plan after a plan joins the controlled group, substitute mortality tables must be used for the newly affiliated plan unless the newly affiliated plan demonstrates that it lacks credible mortality information. However, the proposed regulations

provide for a transition period during which the standard mortality table is permitted to be used for a newly affiliated plan (without affecting the use of substitute mortality tables for other plans within the controlled group) even if the newly affiliated plan fails to demonstrate a lack of credible mortality information. Similarly, the use of substitute mortality tables for a newly affiliated plan is not affected during the transition period merely because the standard mortality tables are used for another plan within the controlled group despite the failure of that other plan to demonstrate a lack of credible mortality information. Notably, these rules do not change the requirement that the continued use of substitute mortality tables for any plan within the controlled group is permitted only if the other pre-affiliation plans within the controlled group for which substitute mortality tables are not used demonstrate a lack of credible mortality information.

Like the 2008 substitute mortality table regulations, the proposed regulations do not require the use of pre-affiliation experience in order to establish whether a newly-affiliated plan has credible mortality information. If the pre-affiliation data is excluded and substitute mortality tables will be used for the plan, then the experience study period may be as short as one year (instead of two years). If the pre-affiliation data is excluded and substitute mortality tables will not be used for the plan, then the experience study period used to demonstrate that the plan does not have credible mortality information may also be shortened, provided that the period ends not more than one year and one day before the first day of the plan year.

5. Treatment of Mortality Experience With Respect to Disabled Individuals

As under the 2008 substitute mortality table regulations, if separate mortality tables under section 430(h)(3)(D) are used for certain disabled individuals under a plan, then those individuals are disregarded for all purposes with respect to substitute mortality tables under section 430(h)(3)(C). Thus, if the mortality tables under section 430(h)(3)(D) are used for certain disabled individuals under a plan, mortality experience with respect to those individuals must be excluded in determining mortality rates for substitute mortality tables with respect to a plan.

6. Early Termination of Use of Substitute Mortality Tables

The proposed regulations retain the rules from the 2008 substitute mortality table regulations regarding the early termination of use of substitute mortality tables. Under those rules, a plan's substitute mortality tables may not be used beginning with the earliest of: (1) For a plan for which substitute mortality tables are used for only one gender because of a lack of credible mortality information with respect to the other gender, the first plan year for which there is credible mortality information with respect to the gender that had lacked credible mortality information (unless the plan receives approval to use a substitute mortality table for that other gender); (2) the first plan year for which the requirements regarding use of substitute mortality tables by controlled group members are not satisfied; (3) the second plan year following the plan year for which there is a significant change in individuals covered by the plan (unless the plan's actuary certifies in writing to the satisfaction of the Commissioner that the substitute mortality tables used for the plan population continue to be accurately predictive of future mortality of that population (taking into account the effect of the change in the population)); (4) the first plan year following the plan year for which a substitute mortality table used for a plan population is no longer accurately predictive of future mortality of that population, as determined by the Commissioner or as certified by the plan's actuary to the satisfaction of the Commissioner; or (5) the date specified in guidance published in the Internal Revenue Bulletin in conjunction with a replacement of generally applicable mortality tables (other than annual updates to the static mortality tables or changes to the mortality improvement rates).

G. Procedures for Requesting Approval of Substitute Mortality Tables

As under the 2008 substitute mortality table regulations, the proposed regulations provide that a plan sponsor that wishes to use substitute mortality tables for a plan must submit a request to the IRS for approval to use the proposed tables. In general, the request must be submitted at least 7 months before the first day of the plan year for which the proposed substitute tables would be used. If the IRS does not deny the request within 180 days (which may be extended as agreed to by the IRS and the plan sponsor), the request is deemed to have been approved.

The IRS intends to issue an updated version of Rev. Proc. 2008–62 after final regulations regarding substitute mortality tables are issued. If the timing of the release of those final regulations and the associated revenue procedure does not leave adequate time to submit an application to use substitute mortality tables for the plan year beginning in 2018, Treasury and the IRS expect that they would provide a transition rule that would permit extra time to submit such an application

Before final regulations adopting the provisions set forth in these proposed regulations are issued, plan sponsors requesting the use of substitute mortality tables should continue to use the procedures set forth in Rev. Proc. 2008–62. During that period, the IRS will not evaluate whether a substitute mortality table for a population with only partially credible mortality information is appropriate.

Applicability Date

These regulations are proposed to apply to plan years beginning on or after January 1, 2018. Under the proposed regulations, a plan sponsor may use a substitute mortality table for a plan year beginning on or after January 1, 2018 only if that substitute mortality table is approved as provided in these proposed regulations.

Statement of Availability of IRS Documents

IRS Revenue Rulings, Revenue Procedures, and Notices cited in this document are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, or by visiting the IRS Web site at *www.irs.gov*.

Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory assessment is not required. The regulations do not impose a collection of information on small entities, therefore the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to Treasury and the IRS as prescribed in this preamble in the **ADDRESSES** section.

Treasury and the IRS request comments on all aspects of these proposed regulations. All comments will be available for public inspection and copying at *www.regulations.gov* or upon request.

A public hearing on these proposed regulations has been scheduled for April 13, 2017 beginning at 10 a.m. in the Auditorium, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC 20224. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written or electronic comments by March 29, 2017, and an outline of topics to be discussed and the amount of time to be devoted to each topic by March 29, 2017. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal authors of these regulations are Thomas Morgan and Linda S. F. Marshall of Office of Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from Treasury and the IRS participated in the development of these regulations.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be 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 * * *

■ **Par. 2.** Section 1.430(h)(3)–1 is revised to read as follows:

§ 1.430(h)(3)–1 Mortality tables used to determine present value.

(a) *Basis for mortality tables*—(1) *In general.* This section sets forth rules for the mortality tables to be used in determining present value or making any computation under section 430. Generally applicable mortality tables for participants and beneficiaries are set forth in this section pursuant to section 430(h)(3)(A). In general, either the generational mortality tables set forth in paragraph (a)(2) of this section or the static mortality tables set forth in paragraph (a)(3) of this section must be used for a plan. In lieu of using the mortality tables provided under this section with respect to participants and beneficiaries, plan-specific substitute mortality tables are permitted to be used for this purpose pursuant to section 430(h)(3)(C), provided that the requirements of § 1.430(h)(3)-2 are satisfied. Mortality tables that may be used with respect to disabled individuals are to be provided in guidance published in the Internal Revenue Bulletin. See § 601.601(d)(2)(ii)(b) of this chapter.

(2) *Generational mortality tables*—(i) *In general*—(A) *Use of generational mortality tables.* The generational mortality tables that are permitted to be used under section 430(h)(3)(A) and paragraph (a)(1) of this section are determined using the base mortality tables described in paragraph (a)(2)(i)(B) of this section and the mortality improvement rates described in paragraph (a)(2)(i)(C) of this section.

(B) *Base mortality tables.* The base mortality tables are set forth in paragraph (d) of this section. The base year for those tables is 2006.

(C) *Mortality improvement rates.* The mortality improvement rates for valuation dates occurring during 2018 are the mortality improvement rates contained in the Mortality Improvement Scale MP–2016 Report (issued by the Retirement Plans Experience Committee (RPEC) of the Society of Actuaries and available at *www.soa.org/Research/Experience-Study/Pension/research-2016-mp.aspx*). For later years, updated mortality improvement rates that take into account new data for mortality improvement trends of the general population are to be provided in guidance published in the Internal Revenue Bulletin. See § 601.601(d)(2)(ii)(b) of this chapter.

(D) *Application of mortality improvement rates.* Under the generational mortality tables described in this paragraph (a)(2), the probability of an individual's death at a particular age in the future is determined as the individual's base mortality rate that applies at that age (that is, the applicable mortality rate from the table set forth in paragraph (d) of this section for that age, gender, and status as an annuitant or a nonannuitant) multiplied by the cumulative mortality improvement factor for the individual's gender and for that age for the period from 2006 through the calendar year in which the individual is projected to reach the particular age. Paragraph (a)(2)(ii) of this section shows how the base mortality tables in paragraph (d) of this section and the mortality improvement rates for valuation dates occurring during 2018 are combined to determine projected mortality rates.

(E) *Cumulative mortality improvement factor.* The cumulative mortality improvement factor for an age and gender for a period is the product of the annual mortality improvement factors for that age and gender for each year within that period.

(F) *Annual mortality improvement factor.* The annual mortality improvement factor for an age and gender for a year is 1 minus the mortality improvement rate that applies for that age and gender for that year.

(ii) *Example of calculation*—(A) *Calculation of mortality rate.* The mortality rate for 2018 that is applied to male annuitants who are age 66 in 2018 is equal to the product of the mortality rate for 2006 that applied to male annuitants who were age 66 in 2006 (0.013855) and the cumulative mortality improvement factor for age 66 males from 2006 to 2018. The cumulative mortality improvement factor for age 66 males for the period from 2006 to 2018 is 0.8929, and the mortality rate for 2018 for male annuitants who are age 66 in that year would be 0.012371, as shown in the following table.

Calendar year	Scale MP–2016 mortality improvement rate	Annual mortality improvement factor (1-scale MP–2016 rate)	Cumulative mortality improvement factor	Mortality rate
2006	n/a	n/a	n/a	0.013855
2007	0.0237	0.9763	0.9763	
2008	0.0211	0.9789	0.9557	
2009	0.0180	0.9820	0.9385	
2010	0.0142	0.9858	0.9252	
2011	0.0099	0.9901	0.9160	
2012	0.0053	0.9947	0.9112	
2013	0.0043	0.9957	0.9072	
2014	0.0035	0.9965	0.9041	
2015	0.0030	0.9970	0.9014	
2016	0.0028	0.9972	0.8988	
2017	0.0030	0.9970	0.8961	
2018	0.0036	0.9964	0.8929	0.012371

(B) *Probability of survival for an individual.* After the projected mortality rates are derived for each age for each year, the rates are used to calculate the present value of a benefit stream that depends on the probability of survival year-by-year. For example, for purposes of calculating the present value (for a 2018 valuation date) of future payments in a benefit stream payable for a male annuitant who is age 66 in 2018, the probability of survival for the annuitant is based on the mortality rate for a male annuitant who is age 66 in 2018 (0.012371), and the projected mortality rate for a male annuitant who will be age 67 in 2019 (0.013302), age 68 in 2020 (0.014321), and so on.

(3) *Static mortality tables.* The static mortality tables that are permitted to be used under section 430(h)(3)(A) and paragraph (a)(1) of this section are updated annually by the IRS according to the methodology described in paragraph (c)(2) of this section. Paragraph (e) of this section sets forth static tables that are permitted to be used for valuation dates in 2018. For valuation dates in later years, static mortality tables are to be provided in guidance published in the Internal Revenue Bulletin. See § 601.601(d)(2)(ii)(b) of this chapter.

(b) *Use of the tables*—(1) *Separate tables for annuitants and nonannuitants*—(i) *In general.* Separate tables are provided for use for annuitants and nonannuitants. The nonannuitant mortality table is applied to determine the probability of survival for a nonannuitant for the period before the nonannuitant is projected to commence receiving benefits. The annuitant mortality table is applied to determine the present value of benefits for each annuitant. In addition, the annuitant mortality table is applied for each nonannuitant with respect to each assumed commencement of benefits for the period beginning with that assumed commencement. For purposes of this section, an annuitant means a plan participant who has commenced receiving benefits and a nonannuitant means a plan participant who has not yet commenced receiving benefits (for example, an active employee or a terminated vested participant). A participant whose benefit has partially commenced is treated as an annuitant with respect to the portion of the benefit that has commenced and treated as a nonannuitant with respect to the balance of the benefit. In addition, with respect to a beneficiary of a participant, the annuitant mortality table applies for the period beginning with each assumed commencement of benefits for the participant. If the participant has died (or to the extent the participant is assumed to die before commencing benefits), the annuitant mortality table applies with respect to the beneficiary for the period beginning with each assumed commencement of benefits for the beneficiary.

(ii) *Examples of calculation using separate annuitant and nonannuitant tables.* With respect to a 45-year-old active participant who is projected to commence receiving an annuity at age 55, the funding target is determined using the nonannuitant mortality table for the period before the participant attains age 55 (so that, if the static mortality tables are used pursuant to paragraph (a)(3) of this section, the probability of an active male participant living from age 45 to age 55 using the table that applies for a valuation date in 2018 is 0.988857) and using the annuitant mortality table for the period ages 55 and above. Similarly, for a 45-year-old terminated vested participant who is projected to commence an annuity at age 65, the funding target is determined using the nonannuitant mortality table for the period before the participant attains age 65 and using the annuitant mortality table for ages 65 and above.

(2) *Small plan tables.* If static mortality tables are used pursuant to paragraph (a)(3) of this section, as an alternative to the separate static tables specified for annuitants and nonannuitants pursuant to paragraph (b)(1) of this section, combined static tables that apply the same mortality rates to both annuitants and nonannuitants are permitted to be used for a small plan. For this purpose, a small plan is defined as a plan with 500 or fewer total participants (including both active and inactive participants and beneficiaries of deceased participants) on the valuation date. The combined static tables that are permitted to be used for small plans pursuant to this paragraph (b)(2) are constructed from the separate nonannuitant and annuitant static mortality tables using the weighting factors for small plans that are set forth in paragraph (d) of this section. The weighting factors are applied to develop these combined static tables using the following equation: Combined mortality rate = [nonannuitant rate * (1- weighting factor)] + [annuitant rate * weighting factor].

(c) *Static tables*—(1) *Source of rates.* The static mortality tables that are used pursuant to paragraph (a)(3) of this section are determined using the base mortality tables described in paragraph (a)(2)(i)(B) of this section taking into account the mortality improvement rates described in paragraph (a)(2)(i)(C) of this section, in accordance with the rules set forth in paragraph (c)(3) of this section.

(2) *Selection of static tables.* The static mortality tables that are used for a valuation date are the static mortality tables for the calendar year that contains the valuation date.

(3) *Projection of mortality improvements*—(i) *General rule.* Except as provided in paragraph (c)(3)(iii) of this section, the static mortality tables for a calendar year are determined by multiplying the applicable mortality rate for each age from the base mortality tables by both—

(A) The cumulative mortality improvement factor (determined under the rules of paragraph (a)(2) of this section) for the period from 2006 through that calendar year; and

(B) The cumulative mortality improvement factor (determined under the rules of paragraph (a)(2) of this section) for the period beginning in that calendar year and continuing beyond that calendar year for the number of years in the projection period described in paragraph (c)(3)(ii) of this section.

(ii) *Projection period for static mortality tables*—(A) *In general.* The projection period is 8 years for males and 9 years for females, as adjusted based on age as provided in paragraph (c)(3)(ii)(B) of this section.

(B) *Age adjustment.* For ages below 80, the projection period is increased by 1 year for each year below age 80. For ages above 80, the projection period is reduced (but not below zero) by ⅓ year for each year above 80.

(iii) *Fractional projection periods.* If for an age the number of years in the projection period determined under this paragraph (c)(3) is not a whole number, then the mortality rate for that age is determined by using linear interpolation between—

(A) The mortality rate for that age that would be determined under paragraph (c)(3)(i) of this section if the number of years in the projection period were the next lower whole number; and

(B) The mortality rate for that age that would be determined under paragraph (c)(3)(i) of this section if the number of years in the projection period were the next higher whole number.

(iv) *Example.* For example, at age 85 the projection period for a male is 6⅓ years (8 years minus ⅓ year for each of the 5 years above age 80). For a valuation date in 2018, the mortality rate in the static mortality table for an 85-year-old male is based on a projection of mortality improvement for 6⅓ years beyond 2018. Under paragraph (c)(3)(iii) of this section, the mortality rate for an 85-year-old male annuitant in the static mortality table for 2018 is ⅔ times the projected mortality rate for a male annuitant that age in 2024 plus ⅓ times the projected mortality rate for a male annuitant that age in 2025. Accordingly, the mortality rate for an 85-year-old male annuitant in the static mortality table for 2018 is 0.075196 (⅔ times the projected mortality rate for an 85-year old male annuitant in 2024 (0.075447) plus ⅓ times the projected mortality rate for an 85-year old male annuitant in 2025 (0.074693)).

(d) *Base mortality tables.* The following are the base mortality tables. The base year for these tables is 2006.

	Males			Females		
Age	Non-annuitant	Annuitant	Weighting factor for small plans	Non-annuitant	Annuitant	Weighting factor for small plans
0	0.008878	0.008878	0	0.007278	0.007278	0
1	0.000515	0.000515	0	0.000451	0.000451	0
2	0.000348	0.000348	0	0.000295	0.000295	0
3	0.000289	0.000289	0	0.000220	0.000220	0
4	0.000225	0.000225	0	0.000165	0.000165	0
5	0.000197	0.000197	0	0.000149	0.000149	0
6	0.000177	0.000177	0	0.000137	0.000137	0
7	0.000156	0.000156	0	0.000127	0.000127	0
8	0.000132	0.000132	0	0.000117	0.000117	0
9	0.000107	0.000107	0	0.000109	0.000109	0
10	0.000090	0.000090	0	0.000102	0.000102	0
11	0.000095	0.000095	0	0.000105	0.000105	0
12	0.000142	0.000142	0	0.000121	0.000121	0
13	0.000187	0.000187	0	0.000137	0.000137	0
14	0.000230	0.000230	0	0.000151	0.000151	0
15	0.000274	0.000274	0	0.000165	0.000165	0
16	0.000318	0.000318	0	0.000177	0.000177	0
17	0.000364	0.000364	0	0.000187	0.000187	0
18	0.000412	0.000412	0	0.000196	0.000196	0
19	0.000463	0.000463	0	0.000202	0.000202	0
20	0.000510	0.000510	0	0.000202	0.000202	0
21	0.000552	0.000552	0	0.000197	0.000197	0
22	0.000587	0.000587	0	0.000191	0.000191	0
23	0.000599	0.000599	0	0.000190	0.000190	0
24	0.000594	0.000594	0	0.000188	0.000188	0
25	0.000545	0.000545	0	0.000186	0.000186	0
26	0.000510	0.000510	0	0.000186	0.000186	0
27	0.000486	0.000486	0	0.000188	0.000188	0
28	0.000472	0.000472	0	0.000192	0.000192	0
29	0.000468	0.000468	0	0.000198	0.000198	0
30	0.000470	0.000470	0	0.000209	0.000209	0
31	0.000480	0.000480	0	0.000222	0.000222	0
32	0.000495	0.000495	0	0.000238	0.000238	0
33	0.000514	0.000514	0	0.000257	0.000257	0
34	0.000534	0.000534	0	0.000278	0.000278	0
35	0.000557	0.000557	0	0.000301	0.000301	0
36	0.000581	0.000581	0	0.000325	0.000325	0
37	0.000611	0.000611	0	0.000355	0.000355	0
38	0.000648	0.000648	0	0.000389	0.000389	0
39	0.000694	0.000694	0	0.000428	0.000428	0
40	0.000750	0.000750	0	0.000471	0.000471	0

	Males			Females		
Age	Non-annuitant	Annuitant	Weighting factor for small plans	Non-annuitant	Annuitant	Weighting factor for small plans
41	0.000814	0.000823	.0045	0.000518	0.000515	0
42	0.000890	0.000969	.0091	0.000570	0.000603	0
43	0.000982	0.001188	.0136	0.000628	0.000735	0
44	0.001088	0.001480	.0181	0.000691	0.000911	0
45	0.001207	0.001846	.0226	0.000758	0.001131	.0084
46	0.001342	0.002285	.0272	0.000831	0.001395	.0167
47	0.001487	0.002797	.0317	0.000908	0.001703	.0251
48	0.001643	0.003382	.0362	0.000986	0.002055	.0335
49	0.001807	0.004040	.0407	0.001065	0.002451	.0419
50	0.001979	0.004771	.0453	0.001151	0.002891	.0502
51	0.002159	0.005059	.0498	0.001242	0.002993	.0586
52	0.002351	0.005343	.0686	0.001344	0.003124	.0744
53	0.002539	0.005592	.0953	0.001458	0.003291	.0947
54	0.002741	0.005839	.1288	0.001588	0.003499	.1189
55	0.002967	0.006102	.2066	0.001735	0.003755	.1897
56	0.003231	0.006399	.3173	0.001902	0.004065	.2857
57	0.003548	0.006746	.3780	0.002091	0.004435	.3403
58	0.003932	0.007155	.4401	0.002302	0.004869	.3878
59	0.004396	0.007639	.4986	0.002537	0.005373	.4360
60	0.004954	0.008211	.5633	0.002795	0.005942	.4954
61	0.005616	0.008878	.6338	0.003080	0.006581	.5805
62	0.006392	0.009646	.7103	0.003388	0.007283	.6598
63	0.007291	0.010523	.7902	0.003724	0.008043	.7520
64	0.008320	0.011514	.8355	0.004089	0.008870	.8043
65	0.009486	0.012621	.8832	0.004482	0.009760	.8552
66	0.010668	0.013855	.9321	0.005004	0.010731	.9118
67	0.011973	0.015221	.9510	0.005575	0.011790	.9367
68	0.013414	0.016736	.9639	0.006205	0.012952	.9523
69	0.015006	0.018421	.9714	0.006898	0.014226	.9627
70	0.016761	0.020288	.9740	0.007662	0.015628	.9661
71	0.018690	0.022348	.9766	0.008507	0.017170	.9695
72	0.020824	0.024638	.9792	0.009438	0.018861	.9729
73	0.023176	0.027176	.9818	0.010470	0.020723	.9763
74	0.025770	0.029992	.9844	0.011615	0.022780	.9797
75	0.028623	0.033113	.9870	0.012887	0.025057	.9830
76	0.031761	0.036585	.9896	0.014301	0.027590	.9864
77	0.035214	0.040457	.9922	0.015885	0.030438	.9898
78	0.039007	0.044778	.9948	0.017656	0.033653	.9932
79	0.043169	0.049605	.9974	0.019639	0.037296	.9966
80	0.047750	0.055022	1.0	0.021859	0.041440	1.0
81	0.049804	0.061087	1.0	0.023791	0.046181	1.0
82	0.053911	0.067902	1.0	0.027655	0.051564	1.0
83	0.060072	0.075550	1.0	0.033451	0.057714	1.0
84	0.068286	0.084162	1.0	0.041179	0.064709	1.0
85	0.078554	0.093775	1.0	0.050838	0.072601	1.0
86	0.090876	0.104507	1.0	0.062429	0.081490	1.0
87	0.105251	0.116487	1.0	0.075952	0.091444	1.0
88	0.121680	0.129770	1.0	0.091407	0.102470	1.0
89	0.140162	0.144470	1.0	0.108794	0.114635	1.0
90	0.160698	0.160698	1.0	0.128113	0.128113	1.0
91	0.177741	0.177741	1.0	0.142619	0.142619	1.0
92	0.195154	0.195154	1.0	0.157939	0.157939	1.0
93	0.212642	0.212642	1.0	0.173886	0.173886	1.0
94	0.230055	0.230055	1.0	0.190319	0.190319	1.0
95	0.247257	0.247257	1.0	0.207191	0.207191	1.0
96	0.265940	0.265940	1.0	0.225057	0.225057	1.0
97	0.284940	0.284940	1.0	0.243507	0.243507	1.0
98	0.304432	0.304432	1.0	0.262587	0.262587	1.0
99	0.324272	0.324272	1.0	0.282171	0.282171	1.0
100	0.344364	0.344364	1.0	0.302162	0.302162	1.0
101	0.364420	0.364420	1.0	0.322282	0.322282	1.0
102	0.384058	0.384058	1.0	0.342371	0.342371	1.0
103	0.403188	0.403188	1.0	0.362210	0.362210	1.0
104	0.421533	0.421533	1.0	0.381534	0.381534	1.0
105	0.438903	0.438903	1.0	0.400321	0.400321	1.0
106	0.455492	0.455492	1.0	0.418418	0.418418	1.0
107	0.470810	0.470810	1.0	0.435390	0.435390	1.0
108	0.484965	0.484965	1.0	0.451459	0.451459	1.0
109	0.498023	0.498023	1.0	0.466408	0.466408	1.0
110	0.509768	0.509768	1.0	0.480123	0.480123	1.0
111	0.512472	0.512472	1.0	0.492664	0.492664	1.0

	Males			Females		
Age	Non-annuitant	Annuitant	Weighting factor for small plans	Non-annuitant	Annuitant	Weighting factor for small plans
112	0.509296	0.509296	1.0	0.503970	0.503970	1.0
113	0.506193	0.506193	1.0	0.507361	0.507361	1.0
114	0.503061	0.503061	1.0	0.503564	0.503564	1.0
115	0.500000	0.500000	1.0	0.500000	0.500000	1.0
116	0.500000	0.500000	1.0	0.500000	0.500000	1.0
117	0.500000	0.500000	1.0	0.500000	0.500000	1.0
118	0.500000	0.500000	1.0	0.500000	0.500000	1.0
119	0.500000	0.500000	1.0	0.500000	0.500000	1.0
120	1.000000	1.000000	1.0	1.000000	1.000000	1.0

(e) *Static tables for 2018.* The following static mortality tables are used pursuant to paragraph (a)(3) of this section for determining present value or making any computation under section 430 with respect to valuation dates occurring during 2018.

	Males			Females		
Age	Non-annuitant	Annuitant	Optional combined table for small plans	Non-annuitant	Annuitant	Optional combined table for small plans
0	0.002420	0.002420	0.002420	0.002234	0.002234	0.002234
1	0.000142	0.000142	0.000142	0.000140	0.000140	0.000140
2	0.000097	0.000097	0.000097	0.000092	0.000092	0.000092
3	0.000081	0.000081	0.000081	0.000070	0.000070	0.000070
4	0.000064	0.000064	0.000064	0.000053	0.000053	0.000053
5	0.000056	0.000056	0.000056	0.000048	0.000048	0.000048
6	0.000051	0.000051	0.000051	0.000045	0.000045	0.000045
7	0.000046	0.000046	0.000046	0.000042	0.000042	0.000042
8	0.000039	0.000039	0.000039	0.000039	0.000039	0.000039
9	0.000032	0.000032	0.000032	0.000037	0.000037	0.000037
10	0.000027	0.000027	0.000027	0.000035	0.000035	0.000035
11	0.000029	0.000029	0.000029	0.000036	0.000036	0.000036
12	0.000044	0.000044	0.000044	0.000042	0.000042	0.000042
13	0.000058	0.000058	0.000058	0.000048	0.000048	0.000048
14	0.000072	0.000072	0.000072	0.000053	0.000053	0.000053
15	0.000087	0.000087	0.000087	0.000059	0.000059	0.000059
16	0.000102	0.000102	0.000102	0.000064	0.000064	0.000064
17	0.000118	0.000118	0.000118	0.000068	0.000068	0.000068
18	0.000135	0.000135	0.000135	0.000072	0.000072	0.000072
19	0.000153	0.000153	0.000153	0.000075	0.000075	0.000075
20	0.000170	0.000170	0.000170	0.000076	0.000076	0.000076
21	0.000192	0.000192	0.000192	0.000078	0.000078	0.000078
22	0.000214	0.000214	0.000214	0.000080	0.000080	0.000080
23	0.000229	0.000229	0.000229	0.000084	0.000084	0.000084
24	0.000238	0.000238	0.000238	0.000087	0.000087	0.000087
25	0.000230	0.000230	0.000230	0.000090	0.000090	0.000090
26	0.000226	0.000226	0.000226	0.000094	0.000094	0.000094
27	0.000226	0.000226	0.000226	0.000099	0.000099	0.000099
28	0.000230	0.000230	0.000230	0.000105	0.000105	0.000105
29	0.000238	0.000238	0.000238	0.000111	0.000111	0.000111
30	0.000249	0.000249	0.000249	0.000120	0.000120	0.000120
31	0.000263	0.000263	0.000263	0.000130	0.000130	0.000130
32	0.000278	0.000278	0.000278	0.000142	0.000142	0.000142
33	0.000294	0.000294	0.000294	0.000155	0.000155	0.000155
34	0.000309	0.000309	0.000309	0.000168	0.000168	0.000168
35	0.000323	0.000323	0.000323	0.000182	0.000182	0.000182
36	0.000336	0.000336	0.000336	0.000196	0.000196	0.000196
37	0.000350	0.000350	0.000350	0.000213	0.000213	0.000213
38	0.000366	0.000366	0.000366	0.000231	0.000231	0.000231
39	0.000385	0.000385	0.000385	0.000251	0.000251	0.000251
40	0.000410	0.000410	0.000410	0.000273	0.000273	0.000273
41	0.000438	0.000443	0.000438	0.000298	0.000296	0.000298
42	0.000474	0.000516	0.000474	0.000326	0.000344	0.000326
43	0.000518	0.000627	0.000519	0.000358	0.000419	0.000358
44	0.000573	0.000779	0.000577	0.000395	0.000520	0.000395
45	0.000636	0.000973	0.000644	0.000436	0.000651	0.000438
46	0.000712	0.001213	0.000726	0.000484	0.000813	0.000489
47	0.000798	0.001502	0.000820	0.000538	0.001010	0.000550
48	0.000896	0.001844	0.000930	0.000597	0.001245	0.000619
49	0.001005	0.002248	0.001056	0.000661	0.001522	0.000697
50	0.001128	0.002719	0.001200	0.000734	0.001844	0.000790

	Males			Females		
Age	Non-annuitant	Annuitant	Optional combined table for small plans	Non-annuitant	Annuitant	Optional combined table for small plans
51	0.001265	0.002963	0.001350	0.000814	0.001961	0.000881
52	0.001418	0.003224	0.001542	0.000903	0.002099	0.000992
53	0.001580	0.003481	0.001761	0.001003	0.002263	0.001122
54	0.001761	0.003751	0.002017	0.001114	0.002454	0.001273
55	0.001964	0.004040	0.002393	0.001235	0.002673	0.001508
56	0.002200	0.004357	0.002884	0.001367	0.002921	0.001811
57	0.002474	0.004704	0.003317	0.001509	0.003200	0.002084
58	0.002796	0.005088	0.003805	0.001661	0.003512	0.002379
59	0.003174	0.005515	0.004341	0.001823	0.003860	0.002711
60	0.003613	0.005989	0.004951	0.001994	0.004238	0.003106
61	0.004122	0.006516	0.005639	0.002181	0.004659	0.003619
62	0.004705	0.007100	0.006406	0.002381	0.005119	0.004188
63	0.005364	0.007742	0.007243	0.002600	0.005616	0.004868
64	0.006111	0.008457	0.008071	0.002842	0.006165	0.005515
65	0.006940	0.009234	0.008966	0.003107	0.006766	0.006236
66	0.007779	0.010103	0.009945	0.003465	0.007430	0.007080
67	0.008697	0.011056	0.010940	0.003863	0.008170	0.007897
68	0.009709	0.012114	0.012027	0.004308	0.008993	0.008770
69	0.010836	0.013302	0.013231	0.004806	0.009912	0.009722
70	0.012093	0.014637	0.014571	0.005366	0.010945	0.010756
71	0.013486	0.016126	0.016064	0.006001	0.012111	0.011925
72	0.015044	0.017799	0.017742	0.006711	0.013412	0.013230
73	0.016794	0.019693	0.019640	0.007521	0.014886	0.014711
74	0.018751	0.021823	0.021775	0.008439	0.016552	0.016387
75	0.020950	0.024237	0.024194	0.009485	0.018443	0.018291
76	0.023428	0.026986	0.026949	0.010678	0.020600	0.020465
77	0.026183	0.030081	0.030051	0.012035	0.023061	0.022949
78	0.029308	0.033645	0.033622	0.013582	0.025888	0.025804
79	0.032774	0.037661	0.037648	0.015347	0.029144	0.029097
80	0.036705	0.042295	0.042295	0.017347	0.032886	0.032886
81	0.038556	0.047291	0.047291	0.019058	0.036992	0.036992
82	0.042087	0.053009	0.053009	0.022345	0.041662	0.041662
83	0.047283	0.059466	0.059466	0.027251	0.047017	0.047017
84	0.054248	0.066860	0.066860	0.033811	0.053130	0.053130
85	0.062990	0.075196	0.075196	0.042053	0.060056	0.060056
86	0.073605	0.084646	0.084646	0.052009	0.067888	0.067888
87	0.086115	0.095308	0.095308	0.063725	0.076724	0.076724
88	0.100513	0.107196	0.107196	0.077205	0.086549	0.086549
89	0.116840	0.120431	0.120431	0.092462	0.097426	0.097426
90	0.135087	0.135087	0.135087	0.109484	0.109484	0.109484
91	0.150610	0.150610	0.150610	0.122541	0.122541	0.122541
92	0.166534	0.166534	0.166534	0.136397	0.136397	0.136397
93	0.182546	0.182546	0.182546	0.150811	0.150811	0.150811
94	0.198598	0.198598	0.198598	0.165818	0.165818	0.165818
95	0.214442	0.214442	0.214442	0.181360	0.181360	0.181360
96	0.232944	0.232944	0.232944	0.198746	0.198746	0.198746
97	0.251903	0.251903	0.251903	0.216930	0.216930	0.216930
98	0.271612	0.271612	0.271612	0.235921	0.235921	0.235921
99	0.291889	0.291889	0.291889	0.255617	0.255617	0.255617
100	0.312680	0.312680	0.312680	0.275938	0.275938	0.275938
101	0.333720	0.333720	0.333720	0.296628	0.296628	0.296628
102	0.354570	0.354570	0.354570	0.317471	0.317471	0.317471
103	0.375136	0.375136	0.375136	0.338385	0.338385	0.338385
104	0.395172	0.395172	0.395172	0.358868	0.358868	0.358868
105	0.413945	0.413945	0.413945	0.379183	0.379183	0.379183
106	0.432145	0.432145	0.432145	0.398878	0.398878	0.398878
107	0.449197	0.449197	0.449197	0.417703	0.417703	0.417703
108	0.465497	0.465497	0.465497	0.435384	0.435384	0.435384
109	0.480869	0.480869	0.480869	0.452108	0.452108	0.452108
110	0.495080	0.495080	0.495080	0.467928	0.467928	0.467928
111	0.500557	0.500557	0.500557	0.482562	0.482562	0.482562
112	0.500454	0.500454	0.500454	0.496164	0.496164	0.496164
113	0.500352	0.500352	0.500352	0.502110	0.502110	0.502110
114	0.500201	0.500201	0.500201	0.500952	0.500952	0.500952
115	0.500000	0.500000	0.500000	0.500000	0.500000	0.500000
116	0.500000	0.500000	0.500000	0.500000	0.500000	0.500000
117	0.500000	0.500000	0.500000	0.500000	0.500000	0.500000
118	0.500000	0.500000	0.500000	0.500000	0.500000	0.500000
119	0.500000	0.500000	0.500000	0.500000	0.500000	0.500000
120	1.000000	1.000000	1.000000	1.000000	1.000000	1.000000

■ **Par. 3.** Section 1.430(h)(3)–2 is revised to read as follows:

§ 1.430(h)(3)–2 Plan-specific substitute mortality tables used to determine present value.

(a) *In general.* This section sets forth rules for the use of substitute mortality tables under section 430(h)(3)(C) in determining any present value or making any computation under section 430 in accordance with § 1.430(h)(3)–1(a)(1). In order to use substitute mortality tables, a plan sponsor must obtain approval to use substitute mortality tables for the plan in accordance with the procedures set forth in paragraph (b) of this section. Paragraph (c) of this section sets forth rules for the development of substitute mortality tables, including guidelines providing that a plan must have either full or partial credibility in order to have sufficient credible mortality information to use substitute mortality tables. Paragraph (d) of this section describes the requirements for full credibility. Paragraph (e) of this section describes the requirements for partial credibility. Paragraph (f) of this section provides special rules for newly affiliated plans not using substitute mortality tables. Paragraph (g) of this section specifies the effective date and applicability date of this section. The Commissioner may, in revenue rulings and procedures, notices or other guidance published in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(b) of this chapter), provide additional guidance regarding approval and use of substitute mortality tables under section 430(h)(3)(C) and related matters.

(b) *Procedures for obtaining approval to use substitute mortality tables*—(1) *Written request to use substitute mortality tables*—(i) *General requirements.* In order to use substitute mortality tables, a plan sponsor must submit a written request to the Commissioner that demonstrates that those substitute mortality tables meet the requirements of section 430(h)(3)(C) and this section. This request must specify the first plan year and the term of years (not more than 10) for which the tables are to apply.

(ii) *Time for written request.* Substitute mortality tables may not be used for a plan year unless the plan sponsor submits the written request described in paragraph (b)(1)(i) of this section at least 7 months prior to the first day of the first plan year for which the substitute mortality tables are to apply.

(2) *Commissioner's review of request*—(i) *In general.* During the 180-day period that begins on the date the plan sponsor submits a request to use substitute mortality tables for a plan pursuant to this section, the Commissioner will determine whether the request to use substitute mortality tables satisfies the requirements of this section (including any published guidance issued pursuant to paragraph (a) of this section), and will either approve or deny the request. The Commissioner will deny a request if the request fails to meet the requirements of this section or if the Commissioner determines that a substitute mortality table does not sufficiently reflect the mortality experience of the applicable plan population.

(ii) *Request for additional information.* The Commissioner may request additional information with respect to the submission. Failure to provide that information on a timely basis constitutes grounds for denial of the request.

(iii) *Deemed approval.* Except as provided in paragraph (b)(2)(iv) of this section, if the Commissioner does not issue a denial within the 180-day review period, the request is deemed to have been approved.

(iv) *Extension of time permitted.* The Commissioner and a plan sponsor may, before the expiration of the 180-day review period, agree in writing to extend that period, provided that any such agreement also specifies any revisions in the plan sponsor's request, including any change in the requested term of use of the substitute mortality tables.

(c) *Development of substitute mortality tables*—(1) *Substitute mortality tables must be used for all plans in controlled group*—(i) *General rule.* Except as otherwise provided in this paragraph (c), substitute mortality tables are permitted to be used for a plan for a plan year only if, for that plan year (or any portion of that plan year), substitute mortality tables are also approved and used for each other pension plan subject to the requirements of section 430 that is maintained by the plan sponsor and by each member of the plan sponsor's controlled group. For purposes of this section, the term controlled group means any group treated as a single employer under paragraph (b), (c), (m), or (o) of section 414.

(ii) *Treatment of plans without credible mortality information.* The rule of paragraph (c)(1)(i) of this section does not prohibit use of substitute mortality tables for one plan for a plan year if the only other plan or plans maintained by the plan sponsor (or by a member of the plan sponsor's controlled group) for which substitute mortality tables are not used are too small to have fully or partially credible mortality information for the plan year. For purposes of demonstrating that neither males nor females under a plan have credible mortality information for a plan year, the length of the experience study period must be the same length as the longest experience study period used for any plan within the controlled group.

(2) *Mortality experience requirements*—(i) *In general.* Substitute mortality tables must reflect the actual mortality experience of the pension plan for which the tables are to be used and that mortality experience must be credible mortality information as described in paragraph (c)(2)(ii) of this section. Separate mortality tables must be established for each gender under the plan, and a substitute mortality table is permitted to be established for a gender only if the plan has credible mortality information with respect to that gender. See paragraph (d)(5) of this section for rules permitting the use of substitute mortality tables for populations within a gender that have full credibility.

(ii) *Credible mortality information*—(A) *In general.* There is credible mortality information for a gender within a plan if and only if the mortality experience with respect to that gender satisfies the requirement for either—

(*1*) Full credibility (as described in paragraph (d) of this section); or

(*2*) Partial credibility (as described in paragraph (e) of this section).

(B) *Simplified rule.* Whether there is credible mortality information for a gender may be determined by only taking into account people who are at least age 50 and less than age 100. If there is credible mortality information for a gender when applying this simplified rule, the entire gender (not just those who are at least age 50 and less than age 100) has credible mortality information.

(iii) *Gender without credible mortality information*—(A) *In general.* If for a plan, one gender has credible mortality information but for a plan year the other gender does not have credible mortality information, then the substitute mortality tables are established for the gender that does have credible mortality information and the mortality tables under § 1.430(h)(3)–1 are used for the gender that does not have credible mortality information.

(B) *Demonstration of lack of credible mortality information for a gender.* In general, in order to demonstrate that a gender within a plan does not have credible mortality information for a plan year, the demonstration that the gender within the plan has fewer than the

minimum number of actual deaths to have partial credibility, as described in paragraph (e)(1) of this section, must be made by analyzing the actual number of deaths over a period that is the same length as the period for the experience study on which the substitute mortality tables are based and that ends less than three years before the first day of the plan year.

(3) *Determination of substitute mortality tables*—(i) *Requirement to use generational mortality table.* A plan's substitute mortality tables must be generational mortality tables. A plan's substitute mortality tables are determined using the plan's base substitute mortality tables developed pursuant to paragraph (d) or (e) of this section and the mortality improvement factors described in paragraph (c)(3)(ii) of this section.

(ii) *Determination of mortality improvement factors.* The mortality improvement factor for an age and a gender is the cumulative mortality improvement factor determined under § 1.430(h)(3)–1(a)(2)(i)(E) for the applicable period. The applicable period is the period beginning with the base year of the base substitute mortality table determined under paragraph (d) or (e) of this section and ending in the calendar year in which the individual attains the age for which the probability of death is being determined. The base year for the base substitute mortality table is the calendar year that contains the day before the midpoint of the experience study period.

(4) *Disabled individuals.* Under section 430(h)(3)(D), separate mortality tables are permitted to be used for certain disabled individuals. If such separate mortality tables are used for those disabled individuals, then those individuals are disregarded for all purposes under this section. Thus, if the mortality tables under section 430(h)(3)(D) are used for disabled individuals under a plan, mortality experience with respect to those individuals must be excluded in developing mortality rates for substitute mortality tables under this section.

(5) *Aggregation*—(i) *Permissive aggregation of plans.* A plan sponsor may use a set of substitute mortality tables for two or more its plans provided that the rules of this section are applied by treating those plans as a single plan. In such a case, the substitute mortality tables must be used for the aggregated plans and must be based on data collected with respect to those aggregated plans.

(ii) *Required aggregation of plans.* In general, plans are not required to be aggregated for purposes of applying the rules of this section. However, for purposes of this section, a plan is required to be aggregated with any plan that was previously spun off from that plan if a purpose of the spinoff is to avoid the use of substitute mortality tables for any of the plans that were involved in the spinoff.

(6) *Duration of use of tables*—(i) *General rule.* Except as provided in this paragraph (c)(6), substitute mortality tables are used for a plan for the term of consecutive plan years specified in the plan sponsor's written request to use such tables under paragraph (b)(1) of this section and approved by the Commissioner, or a shorter period prescribed by the Commissioner in the approval to use substitute mortality tables. Following the end of the approved term of use, or following any early termination of use described in this paragraph (c)(6), the mortality tables specified in § 1.430(h)(3)–1 are used for the plan unless approval under paragraph (b)(1) of this section has been received by the plan sponsor to use substitute mortality tables for a further term.

(ii) *Early termination of use of tables.* A plan's substitute mortality tables must not be used beginning with the earliest of—

(A) For a plan using a substitute mortality table for only one gender because of a lack of credible mortality information with respect to the other gender, the first plan year for which there is credible mortality information with respect to the gender that had lacked credible mortality information (unless an approved substitute mortality table is used for that gender);

(B) The first plan year for which the plan fails to satisfy the requirements of paragraph (c)(1) of this section (regarding use of substitute mortality tables by controlled group members);

(C) The second plan year following the plan year for which there is a significant change in individuals covered by the plan as described in paragraph (c)(6)(iii) of this section;

(D) The first plan year following the plan year for which a substitute mortality table used for a plan population is no longer accurately predictive of future mortality of that population, as determined by the Commissioner or as certified by the plan's actuary to the satisfaction of the Commissioner; or

(E) The date specified in guidance published in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(b) of this chapter) in conjunction with a replacement of mortality tables specified under section 430(h)(3)(A) and § 1.430(h)(3)–1 (other than annual updates to the static mortality tables issued pursuant to § 1.430(h)(3)–1(a)(3) or changes to the mortality improvement rates pursuant to § 1.430(h)(3)–1(a)(2)(i)(C)).

(iii) *Significant change in coverage*—(A) *Change in coverage from time of experience study.* For purposes of applying the rules of paragraph (c)(6)(ii)(C) of this section, a significant change in the individuals covered by a substitute mortality table occurs if there is an increase or decrease in the number of individuals of at least 20 percent compared to the average number of individuals in that population over the years covered by the experience study on which the substitute mortality tables are based. However, a change in coverage is not treated as significant if the plan's actuary certifies in writing to the satisfaction of the Commissioner that the substitute mortality tables used for the plan population continue to be accurately predictive of future mortality of that population (taking into account the effect of the change in the population).

(B) *Change in coverage from time of certification.* For purposes of applying the rules of paragraph (c)(6)(ii)(C) of this section, a significant change in the individuals covered by a substitute mortality table occurs if there is an increase or decrease in the number of individuals covered by a substitute mortality table of at least 20 percent compared to the number of individuals in a plan year for which a certification described in paragraph (c)(6)(iii)(A) of this section was made on account of a prior change in coverage. However, a change in coverage is not treated as significant if the plan's actuary certifies in writing to the satisfaction of the Commissioner that the substitute mortality tables used by the plan with respect to the covered population continue to be accurately predictive of future mortality of that population (taking into account the effect of the change in the plan population).

(d) *Full credibility*—(1) *In general.* The mortality experience with respect to a gender or other population within a plan has full credibility if the actual number of deaths for that population during the experience study period described in paragraph (d)(2) of this section is at least the full credibility threshold described in paragraph (d)(3) of this section. Paragraph (d)(4) of this section provides rules for the creation of a base substitute mortality table from the experience study, which apply if the mortality experience for the population has full credibility.

(2) *Experience study period requirements.* The base substitute

mortality table for a gender or other population within a plan must be developed from an experience study of the mortality experience of that population that is collected over an experience study period. The length of the experience study period must be at least 2 years and no more than 5 years. The last day of the final year reflected in the experience data must be less than 3 years before the first day of the first plan year for which the substitute mortality tables are to apply. For example, if July 1, 2019, is the first day of the first plan year for which the substitute mortality tables will be used, then an experience study using calendar year data must include data collected for a period that ends no earlier than December 31, 2016.

(3) *Full credibility threshold*—(i) *Threshold number of deaths.* The full credibility threshold for a gender or other population within a plan is the product of 1,082 and the population's benefit dispersion factor. In calculating the population's benefit dispersion factor, for purposes of paragraphs (d)(3)(iii), (iv), and (v) of this section, the population is adjusted, as appropriate, for people who leave on account of reason other than death.

(ii) *Population's benefit dispersion factor.* The population's benefit dispersion factor is equal to—

(A) The number of expected deaths for the population during the experience study period (as defined in paragraph (d)(3)(iii) of this section); multiplied by

(B) The mortality-weighted square of the benefits (as defined in paragraph (d)(3)(iv) of this section); divided by

(C) The square of the mortality-weighted benefits (as defined in paragraph (d)(3)(v) of this section).

(iii) *Number of expected deaths.* The number of expected deaths for a population during the experience study period is equal to the sum, for each year in the experience study period, of the expected number of deaths in the population during the year using the mortality rates from the standard mortality tables set forth in paragraph (d)(4)(iii) of this section.

(iv) *Mortality-weighted square of the benefits.* The mortality-weighted square of the benefits for a population is the sum, for each year in the experience study period, for all individuals for each age in the population at the beginning of the year, of the product of—

(A) The probability of death of those individuals using the mortality rate for that age from the standard mortality table set forth in paragraph (d)(4)(iii) of this section; and

(B) The sum of the square of the accrued benefits (substituting the current periodic payment in the case of individuals in pay status) for those individuals.

(v) *Square of the mortality-weighted benefits.* The square of the mortality-weighted benefits is equal to the square of the sum, for each year in the experience study period, for all individuals for each age in the population at the beginning of the year, of the product of—

(A) The probability of death of those individuals using the mortality rate for that age from the standard mortality table set forth in paragraph (d)(4)(iii) of this section; and

(B) The sum of the accrued benefits (substituting the current periodic payment in the case of individuals in pay status) for those individuals.

(4) *Development of mortality rates*—(i) *In general.* The mortality rates derived from the experience study must be amounts-weighted mortality rates that are derived by multiplying the mortality rate from the standard mortality table described in paragraph (d)(4)(iii) of this section by the mortality ratio determined under paragraph (d)(4)(ii) of this section. If the simplified rule of paragraph (c)(2)(ii)(B) of this section is used for the population, then the mortality ratio is determined only taking into account people who are at least 50 years old and less than 100 years old, but the mortality ratio is applied to all ages. Because amounts-weighted mortality rates for a plan cannot be determined without benefit amounts, the mortality experience study used to develop a base table must not include periods before the plan was established.

(ii) *Mortality ratio.* The mortality ratio for a gender or other population within a plan is equal to the quotient determined by dividing—

(A) The sum, for each year in the experience study period, of the accrued benefits (substituting the current periodic payment in the case of individuals in pay status) for all individuals in the population at the beginning of the year who died during the year, by

(B) The sum, for each year in the experience study period, for all individuals for each age in the population at the beginning of the year (adjusted, as appropriate, for people who leave on account of reason other than death), of the product of—

(*1*) The probability of death of those individuals using the mortality rate for that age from the standard mortality table set forth in paragraph (d)(4)(iii) of this section; and

(*2*) The sum of the accrued benefits (substituting the current periodic payment in the case of individuals in pay status) for those individuals.

(iii) *Standard mortality table*—(A) *Projection of base table.* The standard mortality table for a year is the mortality table determined by applying cumulative mortality improvement factors determined under § 1.430(h)(3)–1(a)(2)(i)(E) to the base mortality table under § 1.430(h)(3)–1(d) for the period beginning with 2006 and ending in the base year for the base substitute mortality table determined under paragraph (d) or (e) of this section. For purposes of the previous sentence, the cumulative mortality improvement factors are determined using the mortality improvement rates described in § 1.430(h)(3)–1(a)(2)(i)(C) that apply for the calendar year during which the plan sponsor submits the request to use substitute mortality tables. If the plan sponsor submits such a request during 2017, then the cumulative mortality improvement factors are determined using the mortality improvement rates contained in the Mortality Improvement Scale MP–2016 Report (issued by the Retirement Plans Experience Committee (RPEC) of the Society of Actuaries and available at *www.soa.org/Research/Experience-Study/Pension/research-2016-mp.aspx*).

(B) *Selection of base table.* If the population consists solely of annuitants, the annuitant base mortality table under § 1.430(h)(3)–1(d) must be used for purposes of paragraph (d)(4)(iii)(A) of this section. If the population consists solely of nonannuitants, the nonannuitant base mortality table under § 1.430(h)(3)–1(d) must be used for that purpose. If the population includes both annuitants and non-annuitants, a combination of the annuitant and nonannuitant base tables under § 1.430(h)(3)–1(d) must be used for that purpose. The combined table is constructed using the weighting factors for small plans that are set forth in § 1.430(h)(3)–1(d). The weighting factors are applied to develop the combined table using the following equation: Combined mortality rate = [nonannuitant rate * (1 − weighting factor)] + [annuitant rate * weighting factor].

(iv) *Change in number of individuals covered by table.* Experience data may not be used to develop a base table if the number of individuals in the population covered by the table (for example, the male annuitant population) as of the last day of the plan year before the year the request to use substitute mortality tables is made, compared to the average number of individuals in that population over the years covered by the experience study on which the

substitute mortality tables are based, reflects a difference of 20 percent or more, unless it is demonstrated to the satisfaction of the Commissioner that the experience data is accurately predictive of future mortality of that plan population (taking into account the effect of the change in individuals) after appropriate adjustments to the data are made (for example, excluding data from individuals with respect to a spun-off portion of the plan). For this purpose, a reasonable estimate of the number of individuals in the population covered by the table may be used.

(5) *Separate tables for specified populations*—(i) *In general.* Except as provided in this paragraph (d)(5), separate substitute mortality tables are permitted to be used for separate populations within a gender under a plan only if—

(A) All individuals of that gender in the plan are divided into separate populations;

(B) Each separate population has mortality experience that has full credibility as determined under the rules of paragraph (d)(5)(iii) of this section; and

(C) The separate base substitute mortality table for each separate population is developed applying the rules of paragraphs (d)(1) through (4) of this section using an experience study that takes into account solely members of that population.

(ii) *Annuitant and nonannuitant separate populations.* Notwithstanding paragraph (d)(5)(i)(B) of this section, substitute mortality tables for separate populations of annuitants and nonannuitants within a gender may be used even if only one of those separate populations has credible mortality information. Similarly, if separate populations that satisfy paragraph (d)(5)(i)(B) of this section are established, then any of those populations may be further subdivided into separate annuitant and nonannuitant subpopulations, provided that at least one of the two resulting subpopulations has credible mortality experience. The standard mortality tables under § 1.430(h)(3)–1 are used for a resulting subpopulation that does not have credible mortality information. For example, in the case of a plan with mortality experience for both its male hourly and salaried individuals that has full credibility, if the male salaried annuitant population has credible mortality information, substitute mortality tables may be used for the plan with respect to that population even if the standard mortality tables under § 1.430(h)(3)–1 are used with respect to the male salaried nonannuitant population (because that nonannuitant population does not have credible mortality information).

(iii) *Credible mortality experience for separate populations.* In determining whether the mortality experience for a separate population within a gender has full credibility, the requirements of paragraph (d)(1) of this section must be satisfied but, in applying that paragraph (d)(1), the separate population should be substituted for the particular gender. In demonstrating that an annuitant or nonannuitant population within a gender or within a separate population does not have credible mortality information, the requirements of paragraph (c)(2)(iii)(B) of this section must be satisfied but, in applying that paragraph, the annuitant (or nonannuitant) population should be substituted for the particular gender.

(e) *Partial credibility*—(1) *In general.* The mortality experience with respect to a population has partial credibility if the actual number of deaths for that population during the experience study period described in paragraph (d)(2) of this section is at least equal to the partial credibility threshold of 100 and is less than the full credibility threshold described for the population in paragraph (d)(3) of this section. If the mortality experience for the population has partial credibility, then in lieu of creating a base substitute mortality table as described in paragraph (d) of this section, the base substitute mortality table is created as the sum of—

(i) The product of—

(A) The partial credibility weighting factor determined under paragraph (e)(2) of this section; and

(B) The mortality rates that are derived from the experience study determined under paragraph (d)(4)(i) of this section, and

(ii) The product of—

(A) One minus the partial credibility weighting factor described in paragraph (e)(2) of this section; and

(B) The mortality rate from the standard mortality tables described in paragraph (d)(4)(iii) of this section.

(2) *Partial credibility weighting factor.* The partial credibility weighting factor is equal to the square root of the fraction—

(i) The numerator of which is the actual number of deaths for the population during the experience study period, and

(ii) The denominator of which is the full credibility threshold for the population described in paragraph (d)(3) of this section.

(f) *Special rules for newly affiliated plans*—(1) *In general.* This paragraph (f) provides special rules that provide temporary relief from certain rules in this section in the case of a controlled group that includes a newly affiliated plan. Paragraph (f)(2) of this section provides a transition period during which the requirement in paragraph (c)(1) of this section (that is, the requirement that all plans within the controlled group that have credible mortality information must use substitute mortality tables) is not applicable. Paragraph (f)(3) of this section provides special rules that permit the use of a shorter experience study period in the case of a newly affiliated plan that excludes the mortality experience data for the period prior to the date the plan sponsor becomes maintained by a member of the new plan sponsor's controlled group. Paragraph (f)(4) of this section defines *newly affiliated plan.*

(2) *Transition period for newly affiliated plans.* The use of substitute mortality tables for a plan within a controlled group is not prohibited merely because substitute mortality tables are not used during the transition period for a newly affiliated plan that fails to demonstrate a lack of credible mortality information during the that period. Similarly, during the transition period, the use of substitute mortality tables for a newly affiliated plan is not prohibited merely because substitute mortality tables are not used for another plan within the controlled group that fails to demonstrate a lack of credible mortality information during that period. The transition period runs through the last day of the plan year that contains the last day of the period described in section 410(b)(6)(C)(ii) for either of the plans, whichever is later.

(3) *Experience study period for newly affiliated plan*—(i) *In general.* The mortality experience data for a newly affiliated plan may either include or exclude mortality experience data for the period prior to the date the plan becomes maintained by a member of the new plan sponsor's controlled group. If a plan sponsor excludes mortality experience data for the period prior to the date the plan becomes maintained within the new plan sponsor's controlled group, the exclusion must apply for all populations within the plan.

(ii) *Demonstration relating to lack of credible mortality experience.* If the experience study for a newly affiliated plan excludes mortality experience data for the period prior to the date the plan becomes maintained by a member of the new plan sponsor's controlled group, then the demonstration that the plan does not have credible mortality information for a plan year that begins

after the transition period can be made using a shorter experience study period than would otherwise be permitted under paragraph (c)(2)(iii)(B) of this section, provided that the experience study period begins with the date the plan becomes maintained within the sponsor's controlled group and ends not more than one year and one day before the first day of the plan year.

(iii) *Demonstration relating to credible mortality experience.* If the experience study for a newly affiliated plan excludes mortality experience data for the period prior to the date the plan becomes maintained by a member of the new plan sponsor's controlled group and the plan fails to demonstrate that it does not have credible mortality information for the plan year under the rules of paragraph (f)(3)(ii) of this section, then other plans within the controlled group can continue to use substitute mortality tables only if substitute mortality tables are used for the newly affiliated plan the plan year. In such a case, the experience study period can be a shorter period than the period in paragraph (d)(2) of this section, provided that the period is at least one year.

(4) *Definition of newly affiliated plan.* For purposes of this paragraph (f), a plan is treated as a newly affiliated plan if it becomes maintained by the plan sponsor (or by a member of the plan sponsor's controlled group) in connection with a merger, acquisition, or similar transaction described in § 1.410(b)–2(f). A plan also is treated as a newly affiliated plan for purposes of this section if the plan is established in connection with a transfer of assets and liabilities from another employer's plan in connection with a merger, acquisition, or similar transaction described in § 1.410(b)–2(f).

(g) *Effective/applicability date.* This section applies for plan years beginning on or after January 1, 2018, and any substitute mortality table used for a plan for such a plan year must comply with the rules of this section.

■ **Par. 4.** Section 1.431(c)(6)–1 is revised to read as follows:

§ 1.431(c)(6)–1 Mortality tables used to determine current liability.

(a) *Mortality tables used to determine current liability.* The mortality assumptions that apply to a defined benefit plan for the plan year pursuant to section 430(h)(3)(A) and § 1.430(h)(3)–1(a) are used to determine a multiemployer plan's current liability for purposes of applying the rules of section 431(c)(6). Either the generational mortality tables used pursuant to § 1.430(h)(3)–1(a)(2) or the static mortality tables used pursuant to § 1.430(h)(3)–1(a)(3) are permitted to be used for a multiemployer plan for this purpose. However, for this purpose, substitute mortality tables under § 1.430(h)(3)–2 are not permitted to be used for a multiemployer plan.

(b) *Effective/applicability date.* This section applies for plan years beginning on or after January 1, 2018. For rules that apply to plan years beginning before January 1, 2018 and on or after January 1, 2008, see § 1.431(c)(6)–1 (as contained in 26 CFR part 1 revised April 1, 2015).

■ **Par. 5.** Section 1.433(h)(3)–1 is added to read as follows:

§ 1.433(h)(3)–1 Mortality tables used to determine current liability.

(a) *Mortality tables used to determine current liability.* In accordance with section 433(h)(3)(B), the mortality assumptions that apply to a defined benefit plan for the plan year pursuant to section 430(h)(3)(A) and § 1.430(h)(3)–1(a) are used to determine a CSEC plan's current liability for purposes of applying the rules of section 433(c)(7)(C). Either the static mortality tables used pursuant to § 1.430(h)(3)–1(a)(3) or generational mortality tables used pursuant to § 1.430(h)(3)–1(a)(2) are permitted to be used for a CSEC plan for this purpose, but substitute mortality tables under § 1.430(h)(3)–2 are not permitted to be used for this purpose.

(b) *Effective/applicability date.* This section applies for plan years beginning on or after January 1, 2018.

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2016–30906 Filed 12–28–16; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–112800–16]

RIN 1545–BN42

Nuclear Decommissioning Funds

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document provides proposed changes to the regulations under section 468A of the Internal Revenue Code of 1986 (Code) relating to deductions for contributions to trusts maintained for decommissioning nuclear power plants and the use of the amounts in those trusts to decommission nuclear plants. The proposed regulations revise certain provisions to: Address issues that have arisen as more nuclear plants have begun the decommissioning process; and clarify provisions in the current regulations regarding self-dealing and the definition of substantial completion of decommissioning.

DATES: Written or electronic comments and requests for a public hearing must be received by March 29, 2017.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–112800–16), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG–112800–16), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC, or sent electronically, via the Federal eRulemaking Portal at *http://www.regulations.gov/* (IRS REG–112800–16).

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Jennifer C. Bernardini, (202) 317–6853; concerning submissions and to request a hearing, Regina Johnson, (202) 317–6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

There is no new collection of information contained in this notice of proposed rulemaking. The collection of information contained in the regulations under section 468A has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545–2091. Responses to these collections of information are required to obtain a tax benefit.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

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 section 6103 of the Code.

Background

This proposed rulemaking consists of several amendments to the existing regulations under section 468A. Section 468A was originally enacted by section

91(c)(1) of the Deficit Reduction Act of 1984, Public Law 98–369, (98 Stat 604) and has been amended, most recently by section 1310 of the Energy Policy Act of 2005, Public Law 109–58 (119 Stat 594). Temporary regulations (TD 9374) under section 468A were published in the **Federal Register** for December 31, 2007 (72 FR 74175). Regulations finalizing and removing the temporary regulations (TD 9512) were published in the **Federal Register** on December 23, 2010 (75 FR 80697).

Explanation of Provisions

1. Definition of Nuclear Decommissioning Costs

A. Inclusion of Amounts Related to the Storage of Spent Fuel Within Definition of Nuclear Decommissioning Costs

Section 468A is intended to allow taxpayers to currently deduct amounts set aside in a qualified fund (Fund) for the purpose of decommissioning a nuclear power plant. The taxpayer must include the amount of any actual or deemed distribution from the Fund in gross income in the year of the distribution, as provided in § 1.468A–2(d)(1). Taxpayers may then claim an offsetting deduction for amounts spent on decommissioning costs as determined under section 461(h) and other sections. See § 1.468A–2(e).

Taxpayers that operate nuclear power plants, whether such plants are currently operating or have ceased operations, must safely store spent fuel. Nuclear fuel assemblies are removed from the reactor and those assemblies are stored in a spent fuel pool for cooling. Subsequently, the spent fuel may be inserted into storage casks and the casks transferred to an on-site Independent Spent Fuel Storage Installation (ISFSI). An ISFSI consists of a concrete storage pad on which the storage casks are placed. Although the Nuclear Waste Policy Act of 1982, 42 U.S.C. 10101, et seq, requires the Department of Energy (DOE) to take and dispose of spent nuclear fuel in a permanent geologic repository, no such repository has been established and the government has not yet begun accepting spent fuel. Thus, operators of nuclear power plants must safely store spent fuel in an on-site ISFSI.

Existing § 1.468A–1(b)(6) defines nuclear decommissioning costs as including ''all otherwise deductible expenses to be incurred in connection with'' the disposal of certain nuclear assets. Section 1.468A–1(b)(6) continues that ''such term also includes costs incurred in connection with the construction, operation, and ultimate decommissioning of a facility used solely to store, pending acceptance by the government for permanent storage or disposal, spent nuclear fuel generated by the nuclear power plant or plants located on the same site as the storage facility.'' The Treasury Department and the IRS have become aware that there are questions regarding whether ISFSI-related costs for the construction or purchase of assets that would not necessarily qualify as ''otherwise deductible'' expenses under the current regulation are included as nuclear decommissioning costs. The proposed regulations clarify the definition of nuclear decommissioning costs to specifically provide for ISFSI-related costs.

B. Inclusion of Amounts for Purchase or Construction of a Depreciable Asset as Part of Decommissioning Process Within Definition of Nuclear Decommissioning Costs

Under the existing regulations, questions have arisen as to whether a cost must be currently deductible for that amount to be payable currently from the Fund under the ''otherwise deductible'' language of § 1.468A–1(b)(6). For example, where a depreciable asset is purchased or constructed as part of the decommissioning process (and the asset is not considered abandoned) questions have arisen regarding whether the ''otherwise deductible'' language is satisfied solely by the fact that the property is depreciable or whether the expense is treated as a deductible decommissioning expense only to the extent that depreciation is currently allowed. This raises a timing issue regarding whether a fund may pay for the purchase or construction of a depreciable asset to be used in decommissioning that is not considered abandoned when completed. Under the present regulations, because the asset would be fully depreciable but the cost of the asset is not otherwise deductible, a fund may only pay for the portion of the depreciation allowable in the tax year in which such property is placed in service. The intent of section 468A is to allow owners of nuclear power plants to put amounts in a Fund on a tax-free basis and then to use those amounts and the earnings on those amounts to pay for decommissioning. In order to effectuate that intent, the proposed regulations broaden the definition of nuclear decommissioning costs to include the total cost of depreciable assets by adding the words ''or recoverable through depreciation'' following ''otherwise deductible'' in § 1.468A–1(b)(6).

2. Clarification of the Applicability of the Self-Dealing Rules to Transactions Between the Fund and Related Parties

Section 4951 imposes an excise tax on acts of self-dealing between a ''disqualified person'' and a trust described in section 501(c)(21). Section 468A(e)(5) provides that, under regulations prescribed by the Secretary, for purposes of section 4951, the Fund shall be treated in the same manner as a trust described in section 501(c)(21). Section 1.468A–5(b)(1) states that the excise taxes imposed by section 4951 apply to each act of self-dealing between the Fund and a disqualified person. Section 1.468A–5(b)(2) defines ''self-dealing,'' for purposes of § 1.468A–5(b), as any act described in section 4951(d), but provides for some exclusions, including a payment by a Fund for the purpose of satisfying, in whole or in part, the liability of the taxpayer who has elected section 468A and established a Fund (electing taxpayer) for decommissioning costs of the nuclear power plant to which the Fund relates. Section 1.468A–5(b)(3), by reference to section 4951(e)(4) and § 53.4951–1(d), provides that the term ''disqualified person'' includes, with respect to a trust, a contributor to the trust and a trustee of the trust.

The IRS has issued several private letter rulings holding that a reimbursement to an electing taxpayer or an unrelated party by a Fund of decommissioning costs, such as severance payments and pre-dismantlement decommissioning costs, is made for the purpose of satisfying the liability of the electing taxpayer for decommissioning costs of the nuclear power plant to which the Fund relates and therefore is not self-dealing. Thus, under these rulings, the reimbursement by a Fund of these costs represents a permissible use of the Funds. To remove any lingering uncertainty, as well as to avoid the burden on taxpayers of filing additional ruling requests on these issues, the proposed regulations clarify that reimbursements of decommissioning costs by the Fund to related parties (including the electing taxpayer) that paid such costs are not an act of self-dealing. However, no amount beyond what is actually paid by the related party, including amounts such as direct or indirect overhead or a reasonable profit element, may be included in the reimbursement by the Fund.

3. Definition of ''Substantial Completion'' in § 1.468A–5(d)(3)(i)

Existing § 1.468A–5(d)(3)(i) defines the substantial completion date as ''the

date that the maximum acceptable radioactivity levels mandated by the Nuclear Regulatory Commission [NRC] with respect to a decommissioned nuclear power plant are satisfied.'' However, § 1.468A–5(d)(3)(ii) provides that, if a significant portion of the total estimated decommissioning costs are not incurred on or before the substantial completion date, the electing taxpayer may request a ruling that designates a date subsequent to the substantial completion date as the termination date; such later date may be no later than the last day of the third taxable year after the taxable year that includes the substantial completion date. Under certain state and local requirements, the plant operator must return the site of the plant to conditions requiring time beyond that needed to reach the maximum radioactivity level mandated by the NRC. To accommodate these situations without requiring that the taxpayer request a ruling, the proposed regulations amend the definition of ''substantial completion'' to the date on which all Federal, state, local, and contractual decommissioning liabilities are fully satisfied.

Proposed Effective/Applicability Date

The rules contained in these regulations are proposed to apply to taxable years ending on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. Notwithstanding the prospective effective date, the IRS will not challenge return positions consistent with these proposed regulations for taxable years ending on or after the date these proposed regulations are published.

Special Analyses

Certain IRS regulations, including these, are exempt from the requirements of Executive Order 12866, as supplemented and affirmed 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. This certification is based on (1) the fact that the rules in these proposed regulations primarily affect owners of nuclear power plants which are not small entities as defined by the Regulatory Flexibility Act (5 U.S.C. 601) and (2) the proposed regulations do not impose a collection of information on small entities. Accordingly, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. 601) is not required. We request comment on the accuracy of this certification. Pursuant to section 7805(f) of the Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronically generated comments that are submitted timely to the IRS. The Treasury Department and the IRS generally request comments on the clarity of the proposed rule and how it may be made easier to understand. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested in writing by a person who timely submits comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these regulations is Jennifer C. Bernardini, Office of Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be 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 * * *

■ **Par. 2.** Section § 1.468A–1 is amended by revising paragraph (b)(6) to read as follows:

§ 1.468A–1 Nuclear decommissioning costs; general rules.

* * * * *

(b) * * *

(6)(i) The term *nuclear decommissioning costs* or *decommissioning costs* includes all otherwise deductible expenses to be incurred in connection with the entombment, decontamination, dismantlement, removal and disposal of the structures, systems and components of a nuclear power plant, whether that nuclear power plant will continue to produce electric energy or has permanently ceased to produce electric energy. Such term includes all otherwise deductible expenses to be incurred in connection with the preparation for decommissioning, such as engineering and other planning expenses, and all otherwise deductible expenses to be incurred with respect to the plant after the actual decommissioning occurs, such as physical security and radiation monitoring expenses. An expense is otherwise deductible for purposes of this paragraph (b)(6) if it would be deductible or recoverable through depreciation or amortization under chapter 1 of the Internal Revenue Code without regard to section 280B.

(ii) The term nuclear decommissioning costs or decommissioning costs also includes costs incurred in connection with the construction, operation, and ultimate decommissioning of a facility used solely to store, pending delivery to a permanent repository or disposal, spent nuclear fuel generated by the nuclear power plant or plants located on the same site as the storage facility (for example, an Independent Spent Fuel Storage Installation). Such term does not include otherwise deductible expenses to be incurred in connection with the disposal of spent nuclear fuel under the Nuclear Waste Policy Act of 1982 (Pub. L. 97–425).

* * * * *

■ **Par. 3.** Paragraph § 1.468A–5 is amended by revising the heading and paragraphs (b)(2)(i) and (d)(3)(i) to read as follows:

§ 1.468A–5 Nuclear decommissioning fund—miscellaneous provisions.

* * * * *

(b) * * *

(2) * * *

(i) A payment by a nuclear decommissioning fund for the purpose of satisfying, in whole or in part, the liability of the electing taxpayer for decommissioning costs of the nuclear power plant to which the nuclear decommissioning fund relates, whether such payment is made to an unrelated party in satisfaction of the decommissioning liability or to the plant operator or other otherwise disqualified person as reimbursement solely for actual expenses paid by such person in satisfaction of the decommissioning liability;

* * * * *

(d) * * *

(3) * * *

(i) The substantial completion of the decommissioning of a nuclear power

plant occurs on the date on which all Federal, state, local, and contractual decommissioning requirements are fully satisfied (the substantial completion date). Except as otherwise provided in paragraph (d)(3)(ii) of this section, the substantial completion date is also the termination date.

* * * * *

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2016–31205 Filed 12–28–16; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2016–0130; FXES11130900000 178 FF09E42000]

RIN 1018–BB90

Endangered and Threatened Wildlife and Plants; Reclassifying the Tobusch Fishhook Cactus From Endangered to Threatened on the Federal List of Endangered and Threatened Plants

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule and 12-month petition finding; request for comments.

SUMMARY: Under the authority of the Endangered Species Act of 1973, as amended (Act), we, the U.S. Fish and Wildlife Service (Service), propose to reclassify the Tobusch fishhook cactus (*Sclerocactus brevihamatus* ssp. *tobuschii;* currently listed as *Ancistrocactus tobuschii*) from endangered to threatened on the Federal List of Endangered and Threatened Plants (List). This determination is based on a thorough review of the best available scientific and commercial information, which indicates that the threats to this plant have been reduced to the point that it no longer meets the definition of endangered under the Act, but may still become endangered within the foreseeable future. This document also serves as the 12-month finding on a petition to reclassify this plant from endangered to threatened.

DATES: We will accept comments received or postmarked on or before February 27, 2017. Please note that if you are using the Federal eRulemaking Portal (see **ADDRESSES**), the deadline for submitting an electronic comment is 11:59 p.m. Eastern Time on this date. We must receive requests for public hearings, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by February 13, 2017.

ADDRESSES: *Written comments:* 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–R2–ES–2016–0130, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, 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–R2–ES–2016–0130, U.S. Fish and Wildlife Service, MS: BPHC, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see *Public Comments,* below, for more information).

Copies of Documents: This proposed rule and supporting documents are available on *http://www.regulations.gov.* In addition, the supporting file for this proposed rule will be available for public inspection, by appointment, during normal business hours, at the Austin Ecological Services Field Office, 10711 Burnet Rd., Suite 200, Austin, TX 78727; telephone 512–490–0057.

FOR FURTHER INFORMATION CONTACT: Adam Zerrenner, Field Supervisor, U.S. Fish and Wildlife Service, Austin Ecological Services Field Office, 10711 Burnet Rd., Suite 200, Austin, TX 78727; telephone 512–490–0057; or facsimile 512–490–0974. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Information Requested

Public Comments

We want any final rule resulting from this proposal to be as effective as possible. Therefore, we invite tribal and governmental agencies, the scientific community, industry, and other interested parties to submit comments or recommendations concerning any aspect of this proposed rule. Comments should be as specific as possible.

To issue a final rule to implement this proposed action, we will take into consideration all comments and any additional information we receive. Such communications may lead to a final rule that differs from this proposal. All comments, including commenters' names and addresses, if provided to us, will become part of the supporting record.

We are specifically requesting comments on:

(1) New information on the historical and current status, range, distribution, and population size of the Tobusch fishhook cactus, including the locations of any additional populations.

(2) New information on the known and potential threats to the Tobusch fishhook cactus.

(3) New information regarding the life history, ecology, and habitat use of the Tobusch fishhook cactus.

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 (16 U.S.C. 1531 *et seq.*) 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 the proposed rule by one of the methods listed in **ADDRESSES**. Comments must be submitted to *http://www.regulations.gov* before 11:59 p.m. (Eastern Time) on the date specified in **DATES**. We will not consider hand-delivered comments that we do not receive, or mailed comments that are not postmarked, by the date specified in **DATES**.

We will post your entire comment—including your personal identifying information—on *http://www.regulations.gov.* If you provide personal identifying information in your comment, 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.

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, Austin Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Public Hearing

Section 4(b)(5)(E) of the Act provides for one or more public hearings on this proposed rule, if requested. We must receive requests for public hearings, in

writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by the date shown in **DATES**. We will schedule public hearings on this proposal, if any are requested, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** at least 15 days before the first hearing.

Peer Review

In accordance with our policy, ''Notice of Interagency Cooperative Policy for Peer Review in Endangered Species Act Activities,'' which was published on July 1, 1994 (59 FR 34270), we are soliciting the expert opinion of at least three appropriate independent specialists regarding scientific data and interpretations contained in the Species Status Assessment Report (SSA Report) (Service 2016; available at *http://www.regulations.gov* under Docket No. FWS–R2–ES–2016–0130) supporting this proposed rule. The purpose of such review is to ensure that our decisions are based on scientifically sound data, assumptions, and analysis. We will incorporate, as appropriate, the feedback from the peer review of the SSA Report into any final determination regarding the subspecies.

Background

Section 4(b)(3)(B) of the Act 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 reclassifying a species may be warranted, we make a finding within 12 months of the date of receipt of the petition (''12-month finding''). In this finding, we determine whether the petitioned action is: (1) Not warranted, (2) warranted, or (3) warranted, but 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. We must publish these 12-month findings in the **Federal Register**. This document represents:

- Our 12-month warranted finding on a July 16, 2012, petition to reclassify the Tobusch fishhook cactus from endangered to threatened (that is, to ''downlist'' this plant);
- Our determination that the Tobusch fishhook cactus no longer meets the definition of endangered under the Act; and
- Our proposed rule to reclassify the Tobusch fishhook cactus from endangered to threatened on the Federal List of Endangered and Threatened Plants.

Previous Federal Actions

We published a final rule to list the Tobusch fishhook cactus as an endangered species under the Act on November 7, 1979 (44 FR 64736). At that time, we also determined that it was not prudent to designate critical habitat for the subspecies because the publication of critical habitat maps could make the species more vulnerable to taking. We issued a recovery plan on March 18, 1987. The recovery plan has not been revised. A status review (''5-year review'') under section 4(c)(2)(A) of the Act was completed for the Tobusch fishhook cactus on January 5, 2010. The 5-year review recommended that this plant be reclassified from endangered to threatened (Service 2010).

On July 16, 2012, we received a petition dated July 11, 2012, from The Pacific Legal Foundation, Jim Chilton, the New Mexico Cattle Growers' Association, New Mexico Farm & Livestock Bureau, New Mexico Federal Lands Council, and Texas Farm Bureau requesting, among other things, that the Tobusch fishhook cactus be reclassified as threatened based on the analysis and recommendation contained in the 5-year review. The Service published a 90-day finding on September 9, 2013 (78 FR 55046) that the petition contained substantial scientific or commercial information indicating that the petitioned action may be warranted. On November 20, 2015, the Service received a complaint (*New Mexico Cattle Growers' Association et al.* v. *United States Department of the Interior et al.,* No. 1:15–cv–01065–PJK–LF (D. N.M.)) for declaratory judgment and injunctive relief from the New Mexico Cattle Growers' Association, Jim Chilton, New Mexico Farm & Livestock Bureau, New Mexico Federal Lands Council, and Texas Farm Bureau to, among other things, compel the Service to make a 12-month finding on the petition. This document serves as our 12-month warranted finding on the July 16, 2012, petition to reclassify the Tobusch fishhook cactus from endangered to threatened.

Species Status Assessment for Tobusch fishhook cactus.

We prepared a Species Status Assessment (SSA) for the Tobusch fishhook cactus (Service 2016; available at *http://www.regulations.gov*), which includes a thorough review of the subspecies' taxonomy, natural history, habitats, ecology, populations, and range. The SSA analyzes individual, population, and subspecies requirements, as well as factors affecting the subspecies' survival and its current conditions, to assess the subspecies' current and future viability in terms of resilience, redundancy, and representation.

We define viability as the ability of a species to persist and to avoid extinction over the long term. Resilience refers to the population size and demographic characteristics necessary to endure stochastic environmental variation (Shaffer and Stein 2000, pp. 308–310). Resilient populations are better able to recover from losses caused by random variation, such as fluctuations in recruitment (demographic stochasticity), variations in rainfall (environmental stochasticity), or changes in the frequency of wildfires. Redundancy refers to the number and geographic distribution of populations or sites necessary to endure catastrophic events (Shaffer and Stein 2000, pp. 308–310). As defined here, catastrophic events are rare occurrences, usually of finite duration, that cause severe impacts to one or more populations. Examples of catastrophic events include tropical storms, unusually high or prolonged floods, prolonged drought, and unusually intense wildfire. Species that have multiple resilient populations distributed over a larger landscape are more likely to survive catastrophic events, since not all populations would be affected. Representation refers to the genetic diversity, both within and among populations, necessary to conserve long-term adaptive capability (Shaffer and Stein 2000, pp. 307–308). Species with greater genetic diversity are more able to adapt to environmental changes and to colonize new sites.

The SSA Report provides the scientific basis that informs our regulatory determination as to whether or not this subspecies should be listed as an endangered or a threatened species under the Act. This decision involves the application of standards within the Act, the Act's implementing regulations, and Service policies (see Finding and Proposed Determination, below). The following discussion is a summary of the results and conclusions from the SSA Report. We are soliciting peer review of the draft SSA Report from three objective and independent scientific experts.

Description

Tobusch fishhook cactus is a rare, endemic plant of the Edwards Plateau of central Texas. The common and scientific names honor Herman

Tobusch, who first collected it in 1951 (Marshall 1952, p. 78). In the wild, this globose or columnar cactus rarely exceeds 5 centimeters (2 inches) in diameter and in height (Poole and Janssen 2002, p. 7). As the name implies, it is armed with curved ''fishhook'' spines.

Classification

The taxonomic classifications of Tobusch fishhook cactus include several published synonyms. We listed it as a species, *Ancistrocactus tobuschii* (44 FR 64736, November 7, 1979), and retained this classification for the recovery plan (Service 1987). However, recent phylogenetic evidence supports classifying Tobusch fishhook cactus as subspecies *tobuschii* of *Sclerocactus brevihamatus* (Porter and Prince 2011, pp. 40–47). It is distinguished morphologically from its closest relative, *S. brevihamatus* ssp. *brevihamatus,* on the basis of yellow versus pink- or brown-tinged flowers, fewer radial spines, and fewer ribs (Marshall 1952, p. 79; Poole et al. 2007, p. 442; Porter and Prince 2011, pp. 42–45). Additionally, *S. brevihamatus* ssp. *tobuschii* is endemic to limestone outcrops of the Edwards Plateau, while *S. brevihamatus* ssp. *brevihamatus* occurs in alluvial soils in the Tamaulipan Shrublands and Chihuahuan Desert. A recent investigation confirmed genetic divergence between the two subspecies, although they may interact genetically in a narrow area where their ranges overlap (Rayamajhi 2015, pp. 67, 98; Sharma 2015, p. 1). With the publication of this proposed rule, we officially accept the new scientific name of the Tobusch fishhook cactus as *Sclerocactus brevihamatus* ssp. *tobuschii.*

Reproduction

Tobusch fishhook cactus grows slowly, reaching a reproductive size of about 2 centimeters (0.8 inches) in diameter after 9 years (Emmett 1995, pp. 168–169). It flowers between late January and mid-March, and its major pollinators are honey bees and halictid bees (Emmett 1995, pp. 74–75; Lockwood 1995, pp. 428–430; Reemts and Becraft 2013, pp. 6–7; Langley 2015, pp. 21–23). The breeding system is primarily out-crossing, requiring two individuals for reproduction, but the subspecies is capable of self-fertilization (Emmett 1995, p. 70; Langley 2015, pp. 24–28). Reproductive individuals produce an average of 112 seeds per year (Emmett 1995, p. 108). Ants may be seed predators, dispersers, or both (Emmett 1995, pp. 112–114, 124). Mammals or birds may also accomplish longer distance seed dispersal (Emmett 1995, pp. 115–116, 126). There is little evidence that seeds persist in the soil (Emmett 1995, pp. 120–122).

Habitats

When listed as endangered in 1979, fewer than 200 individuals of Tobusch fishhook cactus were known from 4 riparian sites, 2 of which had been destroyed by floods (44 FR 64736, November 7, 1979; Service 1987, pp. 4–5). We now understand that those riparian habitats were atypical; the great majority of populations that have now been documented occur in upland sites dominated by Ashe juniper-live oak woodlands and savannas on the Edwards Plateau (Poole and Janssen 2002, p. 2). Soils are classified in the Tarrant, Ector, Eckrant, and similar series. Within a matrix of woodland and savanna, the subspecies occurs in discontinuous patches of very shallow, gravelly soils where bare rock and rock fragments comprise a large proportion of the surface cover (Sutton et al. 1997, pp. 442–443). Associated vegetation includes small bunch grasses and forbs. The subspecies' distribution within habitat patches is clumped and tends to be farther from woody plant cover (Reemts 2014, pp. 9–10). The presence of cryptograms, primitive plants that reproduce by spores rather than seeds, may be a useful indicator of fine-scale habitat suitability (Service 2010, p. 17). Wildfire (including prescribed burning) causes negligible damage to Tobusch fishhook cactus populations (Emmett 1995, p. 42; Poole and Birnbaum 2003, p. 12). The subspecies probably does not require fire for germination, establishment, or reproduction, but periodic burning may be necessary to prevent the encroachment of woody plants into its habitats.

Populations and Range

A population of an organism is a group of individuals within a geographic area that are capable of interbreeding or interacting. Although the term is conceptually simple, it may be difficult to determine the extent of a population of rare or cryptic species, and this is certainly the case for Tobusch fishhook cactus. Thorough surveys on public lands, such as state parks and highway rights-of-way, have detected groups of individuals, but since the vast majority of the surrounding private lands have not been surveyed, we do not know if these are small, isolated populations, or parts of larger interacting populations or meta-populations. For convenience, we often informally use the terms ''site'', referring to a place where the species was found, and ''colony'', referring to a cluster of individuals, when we do not know the extent of the local population.

Tobusch fishhook cactus populations are now confirmed in eight central Texas counties: Bandera, Edwards, Kerr, Kimble, Kinney, Real, Uvalde, and Val Verde. In 2009, the Texas Native Diversity Database listed 105 element occurrences, areas in which the species was present, (EOs; NatureServe 2002, p. 10) of Tobusch fishhook cactus, totaling 3,395 individuals (TXNDD 2009, pp. 1–210). Texas Parks and Wildlife Department botanists monitored 118 permanent plots at 12 protected natural areas from 1991 through 2013 (Poole and Janssen 2002, entire; Poole and Birnbaum 2003, entire). Annual mortality in plots was often greater than 20 percent, and consistently exceeded recruitment (Emmett 1995, pp. 155–161; Poole and Birnbaum 2001, p. 5). In particular, infestations by insect larvae caused catastrophic population declines (Emmett 1995, pp. 155–161; Calvert 2003, entire). However, mortality and recruitment determinations are confounded by the great difficulty in detecting live plants in the field (Poole and Janssen 2002, p. 5; Reemts 2014, pp. 1, 8). Despite the decline of many individual colonies, the total known population sizes have steadily increased, due to the discovery of previously undetected individuals and colonies.

Summary of Subspecies Requirements

Requirements of Individuals

Tobusch fishhook cactus plants occur in patches of very shallow, rocky soil overlying limestone. The immediate vicinity of plants is sparsely vegetated with small bunch grasses and forbs and there is little or no woody plant cover. Individuals require an estimated 9 years to reach a reproductive size of about 2 centimeters (0.8 inches) in diameter. Reproduction is primarily by out-crossing between unrelated individuals, and the known pollinators include honey bees and halictid bees. Out-crossing requires genetically diverse cactus populations within the foraging range of pollinators, and is less likely to occur in small, isolated populations. Healthy pollinator populations, in turn, require intact, diverse, native plant communities. Halictid bees are frequent natural pollinators of the Tobusch fishhook cactus. Given their relatively small size, we expect the foraging range of these bees to be fairly limited. Therefore, the health and diversity of native vegetation within the vicinity of Tobusch fishhook cactus plants (a range

of 50 to 500 meters (m) (164 to 1,640 feet (ft)) may be particularly important for successful cactus reproduction. Healthy pollinator populations also require the least possible exposure to agricultural pesticides within their foraging ranges.

Requirements of Populations

Population persistence requires stable or increasing demographic trends. Although some Tobusch fishhook cactus individuals live for decades, annual mortality rates are often greater than 20 percent, and relatively few individuals live long enough to reproduce. Mortality within monitored colonies often exceeds recruitment, and some colonies have died out. Nevertheless, even where individual colonies have collapsed, the total documented population sizes at many protected natural areas are stable or increasing, due to discoveries of new individuals and colonies. Therefore, the assessment of demographic trends depends on how populations are delineated; we conclude that it is more appropriate to track the collective populations of multiple colonies that interact on a landscape scale (*i.e.,* meta-populations). Meta-population persistence requires recruitment of new colonies, and/or reestablishment at sites of former colonies that previously collapsed. A major cause of mortality is infestation by insect larvae, mainly by an undescribed species of *Gerstaeckeria* (cactus weevil), and one or more species of cactus longhorn beetles (*Moneilema* spp.). The adults of these parasites are flightless, so their dispersal to new colonies is likely to be very limited. When individual colonies of the cactus die off, the parasites also die off, rendering those patches of suitable habitat available for cactus re-colonization. Hence, these periodic infestations of parasite larvae greatly influence the population dynamics of the Tobusch fishhook cactus. The distance between colonies has two opposing effects on their persistence. Greater distance reduces susceptibility to parasite infestation, but also reduces the amount of gene flow, by means of pollinators vectoring pollen, or through seed dispersal, between colonies. Thus, the persistence of entire meta-populations would require fairly large landscapes where discontinuous patches of suitable habitat are distributed and populated at a density just low enough to hold the parasites at bay, but just high enough for halictid bees and other pollinators and seed dispersers to vector genes between them.

One measure of population resilience is minimum viable population (MVP), which is an estimate of the minimum population size that has a high probability of enduring a specified period of time. Poole and Birnbaum (2003, p. 1) estimated an MVP of 1,200 individuals for the Tobusch fishhook cactus, using a surrogate species approach (Pavlik 1996, pp. 136–137). For the reasons explained above, MVP levels are more appropriately applied to meta-populations rather than individual colonies of this cactus.

The degree of genetic diversity within Tobusch fishhook cactus populations is important for several reasons. First, diversity within populations should confer greater resistance to pathogens and parasites, and greater adaptability to environmental stochasticity (random variations, such as annual rainfall and temperature patterns) and climate changes. Second, low genetic diversity within interbreeding populations leads to a higher incidence of inbreeding, and potentially to inbreeding depression. Finally, the breeding system of the Tobusch fishhook cactus is primarily out-crossing, so populations with too little genetic diversity would produce fewer progeny.

Fire, whether natural or prescribed, appears to have little effect on individual Tobusch fishhook cactus plants. This is because the plants occur where vegetation is very sparse, and the plants protrude very little above the ground and are protected by surrounding rocks from the heat of vegetation burning nearby. On the other hand, periodic fire is likely to be necessary for population persistence to reduce juniper encroachment into suitable habitats. Furthermore, the diverse shrub and forb vegetation that sustains healthy pollinator populations is maintained by periodic wildfire; without fire, dense juniper groves frequently displace these shrubs and forbs. Hence, if the native plant diversity of entire landscapes surrounding Tobusch fishhook cactus populations succumbs to juniper encroachment, pollinator populations will likely decline, and reproduction of the Tobusch fishhook cactus and gene flow between its colonies may be reduced.

Subspecies Requirements

In addition to population resilience (described above under ''Requirements of Individuals'' and ''Requirements of Populations''), we assess the subspecies' viability in terms of its redundancy and representation.

Given that insect parasites are able to devastate large, dense populations, a few large populations are much more vulnerable than many small populations. The resilience of the Tobusch fishhook cactus derives not merely from the size of meta-populations, but also their density. Meta-populations with a low density of colonies may incur loss of genetic diversity and increased potential for inbreeding. Conversely, vulnerability to insect parasitism increases when meta-populations become too dense, or when individual colonies become too large. Assessments of resilience (meta-population size and demographics) and redundancy (number of meta-populations within representative areas) depend on how meta-populations are delineated. We believe that there must be some optimal range of meta-population density, *i.e.* the distance between meta-populations, and of colony size, although we do not currently know what those are.

Representation reflects the genetic diversity, both within and among populations, necessary to conserve long-term adaptive capability (Shaffer and Stein 2000, pp. 307–308). Genetic diversity within a population can be measured by the numbers of variant forms of genes represented in that population. One measure of this within-population genetic diversity is called heterozygosity; possible values range from 0 (all members of a population are genetically identical for specified genes) to 1.0 (all members of a population a genetically different). Another useful measure is the inbreeding coefficient (F_{IS}), which ranges from -1 (all members of the population are heterozygous, containing two forms of specific genes, and there is no evidence of inbreeding) to 1.0 (all members are homozygous, containing only one form of specific genes, and inbred). Although there are no heterozygosity levels or inbreeding coefficients that are considered healthy for all species, we may assess the genetic health of the Tobusch fishhook cactus by comparison to the observed values of reference species, such as other cactus species with similar life histories that are abundant and widespread (Rayamajhi 2015, pp. 56, 63; Schwabe et al. 2015, pp. 449, 454–455). The array of different environments in which a species occurs, such as the riparian and upland sites where Tobusch fishhook cactus is found, can also be used as a proxy measure for genetic diversity and therefore representation (Shafer and Stein 2000, p. 308).

Review of the Recovery Plan

Section 4(f) of the Act directs us to develop and implement recovery plans for the conservation and survival of endangered and threatened species

unless we determine that such a plan will not promote the conservation of the species. Recovery plans identify site-specific management actions that will achieve recovery of the species, measurable criteria that set a trigger for review of the species' status, and methods for monitoring recovery progress.

Recovery plans are not regulatory documents; instead they are intended to establish goals for long-term conservation of listed species and define criteria that are designed to indicate when the threats facing a species have been removed or reduced to such an extent that the species may no longer need the protections of the Act, as well as actions that may be employed to achieve reaching the criteria. There are many paths to accomplishing recovery of a species, and recovery may be achieved without all criteria being fully met or all actions fully implemented. Recovery of a species is a dynamic process requiring adaptive management that may, or may not, fully follow the guidance provided in a recovery plan.

The Tobusch fishhook cactus recovery plan was approved by the Service on March 18, 1987 (Service 1987). Delisting criteria were not established in the recovery plan. However, the recovery plan established a criterion of 3,000 individuals in each of four safe sites for reclassification from endangered to threatened.

We now understand that insect parasites are able to devastate large, dense populations and we conclude that a few large populations are much more vulnerable than many small populations; therefore, this recovery criterion should be amended. Currently, many small populations exist, and surveyors have documented 3,395 Tobusch fishhook cactus individuals at 105 element occurrences (EOs) in 8 counties of the Edwards Plateau, including 12 sites managed either by the state or conservation organizations, where monitored populations ranged from 34 to 1,090 individuals.

Summary of Factors Affecting the Subspecies

Section 4 of the Act and its implementing regulations (50 CFR part 424) set forth the procedures for listing species, reclassifying species, or removing species from listed status. A species may be determined to be an endangered or threatened species due to one or more of the five listing factors described in section 4(a)(1) of the Act: (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 may be reclassified or delisted on the same basis. Consideration of these factors was incorporated into the Tobusch fishhook cactus SSA (Service 2016; available at *http://www.regulations.gov* under Docket No. FWS–R2–ES–2016–0130) and projected in future scenarios to evaluate viability of the Tobusch fishhook cactus. The effects of conservation measures were also assessed as part of the current condition of the Tobusch fishhook cactus in the SSA Report, and those effects were projected in future scenarios.

Land Use Changes (Factor A)

Relatively little urban and industrial development is occurring within the semi-arid, sparsely populated eight-county known range of the Tobusch fishhook cactus. However, a significant ongoing trend throughout the subspecies' range is the subdivision of large ranches leading to a proliferation of roads, fences, power lines, and residential development, all of which contribute incrementally to habitat loss and fragmentation.

The predominant, historic land use throughout the Edwards Plateau has been livestock grazing. In many cases, poor rangeland management during the last century has caused the depletion of herbaceous vegetation, cessation of the natural wildfire cycle, proliferation of dense juniper stands, soil erosion, and reduced infiltration and storage of rainwater in the soil profile; all of these changes are likely to have harmed Tobusch fishhook cactus populations. The change to a primarily recreational land use often entails continued grazing, but at a sustainable stocking density.

Prescribed burning may be one of the most important vegetation management tools for sustaining Tobusch fishhook cactus populations because it reduces woody vegetation encroachment. However, the proliferation of residential development within the species' habitat makes this tool more challenging for natural resource managers to use.

Changes in Vegetation and Wildfire Frequency (Factor A)

Bray (1904, pp. 14–15, 23–24) documented the rapid transition of grasslands to woodlands in the Edwards Plateau occurring more than a century ago; he attributed this change to overgrazing, the depletion of grasses, and the cessation of wildfires. Fonteyn et al. (1988, p. 79) state that savannas covered portions of the pre-settlement Edwards Plateau, and since 1850 were transformed to shrubland or woodland ''primarily by suppression of recurring natural and anthropogenic fires and the introduction of livestock.'' They list the fire-sensitive Ashe juniper (*Juniperus ashei*) as the most successful of many woody plants that have invaded grasslands. Reemts (2014 p. 1) lists the encroachment of woody plants into the rocky, open habitat as one of several remaining habitat-related threats that endanger the Tobusch fishhook cactus.

Livestock Grazing (Factor A)

The recovery plan stated, ''*Ancistrocactus tobuschii* plants have been observed that were either uprooted or had apical meristem injuries from livestock trampling.'' Nevertheless, livestock trampling and herbivory have not subsequently been identified as significant causes of mortality or damage to Tobusch fishhook cactus plants. Their recurved spines and small size probably protect Tobusch fishhook cactus plants from livestock herbivory. Livestock are not attracted to the sparsely vegetated outcrops where Tobusch fishhook cactus plants typically occur, and the plants are often nestled among larger rocks. While livestock trampling probably occurs in grazed habitats, we have no evidence that it represents a significant threat to the subspecies. A number of healthy Tobusch fishhook cactus populations occur on well-managed rangeland. We conclude that properly managed livestock grazing, especially where juniper thinning and prescribed burning are used to manage rangeland, is generally compatible with conservation of this cactus.

Illegal Collection (Factor B)

Many rare cactus populations have been depleted by overzealous collectors. The recovery plan lists illegal collection as a threat to the subspecies. Westlund (1991, pp. 2, 35, 39) found six specimens of Tobusch fishhook cactus, grown legally from seed, for sale in commercial nurseries. Poole and Janssen (2002, p. 9) noted that one population of the Tobusch fishhook cactus was heavily depleted by collection, but concluded that ''collection is not currently perceived to be a grave threat.'' Although illegal collection has not significantly impacted the subspecies, the wild populations openly accessed by the public remain vulnerable. The potential threat of illegal collection might be diminished if seeds and plants of legally propagated Tobusch fishhook cacti

become easier and less expensive to obtain than wild-dug specimens.

Parasites (Factor C)

The Tobusch fishhook cactus weevil (*Gerstaeckeria* spp.) and cactus longhorn beetle (*Moneilema* spp.) parasitize and kill Tobusch fishhook cactus plants and have contributed significantly to drastic declines in many of the known populations (Calvert 2003, entire).

Periodic outbreaks of insect parasitism appear to be an unavoidable natural cycle. For this reason, large cactus populations could eventually host very large parasite populations, leading to their collapse. The most appropriate conservation strategy may be to protect larger numbers of small, widely spaced meta-populations, rather than fewer large populations that are more vulnerable to parasites.

Other Herbivory (Factor C)

Poole and Birnbaum (2003, pp. 11–12) report that jackrabbits browse the cactus, but in most sites cause less than 2 percent mortality. If the root systems are not too badly damaged, they may regenerate one or more new stems. Feral hogs have uprooted plants in many sites (also observed by Reemts (2015, p. 1)). An unidentified ant species has also caused 1 percent mortality at some sites by creating mounds on top of the stems. With the exception of feral hogs, herbivory does not appear to be a significant cause of mortality or damage to Tobusch fishhook cactus plants.

Inadequacy of Existing Regulatory Mechanisms (Factor D)

Federally listed plants occurring on private lands have limited protection under the Act, unless also protected by state laws; the State of Texas also provides very little protection to listed plant species on private lands. Approximately 95 percent of Texas land area is privately owned. It is reasonable to assume that the vast majority of existing Tobusch fishhook cactus habitat, including sites that have not been documented, occurs on private land. Therefore, most of the subspecies' populations and habitats are not subject to Federal or state protection unless there is a Federal nexus, such as provisions of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a federally funded project.

Demographic Consequences of Small Population Size and Density (Factor E)

Poole and Birnbaum (2003, p. 1) estimated an MVP of 1,200 individuals (Service 2016, section II.7.5, available at *http://www.regulations.gov* under Docket No. FWS–R2–ES–2016–0130). For Tobusch fishhook cactus, MVP levels are more appropriately applied to meta-populations rather than individual colonies. Small populations are less able to recover from losses caused by random environmental changes (Shaffer and Stein 2000, pp. 308–310), such as fluctuations in recruitment (demographic stochasticity), variations in rainfall (environmental stochasticity), or changes in the frequency of wildfires. The Tobusch fishhook cactus has a predominantly out-crossing breeding system. The probability of successful fertilization between unrelated individuals is reduced in small, isolated populations. The remaining plants would produce fewer viable seeds, further reducing population recruitment and engendering a downward spiral toward extirpation. The demographic consequences of small population size are compounded by genetic consequences (discussed below), because reduced out-crossing corresponds to increased inbreeding. In addition to population size, it is likely that population density within meta-populations also influences population viability; density must be high enough for gene flow within meta-populations, but low enough to minimize parasite infestations.

Genetic Consequences of Small Population Sizes (Factor E)

Small, reproductively isolated populations are susceptible to the loss of genetic diversity, to genetic drift, and to inbreeding. The loss of genetic diversity may reduce the ability of a species or population to resist pathogens and parasites, to adapt to changing environmental conditions, or to colonize new habitats. Conversely, populations that pass through a ''genetic bottleneck'', *i.e.* a time of significant loss of genetic diversity, may subsequently benefit through the elimination of harmful alleles, or the variant forms of a given gene. Nevertheless, the net result of loss of the genetic diversity is likely to be a loss of fitness and lower chance of survival of populations and of the subspecies.

Genetic drift is a change in the frequencies of alleles in a population over time. Genetic drift can arise from random differences in founder populations, *i.e.* new populations originally established by a very small number of individuals, and the random loss of rare alleles in small, isolated populations. Genetic drift may have a neutral effect on fitness, or contribution to the gene pool, in larger populations, but may cause the loss of genetic diversity in small populations. Genetic drift may also result in the adaptation of an isolated population to the climates and soils of specific sites, leading to the development of distinct genotypes that are specifically adapted to a particular ecological area and to speciation, or the evolution of new species. For example, the genetic divergence of *Sclerocactus brevihamatus* ssp. *brevihamatus* and *S. brevihamatus* ssp. *tobuschii* (Rayamajhi 2015, pp. 67, 98; Service 2016, pp. 6–7, available at *http://www.regulations.gov* under Docket No. FWS–R2–ES–2016–0130) may have resulted when populations of the species *brevihamatus* migrated into separate geographic regions, and once separated, each population adapted to different soils, climate, and pollinator species.

Inbreeding depression is the loss of fitness among offspring of closely related individuals. While most animal species are susceptible to inbreeding depression, plant species vary greatly in response to inbreeding. Levels of inbreeding can be measured with the inbreeding coefficient (F_{IS}), which ranges from -1 (all members of the population are heterozygous for specific genes and there is no evidence of inbreeding) to 1.0 (all members are homozygous and inbred). Rayamajhi (2015, pp. 63–64) found relatively high inbreeding coefficients in three of eight populations, which he attributed to mating of close relatives within small, isolated populations. Nevertheless, we do not know to what extent inbreeding has reduced fitness of these populations.

Land Ownership (Factor E)

A large portion of the known individuals and populations of the Tobusch fishhook cactus occurs on privately owned land. This does not constitute a direct threat to the subspecies, and many landowners have demonstrated interest and enthusiasm for its conservation. However, private ownership makes conservation more challenging for several reasons. Access to populations and habitats is subject to the interests of hundreds of individual landowners. Consequently, our knowledge of the subspecies' actual status is far from complete. Establishing and maintaining cooperative relationships with large numbers of private landowners is time-consuming, and these important relationships may lapse when personnel of conservation organizations retire or pursue other career choices. The ownership of private lands changes hands over time, and future owners may choose not to continue conservation efforts that were supported by previous owners. Hence, it

is difficult to assure permanent conservation on private lands. These challenges underscore the importance of effective landowner outreach in the conservation of the Tobusch fishhook cactus.

Climate Change (Factor E)

The Fifth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC) (IPCC 2013, p. 23) projects the following changes by the end of the 21st century, relative to the 1986 to 2005 averages: It is virtually certain that most land areas will experience warmer and/or fewer cold days and nights; it is virtually certain that most land areas will experience warmer and/or more frequent hot days and nights; it is very likely that the frequency and/or duration of warm spells and heat waves will increase in most land areas; it is very likely that the frequency, intensity, and/or amount of heavy precipitation will increase in mid-latitude land masses; it is likely that the intensity and/or duration of droughts will increase on a regional to global scale. The magnitude of projected changes varies widely, depending on which scenario of future greenhouse gas emissions is used.

To evaluate how the climate of Tobusch fishhook cactus habitats may change, we used the National Climate Change Viewer (U.S. Geological Survey 2015) to compare past and projected future climate conditions for Edwards County, Texas. The baseline for comparison was the observed mean values from 1950 through 2005, and 30 climate models were used to project future conditions for 2050 through 2074. We selected the climate parameters of August maximum temperature, January minimum temperature, annual mean precipitation, and annual mean evaporative deficit. These particular parameters were selected from those available because they represented those most likely to impact the survival of individuals. The highest temperature of the year (August maximum temperature) could potentially affect individuals by exacerbating the effects of drought and the lowest temperatures of the year (January minimum temperature) could expose individuals to freezing temperatures. The annual mean precipitation and evaporative deficit provide measures of drought that could negatively affect individuals. The results are described in detail in the SSA Report (Service 2016, available at *http://www.regulations.gov* under Docket No. FWS–R2–ES–2016–0130), but generally, these models project that plant growth and survival in Edwards County will become more moisture-limited, although the degree of change varies under different scenarios.

Nevertheless, we do not know how the Tobusch fishhook cactus responded to prior climate changes, nor can we determine how these projected climate changes will affect the Tobusch fishhook cactus and its habitat. Warmer winters could extend the growing season and improve reproduction and survival of the Tobusch fishhook cactus, but might also increase survival of parasite larvae. Heavier, less frequent rainfall could reduce establishment of Tobusch fishhook cactus seedlings, but perhaps less so than the bunch grasses with which it competes. Zaya et al. (2014, pp. 37–38) projected that climate changes will be detrimental to 4 populations, due primarily to lower survival and reproduction, and beneficial to 6 others, given increased individual growth rates. Thus, although it is likely that the projected climate changes will affect the survival of the Tobusch fishhook cactus in infinitely complex ways, we do not currently know what the net result of beneficial and detrimental effects will be.

Conservation Efforts

Support for the recovery of Tobusch fishhook cactus has come from a variety of sources. Conservation measures from nine formal consultations under section 7 of the Act supported scientific investigations, the salvage of individuals that would have been destroyed by development, and contributions to the Tobusch Fishhook Cactus Conservation Fund (Fund). The Lady Bird Johnson Wildflower Center manages the Fund through a memorandum of agreement with the Service. The Fund supported three projects that contributed significantly to our knowledge of the Tobusch fishhook cactus. These three Tobusch fishhook cactus projects included a study on the effects of shading by woody shrubs, a conservation genetics study, and population viability analyses. Five grants under section 6 of the Act have supported scientific investigations and extensive inventory and monitoring of the subspecies on state highway rights-of-way, in state parks, in wildlife management areas, and in state natural areas. Four graduate-level investigations focused on the Tobusch fishhook cactus, leading to three Master's theses and a doctoral dissertation, and provided information that is essential to the subspecies' conservation and recovery.

Current Status

By 2009, surveyors documented 3,395 Tobusch fishhook cactus individuals at 105 E.O.s in 8 counties of the Edwards Plateau. This includes 12 sites managed either by the state or conservation organizations where monitored populations ranged from 34 to 1,090 individuals, and totaled 3,139 individuals. Recent surveys found 660 new Tobusch fishhook cactus individuals that probably represent many new E.O.s, bringing the total documented number of individuals (based on the most recent surveys) to over 4,000.

We developed a model of potential habitat based on the soil types and watersheds of documented populations. This model predicts that over 2 million hectares (ha) (5 million acres (ac)) of potential habitat occurs in the eight counties of the cactus' currently known range, as well as in some adjacent counties (mainly Crockett and Sutton Counties). However, we have no records of the Tobusch fishhook cactus occurring in any of these adjacent counties, nor have any surveys for the subspecies been conducted there, to our knowledge. Within these areas of potential habitat, only a small fraction of the total area contains suitable habitat, consisting of discontinuous, open areas on or near exposed limestone strata. Based on 25 surveys widely distributed across the subspecies range, we calculated an average density across the range of the species. That average density was applied to the amount of suitable habitat and used to calculate an estimate of the global population. We estimate that the global population is about 480,000 individuals (Service 2016, Appendix B, available at *http://www.regulations.gov* under Docket No. FWS–R2–ES–2016–0130).

From 1991 through 2013, many individual colonies of the Tobusch fishhook cactus declined and some have died out completely. A principle cause of colony decline is parasitism by the larvae of flightless insects, including an undescribed species of *Gerstaeckeria* (a cactus weevil) and one or more species of *Moneilema* (cactus longhorn beetles). At the same time, total populations in monitored sites (consisting of multiple colonies; meta-populations) have remained steady or have increased, due to the discovery of new colonies or re-colonization of formerly depleted colonies. We believe that the Tobusch fishhook cactus co-evolved with these parasitic organisms, and that they are important drivers of its population dynamics. Large, dense cactus populations become susceptible to larval parasitism and decline until parasite populations cannot be sustained. Meta-populations, consisting of multiple, widely-dispersed colonies, appear to be stable; however, we do not

know what the long-term demographic trends are at the meta-population or subspecies level.

The expected heterozygosity (H_e) and observed heterozygosity (H_o) are useful measures of within-population genetic diversity; possible values range from 0 (all members of a population are genetically identical for specified genes) to 1.0 (all members of a population are genetically different). Rayamajhi (2015, pp. 57–61, 64, 97) determined that the mean H_e for nine populations of *Sclerocactus brevihamatus* ssp. *tobuschii* was 0.59, and the mean H_o was 0.37. Through comparison to columnar cactus species that are endemic or have limited geographic distribution, he concluded that, for *S. brevihamatus* ssp. *tobuschii,* H_e was moderately high, and H_o was moderate which suggest there is sufficient genetic diversity to conserve long-term adaptive capability.

Another useful measure is the inbreeding coefficient (F_{IS}), which ranges from -1 (all members of the population are heterozygous for specific genes and there is no evidence of inbreeding) to 1.0 (all members are homozygous and inbred). For *Sclerocactus brevihamatus* ssp. *tobuschii,* the mean F_{IS} was 0.38 (range of 0.15 to 0.63) (Rayamajhi 2015). While most populations had an apparently healthy degree of out-crossing, three populations of *S. brevihamatus* ssp. *tobuschii* were at relatively higher risk of inbreeding effects and may have suffered recent genetic bottlenecks through population declines. The higher level of inbreeding in these populations may be due to small, isolated populations; mating of close relatives within populations; the limited range of seed dispersal; and the limited range and foraging behavior of a primary pollinator, halictid bees.

There were relatively few genetic differences between the nine Tobusch fishhook cactus populations in Rayamajhi's study (2015), regardless of the distance between populations. This evidence supports a hypothesis that gene flow has occurred throughout the subspecies' range, at least until recently; however, recently isolated populations may not yet show genetic differentiation, in part because individuals can live and contribute to the local gene pool at least for several decades.

Assessment of Current and Future Viability

We estimate that about 480,000 individuals of Tobusch fishhook cactus are distributed at low density over an area of more than 2 million ha (5 million ac). Thus, it is likely that the Tobusch fishhook cactus has multiple, resilient populations. Although many individual colonies have declined, meta-population levels of monitored areas appear stable; however, we have very little data on meta-population trends over the subspecies' entire range. Genetic data from wild populations indicate that most populations, and the subspecies as a whole, currently possess sufficient genetic diversity to conserve long-term adaptive capability. Nevertheless, some small, isolated populations have higher levels of inbreeding, and may as a consequence suffer reduced fitness and reproduction. There is relatively little genetic diversity between populations, which is evidence that gene flow has occurred fairly recently between populations. Considering the naturally low densities of Tobusch fishhook cactus populations, gene flow among them may be easily disrupted.

Demographic population viability analyses (PVA) of monitoring plot data predicted stable or increasing trends for two or three populations, moderate declines for two populations, and large to precipitous declines in five populations over the next 50 years (Zaya et al. 2014, pp. 29–42). When expected climate changes were included in these analyses, four populations responded negatively to climate changes, and six populations responded positively (compared to PVA without climate changes). These findings predict an overall decline in subspecies viability over the 50 year time frame. However, we do not know how well these analyses project the demographic trends of meta-populations distributed over larger landscapes.

We project what the viability of the Tobusch fishhook cactus could be, between 2050 and 2074, under three scenarios. We considered how conservation support, the subspecies' geographic range, habitat management, population management, and climate changes may contribute to these scenarios. The first scenario represents improvements over current conditions. The second scenario represents the most likely conditions if current trends continue. The third scenario represents deteriorating conditions. We conclude that under the most likely scenario, the subspecies remains viable but requires continued conservation, management, and protection.

Finding and Proposed Determination

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the Tobusch fishhook cactus. The Tobusch fishhook cactus was listed as endangered in 1979, due to: Few known populations, habitat destruction, and altered stream flows (Factor A); illegal collection (Factor B); and very limited geographic range, small population sizes, restricted gene pool, and lack of reproduction (Factor E). We now know there are many more populations over a much wider area; about 4,000 individuals have been documented at more than 105 EOs. These data allow us to estimate that the total population size is about 480,000 individuals distributed at low density over about 2 million ha (5 million ac). Most habitats are relatively secure, given that they are in remote, rocky areas that are unsuitable for growing crops. However, the great majority is on private lands that are becoming increasingly fragmented and may be subject to destruction or modification. Many of the known populations are small and isolated, and the monitored portions of numerous populations have declined. Demographic population viability analyses predict an overall future decline in subspecies' viability. However, we do not know how well these analyses project the demographic trends of meta-populations distributed over larger landscapes. We know that insect parasites are a major cause of mortality, and may naturally reduce populations to low densities. Many populations have sufficient genetic diversity to confer long-term adaptive capability, but some small, isolated populations have higher levels of inbreeding and may be affected by reduced fitness and reproduction. It is likely that projected climate changes will affect the Tobusch fishhook cactus, but we do not currently know whether this will have a net positive or negative effect on its viability.

We have determined that the Tobusch fishhook cactus' current viability is higher than was known at the time of listing. Based on the analysis in the SSA, and summarized above, we believe that the Tobusch fishhook cactus does not meet the definition of endangered under the Act. However, due to continued threats from the demographic and genetic consequences of small population sizes and geographic isolation, insect parasitism, feral hog depredation, and changes in the wildfire cycle and vegetation, as well as unknown long-term effects of land use changes and climate changes, we find that the Tobusch fishhook cactus is likely to become an endangered species within the foreseeable future throughout all of its range. Because we have found that the Tobusch fishhook cactus

(*Sclerocactus brevihamatus* ssp. *tobuschii;* currently listed as *Ancistrocactus tobuschii*) meets the definition of threatened under the Act, we propose to reclassify it from endangered to threatened on the Federal List of Endangered and Threatened Plants (List).

Significant Portion of the Range Analysis

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so throughout all or a significant portion of its range. We published a final policy interpreting the phrase ''significant portion of its range'' (SPR) (79 FR 37578; July 1, 2014). The final policy states that: (1) If a species is found to be endangered or threatened throughout a significant portion of its range, the entire species is listed as endangered or threatened, respectively, and the Act's protections apply to all individuals of the species wherever found; (2) a portion of the range of a species is ''significant'' if the species is not currently endangered or threatened throughout all of its range, but the portion's contribution to the viability of the species is so important that, without the members in that portion, the species would be in danger of extinction, or likely to become so in the foreseeable future, throughout all of its range; (3) the range of a species is considered to be the general geographical area within which that species can be found at the time the Service makes any particular status determination; and (4) if a vertebrate species is endangered or threatened throughout a significant portion of its range, and the population in that significant portion is a valid distinct population segment (DPS), we will list the DPS rather than the entire taxonomic species or subspecies. Because we have determined that the Tobusch fishhook cactus is threatened throughout all of its range, no portion of its range can be ''significant'' for the purposes of the definitions of ''endangered species'' and ''threatened species.''

Conclusion

Using the best available scientific information, we have determined that the Tobusch fishhook cactus is not currently in danger of extinction throughout all or a significant portion of its range, but is likely to become endangered within the foreseeable future throughout all of its range. In accordance with 50 CFR 424.11(c), we therefore propose to reclassify the Tobusch fishhook cactus as threatened on the Federal List of Endangered and Threatened Plants at 50 CFR 17.12(h).

Effects of the Rule

This proposal, if made final, would revise 50 CFR 17.12(h) to reclassify the Tobusch fishhook cactus as threatened on the Federal List of Endangered and Threatened Plants. There is no critical habitat designated for this subspecies; therefore, this proposed rule would not affect 50 CFR 17.96.

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 **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

National Environmental Policy Act

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), need not be prepared in connection with regulations pursuant to section 4(a) of the 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 all references cited in this proposed rule is available at *http://www.regulations.gov* at Docket No. FWS–R2–ES–2016–0130, or upon request from the Austin Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this proposed rule are staff members of the Service's Austin Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

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—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

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

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. Amend § 17.12(h), the List of Endangered and Threatened Plants, under FLOWERING PLANTS by:

■ a. Removing the entry for ''*Ancistrocactus tobuschii*''; and

■ b. Adding, in alphabetical order, an entry for ''*Sclerocactus brevihamatus* ssp. *tobuschii*'' to read as follows:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Scientific name	Common name	Where listed	Status	Listing citations and applicable rules
FLOWERING PLANTS				
*	*	*	*	*
Sclerocactus brevihamatus ssp. *tobuschii*	Tobusch fishhook cactus	Wherever found	T	44 FR 64736; 11/7/1979, [**Federal Register** citation of the final rule].
*	*	*	*	*

Dated: December 15, 2016.

Stephen Guertin,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2016–31296 Filed 12–28–16; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 160426363–6363–01]

RIN 0648–BG03

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Coastal Migratory Pelagic Resources in the Gulf of Mexico and Atlantic Region; Amendment 26

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes to implement management measures described in Amendment 26 to the Fishery Management Plan for the Coastal Migratory Pelagics Fishery of the Gulf of Mexico and Atlantic Region (FMP) as prepared and submitted jointly by the Gulf of Mexico Fishery Management Council (Gulf Council) and South Atlantic Fishery Management Council (South Atlantic Council). Amendment 26 and this proposed rule would adjust the management boundary for the Gulf of Mexico (Gulf) and Atlantic migratory groups of king mackerel; revise acceptable biological catch (ABC), commercial and recreational annual catch limits (ACLs), commercial quotas and recreational annual catch targets (ACTs) for Atlantic migratory group king mackerel; allow limited retention and sale of Atlantic migratory group king mackerel incidentally caught in the shark gillnet fishery; establish a commercial split season for Atlantic migratory group king mackerel in the Atlantic southern zone; establish a commercial trip limit system for Atlantic migratory group king mackerel in the Atlantic southern zone; revise the commercial and recreational ACLs for Gulf migratory group king mackerel; revise commercial zone quotas for Gulf migratory group king mackerel; and modify the recreational bag limit for Gulf migratory group king mackerel. The purpose of Amendment 26 and this proposed rule is to ensure that king mackerel management is based on the best scientific information available, while increasing the social and economic benefits of the fishery.

DATES: Written comments must be received on or before January 30, 2017.

ADDRESSES: You may submit comments on the proposed rule, identified by ''NOAA–NMFS–2016–0120,'' by either of the following methods:

- *Electronic submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal: *http://www.regulations.gov.* Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2016-0120, click the ''Comment Now!''* icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Karla Gore, 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 required fields if you wish to remain anonymous).

Electronic copies of Amendment 26 may be obtained from the Southeast Regional Office Web site at *http://sero.nmfs.noaa.gov/sustainable_fisheries/gulf_sa/cmp/2016/am%2026/index.html.* Amendment 26 includes an environmental assessment, a Regulatory Flexibility Act (RFA) analysis, and a regulatory impact review.

FOR FURTHER INFORMATION CONTACT: Karla Gore, Southeast Regional Office, NMFS, telephone: 727–551–5753, or email: *karla.gore@noaa.gov.*

SUPPLEMENTARY INFORMATION: The coastal migratory pelagic fishery of the Gulf and Atlantic Regions is managed under the FMP and includes the management of the Gulf and Atlantic migratory groups of king mackerel, Spanish mackerel and cobia. The FMP was prepared jointly by the Gulf and South Atlantic Councils (Councils) and is implemented through regulations at 50 CFR part 622 under authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

Background

The Magnuson-Stevens Act requires NMFS and regional fishery management councils to prevent overfishing and achieve, on a continuing basis, OY from federally managed fish stocks.

In September of 2014, the Southeast Data, Assessment, and Review (SEDAR) 38 stock assessment was completed for both the Gulf and Atlantic migratory groups of king mackerel (SEDAR 38). SEDAR 38 determined that both the Gulf and Atlantic migratory groups of king mackerel are not overfished and are not undergoing overfishing. The Gulf Council's and South Atlantic Council's respective Scientific and Statistical Committees (SSCs) reviewed the assessment and concluded that SEDAR 38 should form the basis for revisions to the overfishing limit (OFL), acceptable biological catch (ABC), and ACLs for the two migratory groups of king mackerel. SEDAR 38 also provided genetic information on king mackerel, which indicated that the Councils'

management boundary for the two migratory groups should be revised.

Management Measures Contained in This Proposed Rule

This proposed rule to implement Amendment 26 would adjust the management boundary of the Gulf and Atlantic migratory groups of king mackerel; revise management reference points, the commercial and recreational ACLs, commercial quotas and recreational ACTs for Atlantic migratory group king mackerel; allow limited retention and sale of incidental catch of Atlantic migratory group king mackerel in the shark gillnet fishery; establish a commercial split season for Atlantic migratory group king mackerel in the Atlantic southern zone; establish a commercial trip limit system for Atlantic migratory group king mackerel in the Atlantic southern zone; revise commercial and recreational ACLs for Gulf migratory group king mackerel; revise commercial zone quotas for Gulf migratory group king mackerel; and modify the recreational bag limit for Gulf migratory group king mackerel.

Management Boundary and Zone Descriptions for the Gulf and Atlantic Migratory Groups of King Mackerel

Currently management boundaries change seasonally for the Gulf and Atlantic migratory groups of king mackerel based on the historical understanding that the two migratory groups mixed seasonally off the east coast of Florida and in Monroe County, Florida. However, in 2014, SEDAR 38 determined the mixing zone between the two migratory groups now exists only in the portion of the EEZ off Monroe County, Florida, south of the Florida Keys. This proposed rule would set a single year-round regulatory boundary (Gulf/Atlantic group boundary) separating management of the two migratory groups of king mackerel, based on the genetic analysis used in SEDAR 38. This new year-round Gulf/Atlantic group boundary would be set at a line extending east of the Miami-Dade/Monroe County, FL boundary, to better represent the area where the two migratory groups primarily exist. The newly defined mixing zone off of the Florida Keys would be included in the Gulf migratory group and managed by the Gulf Council.

Through this proposed rule, the Gulf migratory group's current eastern zone-northern subzone and eastern zone-southern subzone would be renamed the northern zone and southern zone, respectively. The southern zone would include the new mixing zone, extending east to the new Gulf/Atlantic group boundary. The name and dimensions of the Gulf migratory group's western zone would remain the same. The Atlantic migratory group's northern zone would also remain unchanged. The southern boundary of the Atlantic migratory group's southern zone would shift to the new Gulf/Atlantic group boundary. Due to this shift, the current Florida east coast subzone would no longer exist under the proposed rule. Instead, that area would be included in the Atlantic migratory group's southern zone year-round.

NMFS notes that, if approved and implemented, the final rule for Amendment 26 would not be effective until after the current Gulf/Atlantic group boundary shifts on November 1, 2016, and the applicable Florida east coast subzone commercial quota is in effect. As described in Amendment 26, landings from that area for the current fishing year would be attributable to the Atlantic southern zone quota. Therefore, any landings from the Florida east coast subzone that occur after November 1, 2016, and before implementation of a final rule for Amendment 26, would count against the Atlantic southern zone king mackerel commercial quota.

This action would not change the current Federal fishing permits requirements for fishing for king mackerel in Gulf and Atlantic Federal waters.

Atlantic Migratory Group King Mackerel ACLs, Commercial Quotas and Recreational ACTs

Amendment 18 to the FMP established reference points, ACLs, and accountability measures for both migratory groups of king mackerel (76 FR 82058, December 29, 2011). The current ABC is 10.46 million lb (4.74 million kg) for Atlantic migratory group king mackerel. This proposed rule to implement Amendment 26 would revise the OFLs and ABCs for Atlantic migratory group king mackerel based on SEDAR 38 and the South Atlantic Council's SSC recommended ABCs based on a high recruitment scenario. The Atlantic migratory group ABC would gradually decrease from 17.4 million lb (7.89 million kg) in the 2016–2017 fishing year to 12.7 million lb (5.76 million kg) in the 2019–2020 fishing year.

Amendment 26 and this proposed rule would also set the Atlantic migratory group stock ACL equal to OY and the proposed ABC. The Atlantic migratory group's sector allocation (37.1 percent of the ACL to the commercial sector and 62.9 percent of the ACL to the recreational sector) will not change through Amendment 26 or this proposed rule. This proposed rule would revise the commercial ACLs for the Atlantic migratory group to be 6.5 million lb (2.9 million kg) for the 2016–2017 fishing year, 5.9 million lb (2.7 million kg) for the 2017–2018 fishing year, 5.2 million lb (2.4 million kg) for the 2018–2019 fishing year, and 4.7 million lb (2.1 mil kg) for the 2019–2020 fishing year and subsequent fishing years. This proposed rule would revise the recreational ACLs for the Atlantic migratory group to be 10.9 million lb (4.9 million kg) for the 2016–2017 fishing year, 9.9 million lb (4.5 mil kg) for the 2017–2018 fishing year, 8.9 million lb (4.0 million kg) for the 2018–2019 fishing year, and 8.0 million lb (3.6 mil kg) for the 2019–2020 fishing year and subsequent fishing years. The recreational sector ACTs for the Atlantic migratory group would be set at 10.1 million lb (4.6 million kg) for the 2016–2017 fishing year, 9.2 million lb (4.2 mil kg) for the 2017–2018 fishing year, 8.3 million lb (3.8 mil kg) for the 2018–2019 fishing year and 7.4 million lb (3.4 mil kg) for the 2019–2020 fishing year and subsequent fishing years.

The commercial ACLs for Atlantic migratory group king mackerel would be divided each fishing year between the northern zone (23.04 percent) and southern zone (76.96 percent) into their respective commercial quotas. The proposed commercial quotas for the Atlantic northern zone would be 1,497,600 lb (679,300 kg) for the 2016–17 fishing year, 1,259,360 lb (571,236 kg) for the 2017–2018 fishing year, 1,198,080 lb (543,440 kg) for the 2018–2019 fishing year, and 1,082,880 lb (491,186 kg) for the 2019–2020 fishing year and subsequent years. The proposed commercial quotas for the Atlantic southern zone would be 5,002,400 lb (2,269,050 kg) for the 2016–2017 fishing year, 4,540,640 lb (2,059,600 kg) for the 2017–2018 fishing year, 4,001,920 lb (1,815,240 kg) for the 2018–2019 fishing year, and 3,617,120 lb (1,640,698 kg) for the 2019–2020 fishing year and subsequent fishing years.

Incidental Catch of Atlantic Migratory Group King Mackerel Caught in the Shark Gillnet Fishery

Amendment 20A to the FMP prohibited recreational bag limit sales of king mackerel by commercially permitted king mackerel fishers in South Atlantic Council jurisdictional waters, which included king mackerel incidentally caught on directed commercial shark trips (79 FR 34246, June 16, 2014).

In Amendment 26, the Councils determined that, as a result of the mesh

size used and the nature of the shark gillnet fishery, most king mackerel are already dead when the shark gillnets are retrieved. The Councils decided that some incidental catch of Atlantic migratory group king mackerel should be allowed for retention and sale if it is incidentally caught in the commercial shark gillnet fishery by vessels with a Federal king mackerel commercial permit.

Through this proposed rule, a vessel in the Atlantic Exclusive Economic Zone (EEZ) that is engaged in directed shark fishing with gillnets that has both a valid Federal shark directed commercial permit and a valid Federal king mackerel commercial permit would be allowed to retain a limited number of king mackerel. Through this proposed rule, in the Atlantic northern zone, no more than three king mackerel per crew member may be retained or sold per trip. In the Atlantic southern zone, no more than two king mackerel per crew member may be retained or sold per trip. These incidentally caught king mackerel would be allowed to be retained or sold to a dealer with a valid Federal Gulf and South Atlantic dealer permit. This action is intended to reduce king mackerel discards and allow for the limited retention and sale of king mackerel, while not encouraging direct harvest of king mackerel on these shark fishing trips. The incidental catch allowance would not apply to commercial trips shark trips that are using an authorized gillnet for Atlantic migratory group king mackerel north of 34°37.3′ N. lat., the latitude of Cape Lookout Light, NC, where the existing commercial trip limit of 3,500 lb (1,588 kg) would apply. No type of gillnet is an allowable gear for Atlantic migratory group king mackerel south of Cape Lookout Light.

Commercial Split Seasons for Atlantic Migratory Group King Mackerel in Atlantic Southern Zone

Currently, the commercial fishing year for Atlantic migratory group king mackerel is March 1 through the end of February, and the commercial ACLs for the Atlantic northern zone and southern zone are allocated for the entire fishing year. This proposed rule would divide the annual Atlantic migratory group commercial quota for the Atlantic southern zone into two commercial seasons. The Atlantic northern zone quota would not be split. This proposed rule would allocate 60 percent of the Atlantic southern zone commercial quota to the first season of March 1 through September 30, and 40 percent to the second of October 1 through the end of February. This commercial split season for the Atlantic southern zone quota is intended to ensure that a portion of the southern zone's quota is available in later months of the fishing year, which will allow for increased fishing opportunities in that area during more of the fishing year.

The proposed seasonal commercial quotas for the first season of March 1 through September 30, in the southern zone would be: 3,001,440 lb (1,361,430 kg) for the 2016–2017 fishing year, 2,724,384 lb (1,235,760 kg) for the 2017–2018 fishing year, 2,401,152 lb (1,089,144 kg) for the 2018–2019 fishing year, and 2,170,272 lb (984,419 kg) for the 2019–2020 fishing year and subsequent fishing years. The proposed seasonal commercial quotas for the second season of October 1 through the end of February in the southern zone would be: 2,000,960 lb (907,620 kg) for the 2016–2017 fishing year, 1,816,256 lb (823,840 kg) for the 2017–2018 fishing year, 1,600,768 lb (726,096 kg) for the 2018–2019 fishing year, and 1,446,848 lb (656,279 kg) for the 2019–2020 fishing year and subsequent years.

Commercial Trip Limit System for the Atlantic Migratory Group of King Mackerel in the Atlantic Southern Zone

Commercial trip limits for Atlantic migratory group king mackerel are limits on the amount of that species that may be possessed on board or landed, purchased or sold from a federally permitted king mackerel vessel per day. Several commercial trip limits currently exist in the Atlantic southern zone. North of 29°25′ N. lat., which is a line directly east from the Flagler/Volusia County, FL, boundary, the trip limit for Atlantic migratory group king mackerel is 3,500 lb (1,588 kg) year-round. In the area between the Flagler/Volusia County, FL, boundary (29°25′ N. lat.) and 28°47.8′ N. lat., which is a line extending directly east from the Volusia/Brevard County, FL, boundary, the trip limit is 3,500 lb (1,588 kg) from April 1 through October 31. In the area between the Volusia/Brevard County, FL, boundary (28°47.8′ N. lat.) and 25°20.4′ N. lat., which is a line directly east from the Miami-Dade/Monroe County, FL boundary, the trip limit is 75 fish from April 1 through October 31. In the area between the Miami-Dade/Monroe County, FL, boundary, and 25°48″ N. lat., which is a line directly west from Monroe/Collier County, FL, boundary, the trip limit is 1,250 lb (567 kg) from April 1 through October 31. This proposed rule would revise the commercial trip limits for Atlantic migratory group king mackerel in the Atlantic southern zone, based on the revised management boundary and split commercial season. During the first commercial season (March 1 through September 30), in the area between the Flagler/Volusia County, FL, boundary (29°25′ N. lat.), and the Miami-Dade/Monroe County, FL boundary (25°20.24″ N. lat.), the trip limit would be 50 fish during March. From April 1 through September 30, the trip limit would be 75 fish, unless NMFS determines that 75 percent or more of the Atlantic southern zone quota for the first season has been landed, then the trip limit would be 50 fish. During the second commercial season (October 1 through the end of February), the trip limit would be 50 fish for the area between the Flagler/Volusia County, FL, boundary, and the the Miami-Dade/Monroe County, FL boundary. During the month of February, the trip limit would remain 50 fish, unless NMFS determines that less than 70 percent of the commercial quota for the southern zone's second season has been landed, then the trip limit would be 75 fish.

This proposed rule would not revise the 3,500 lb (1,588 kg) year-round trip limit for Atlantic migratory group king mackerel, north of the Flagler/Volusia County, FL boundary.

In Amendment 26, the Councils determined that these changes to the commercial season and commercial trip limits for the Atlantic southern zone would ensure the longest possible commercial fishing season for Atlantic migratory group king mackerel.

Gulf Migratory Group King Mackerel ACLs

The current ABC and total ACL for Gulf migratory group king mackerel is 10.8 million lb (4.89 million kg). Based on its review of SEDAR 38, the Gulf Council's SSC recommended OFLs and ABCs for Gulf migratory group king mackerel for the 2015–2016 through 2019–2020 fishing years that decrease over time. The Gulf migratory group king mackerel OFLs and ABCs in Amendment 26 are lower than the current ABC and total ACL, because the geographical area for which the new OFLs and ABCs apply is smaller than the current area for which they apply, as a result of the proposed zone revisions in the Gulf and Atlantic.

Because Gulf migratory group king mackerel is not overfished or undergoing overfishing, the Gulf Council recommended that ACL remain equal to OY and to ABC. Therefore, in Amendment 26, the total ACLs for the Gulf migratory group of king mackerel are equal to the ABCs recommended by the Gulf Council's SSC: 9.21 million lb (4.18 million kg) for the 2016–2017 fishing year, 8.88 million lb (4.03

million kg) for the 2017–2018 fishing year, 8.71 million lb (3.95 million kg) for the 2018–2019 fishing year, and 8.55 million lb (3.88 million kg) for the 2019–2020 fishing year.

This proposed rule would not revise the current recreational and commercial allocations of Gulf migratory group king mackerel (68 percent of the total ACL to the recreational sector and 32 percent to the commercial sector). Based on the existing allocations, the commercial ACLs proposed for Gulf migratory group king mackerel are: 2.95 million lb (1.34 million kg) for the 2016–2017 fishing year, 2.84 million lb (1.29 million kg) for the 2017–2018 fishing year, 2.79 million lb (1.27 million kg) for the 2018–2019 fishing year, and 2.74 million lb (1.24 million kg) for the 2019–2020 fishing year and subsequent fishing years.

These Gulf migratory group commercial ACLs would be further divided into gear-specific commercial ACLs, for hook-and-line gear, and for vessels fishing with run-around gillnet gear, which is only an authorized gear in the southern zone. The hook-and-line component commercial ACL (which applies to the entire Gulf) would be: 2,330,500 lb (1,057,097 kg) for the 2016–2017 fishing year, 2,243,600 lb (1,017,680 kg) for the 2017–2018 fishing year, 2,204,100 lb (999,763 kg) for the 2018–2019 fishing year, and 2,164,600 lb (981,846 kg) for the 2019–2020 fishing year and subsequent years. The run-around gillnet component commercial ACL (which applies to the Gulf southern zone) would be: 619,500 lb (281,000 kg) for the 2016–2017 fishing year, 596,400 lb (270,522 kg) for the 2017–2018 fishing year, 585,900 lb (265,760 kg) for the 2018–2019 fishing year, and 575,400 lb (260,997 kg) for the 2019–2020 fishing year and subsequent fishing years.

The proposed recreational ACLs for Gulf migratory group king mackerel would be: 6.26 million lb (2.84 million kg) for the 2016–2017 fishing year, 6.04 million lb (2.74 million kg) for the 2017–2018 fishing year, 5.92 million lb (2.69 million kg) for the 2018–2019 fishing year, and 5.81 million lb (2.64 million kg) for the 2019–2020 fishing year and subsequent fishing years.

Commercial Zone Quotas for Gulf Migratory Group King Mackerel

Amendment 26 and this proposed rule would revise the Gulf migratory group commercial zone quotas because of the proposed changes to the Councils' jurisdiction boundaries and resultant zone revisions. The current allocation of the commercial zone quota for Gulf migratory group king mackerel by zones is 31 percent in the western zone, 5.17 percent in the northern zone, 15.96 percent for the southern zone using hook-and-line gear, 15.96 percent for the southern zone using gillnet gear, and 31.91 percent for the Florida east coast subzone. However, under the proposed rule, the Florida east coast subzone would no longer exist and the quota associated with that zone would be re-allocated to the remaining zones. The revised allocation of commercial zone quotas for Gulf migratory group king mackerel would be: 40 percent in the western zone, 18 percent in the northern zone, 21 percent for the southern zone using hook-and-line gear, and 21 percent for the southern zone using gillnet gear.

The proposed commercial quotas for the Gulf western zone would be: 1,180,000 lb (535,239 kg) for the 2016–2017 fishing year, 1,136,000 lb (515,281 kg) for the 2017–2018 fishing year, 1,116,000 lb (506,209 kg) for the 2018–2019 fishing year, and 1,096,000 lb (497,137 kg) for the 2019–20 fishing year and subsequent fishing years.

The proposed commercial quotas for the Gulf northern zone would be: 531,000 lb (240,858 kg) for the 2016–2017 fishing year, 511,200 lb (231,876 kg) for the 2017–18 fishing year, 502,200 lb (227,794 kg) for the 2018–2019 fishing year, and 493,200 lb (223,712 kg) for the 2019–2010 fishing year and subsequent fishing years.

The proposed commercial hook-and-line and commercial run-around gillnet component quotas in the southern zone would be equal for each fishing year: 619,500 lb (281,000 kg) for the 2016–2017 fishing year, 596,400 lb (270,522 kg) for the 2017–2018 fishing year, 585,900 lb (265,760 kg) for the 2018–2019 fishing year, and 575,400 lb (260,997 kg) for the 2019–2020 fishing year and subsequent fishing years.

Recreational Bag Limit for Gulf Migratory Group of King Mackerel

From the 2002–2003 fishing year through the 2013–2014 fishing year, the recreational sector's landings of Gulf migratory group king mackerel were consistently less than 50 percent of the recreational ACL, while the commercial sector's landings were consistently 90 percent or more of the commercial ACL. In Amendment 26, the Councils considered, but rejected, the possibility of reallocating from the recreational ACL to the commercial ACL and instead proposed an increase in the recreational bag limit for Gulf migratory group king mackerel from 2 fish per person per trip to 3 fish per person per trip. The Councils determined that this increased recreational bag limit would allow more opportunities for recreational anglers to harvest the recreational sector's ACL.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent with Amendment 26, the FMP, the Magnuson-Stevens Act, and other applicable laws, subject to further consideration after public comment.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

NMFS prepared an initial regulatory flexibility act analysis (IRFA), as required by section 603 of the RFA, for this proposed rule. The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, the objectives of, and legal basis for this action are contained at the beginning of this section in the preamble and in the **SUMMARY** section of the preamble. A copy of the full analysis is available from NMFS (see **ADDRESSES**). A summary of the IRFA follows.

The Magnuson-Stevens Act provides the statutory basis for this proposed rule. No duplicative, overlapping, or conflicting Federal rules have been identified. In addition, no new reporting and record-keeping requirements are introduced by this proposed rule. Accordingly, this proposed rule does not implicate the Paperwork Reduction Act.

This proposed rule would be expected to directly affect all federally permitted commercial fishermen fishing for king mackerel in the Gulf and Atlantic. Recreational anglers fishing for king mackerel would also be directly affected by the proposed action, but they are not considered business entities under the RFA, so they are outside the scope of this analysis. Charterboat and headboat operations are business entities but they are only indirectly affected by the proposed action. For RFA purposes only, NMFS has established a small business size standard for businesses, including their affiliates, whose primary industry is commercial fishing (see 50 CFR 200.2). A business primarily engaged in commercial fishing (NAICS code 11411) is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including affiliates), and has combined annual receipts not in excess of $11 million for all its affiliated operations worldwide.

From the 2000–2001 through 2013–2014 fishing years (the most recent available trip level data at the time that

the Councils took final action on Amendment 26), an average of 274 vessels landed Gulf migratory group king mackerel. Those vessels generated dockside revenues (2014 dollars) of $3,987,671 from king mackerel, $1,935,219 from other species jointly landed with king mackerel, and $12,395,741 from all other species in trips where king mackerel was not caught. The average annual revenue per vessel from all species landed by these vessels, including king mackerel, was $66,952. During the same time period, an average of 736 vessels landed Atlantic migratory group king mackerel. These vessels generated dockside revenues (2014 dollars) of $5,842,731 from king mackerel, $1,888,830 from other species jointly landed with king mackerel, and $12,670,841 from all other species in trips where king mackerel was not caught. The average revenue per vessel from all species landed by these vessels, including king mackerel, was $27,817. Vessels that caught and landed king mackerel may also operate in other fisheries, such as the shellfish fisheries, the revenues of which are not known and are not reflected in these totals. Based on revenue information, all commercial vessels affected by the proposed rule may be assumed to be small entities.

All entities expected to be directly affected by this proposed rule are assumed to be small entities; therefore, NMFS has determined that this proposed rule would affect a substantial number of small entities. The issue of disproportionate effects on small versus large entities does not arise in the present case because all directly affected entities are small entities.

The nine actions in this proposed rule and their effects on small entities are summarized below.

Action 1 in Amendment 26 would establish a single year-round boundary for separating the Gulf and Atlantic migratory groups of king mackerel at the Miami-Dade/Monroe county line, with the Gulf Council being responsible for management measures for the mixing zone, defined as the area of the EEZ off of the Florida Keys. This would replace the current mixing zone boundary that varies seasonally, and thus would simplify management, avoid confusion, and likely improve enforcement, because the new boundary designation would also coincide with the boundary designation currently in place for the Gulf and Atlantic migratory groups of Spanish mackerel. This change would provide a favorable environment for commercial vessels to increase revenues and profits, particularly for those vessels operating out of the Florida Keys. However, the extent of any revenue increases cannot be defined at this time, as any increase in revenue would primarily be determined by the kind of fishing regulations that would be established through this amendment. The current Florida east coast subzone would no longer exist under this proposed rule.

Action 2–1 in Amendment 26 would revise the ABC levels for Atlantic migratory group king mackerel for fishing years 2016–2017 through 2019–2020, based on the ABC levels recommended by the SSC under a high recruitment scenario. This would substantially increase the Atlantic migratory group ABC, thus enabling the Council to increase the ACL, and providing a favorable environment for increases in potential harvest of Atlantic migratory group king mackerel that could result in higher revenues and profits to participating commercial vessels.

Action 2–2 in Amendment 26 would revise Atlantic migratory group king mackerel ACLs, commercial quotas, and recreational ACT, based on the proposed ABC levels selected in Action 2–1. Action 2–2 would set the ACL equal to OY and equal to ABC. Given the substantial increase proposed for ABC, equating ACL and OY to ABC would directly result in increasing the allowable commercial harvest of Atlantic migratory group king mackerel, as well as the associated potential revenues. Relative to the current commercial ACL, the proposed commercial ACL would provide the opportunity for total revenues to increase by an estimated $4.7 million for the 2016–2017 fishing year, $3.6 million for the 2017–2018 fishing year, $2.4 million for the 2018–2019 fishing year, and $1.5 million for the 2019–2020 fishing year and subsequent fishing years. Action 2–2 would also revise the Atlantic northern and southern zone commercial quotas,based on the ACL selected by the Councils. Whether the full revenue potential for each zone would be realized largely depends on whether the full quotas would be taken. Using the highest past landings (2009–2010 landings) as the expected future landings, neither zone would be expected to fully take its respective commercial quota. The revised northern and southern zone commercial quotas may allow for the possibility for further revenue increases in the future through increased harvest; however, this statement does not account for the effects from Action 4, which would split the commercial season into two fishing seasons each year in the Atlantic southern zone.

Action 3 in Amendment 26 would allow the limited retention and sale (equal to the bag limit) of Atlantic migratory group king mackerel caught with gillnet as incidental catch in the gillnet portion of the directed commercial shark fishery, for any vessel with both a valid Federal shark directed commercial permit and valid Federal king mackerel commercial permit. The incidentally caught king mackerel must be sold to a dealer with the Gulf and South Atlantic Federal dealer permit. For this type of incidental catch, no more than 2 king mackerel per crew member per trip in the southern zone may be retained and sold, and no more than 3 king mackerel per crew member per trip in the northern zone (except trips north of Cape Lookout Light, NC, that use an authorized gillnet for Atlantic migratory group king mackerel) may be retained and sold. This proposed change would allow affected vessels to generate some revenue from incidentally caught king mackerel instead of discarding them. Only 3 to 5 vessels and 21 to 33 total vessel trips have reported incidental catches of Atlantic migratory group king mackerel, so any potential adverse impact on vessels that target king mackerel when incidental catches are counted against the Atlantic migratory group commercial ACL would be negligible.

Action 4 in Amendment 26 would allocate the commercial quota for Atlantic migratory group king mackerel's southern zone into two split seasons: 60 percent of the commercial quota would be allocated to the first season of March 1–September 30 and 40 percent would be allocated to the second season of October 1–the end of February. Any remaining quota from the first season would transfer to second season. Any remaining quota from the second season would not be carried forward to the next fishing year. When the commercial quota for either season is met or expected to be met, commercial harvest of king mackerel in the Atlantic southern zone will be prohibited for the remainder of the respective season. In general, the revenue effects of splitting the fishing year into seasons as compared to not splitting the fishing year into seasons are unclear. For example, if all of the commercial quota were harvested early in the fishing season when maintaining only one season, the split-season alternative would comparatively be expected to allow commercial vessels to fish over a longer period of time, because even if the first season quota was reached, 40 percent of the commercial quota would be available

for harvest during the second season. Harvest would occur over a longer period of time (*i.e.* during both the first and second seasons), resulting in a more stable supply of fish. Because a more stable supply is generally associated with higher dockside prices, overall revenues would likely be higher. Conversely, because only 60 percent of the commercial quota is allocated to the first season, the implementation of split seasons may restrict harvest and revenues in the first season that may not be fully recouped in the second season. This could happen if revenues from the relatively higher pricing conditions in the first season, which coincides with the Lenten season, were restricted due to an early season closure. Landings may be higher in the second season, but, if prices were low, the higher landings in the second season may not result in revenue levels that would fully recoup the forgone revenues in the first season. However, given current available information on landings, and the proposed commercial quota increase, no quota closures would be expected for either the first or second season, even if harvest levels reach the highest past recorded landings (2009–2010 landings). Thus, this action would not be expected to adversely affect the revenues and profits of commercial vessels.

Action 5 would establish a commercial trip limit system for the Atlantic southern zone. For both the first and second commercial seasons, the commercial trip limit north of the Flagler/Volusia county line would remain 3,500 lb (1,587 kg). South of the Flagler/Volusia county line, the trip limit for the first season would be 50 fish for the month of March, and 75 fish for the remainder of the first season, but if 75 percent of the commercial quota for first season has been be landed, the trip limit would be 50 fish. For the second season, the commercial trip limit would be 50 fish, and if less than 70 percent of the season's quota has been landed, would be 75 fish during the month of February. Because the 3,500 lb (1,587 kg) trip limit north of the Flagler/Volusia county line is the same as the current trip limit, vessels fishing in this area would be unaffected by this proposed rule. Given that no commercial quota closures would be expected for the first or second season, as discussed in Action 4, the imposition of a commercial trip limit south of the Flagler/Volusia county line would tend to reduce both per trip revenues and profits of commercial vessels. However, the magnitude of annual revenue reductions would be relatively small, as vessels may be able to take more trips due to a longer season under the proposed quota increases.

Action 6 would set the Gulf migratory group king mackerel ACL equal to the ABC recommended by the Gulf Council's SSC for the 2016–2017 through 2019–2020 fishing years. The ABC recommended by the SSC is less than the existing ABC, but the lower number is largely a product of the boundary change, based on new information in SEDAR 38 that the range of Gulf migratory group king mackerel spans a smaller area than previously thought. When the existing commercial ACLs for the Gulf migratory group are adjusted to account for landings in the Florida east coast subzone that would no longer be considered part of Gulf migratory group king mackerel, the new commercial ACLs starting in the 2016–2017 fishing year would actually be greater than the existing ones. For this reason, setting the Gulf migratory group ACL equal to the ABC would be expected to provide higher landings and revenues to commercial vessels. Historically, the commercial sector has fully harvested its allocation of Gulf migratory group king mackerel. Thus, using past landings as a predictor of future landings, it is likely that the commercial sector would harvest up to the level of the proposed quota increases for the Gulf migratory group and generate higher revenues from quota increases. Estimated total revenue increases would be approximately $1,068,000 for the 2016–2017 fishing year, $871,000 for the 2017–2018 fishing year, $781,000 for the 2018–2019 fishing year, and $692,000 for the 2019–2020 fishing year and every fishing year thereafter.

Action 7 in Amendment 26 would revise the commercial zone quotas for Gulf migratory group king mackerel as follows: 40 percent for the western zone; 18 percent for the northern zone; 21 percent for the southern zone hook-and-line component; and 21 percent for the southern zone gillnet component. This revised zone allocation is necessary because the previous Gulf migratory group king mackerel zone allocations included the Florida east coast subzone, which would no longer exist under this proposed rule. The proposed boundary change under Action 1 would render the Florida east coast area part of the southern zone for Atlantic migratory group king mackerel. Action 7 would result in commercial quota increases for all of the Gulf migratory group king mackerel zones, potentially resulting in higher revenues to commercial vessels. However, the quota increases would not be uniform across the zones, with the Gulf northern zone receiving the largest quota increases. For the western zone, total revenue increases would be approximately $194,000 for the 2016–2017 fishing year, $115,000 for the 2017–2018 fishing year, $79,000 for the 2018–2019 fishing year, and $44,000 for the 2019–2020 fishing year and subsequent fishing years. For the northern zone, revenue increases would be approximately $630,000 for the 2016–2017 fishing year, $595,000 for the 2017–2018 fishing year, $579,000 for the 2018–2019 fishing year, and $563,000 for the 2019–2020 fishing year and subsequent fishing years. For the hook-and-line component of the southern zone, revenue increases would be approximately $121,000 for the 2016–2017 fishing year, $80,000 for the 2017–2018 fishing year, $61,000 for the 2018–2019 fishing year, and $42,000 for the 2019–2020 fishing year and subsequent fishing years. Revenue increases for the gillnet component of the southern zone would be identical to those of the hook-and-line component.

Action 8 considered revising the commercial and recreational allocations for the Gulf migratory group king mackerel; however, the Councils selected the no action alternative.

Action 9 in Amendment 26 would modify the recreational bag limit for Gulf migratory group king mackerel from two to three fish per person per day. This would not directly affect any business entities under the RFA.

The following discussion describes the alternatives that were not selected as preferred by the Council. Among the actions considered, only actions that would have direct adverse economic effects on small entities merit inclusion.

Only Action 5 (commercial trip limits for the Atlantic migratory group's southern zone) may result in adverse economic impacts on small commercial business entities. Four alternatives and five sub-alternatives, including the two preferred alternatives and two preferred sub-alternatives, were considered for establishing commercial trip limits in the Atlantic southern zone. All of the considered alternatives would maintain the current trip limit for Atlantic migratory group king mackerel in areas north of the Volusia/Flagler county line. The first alternative, the no action alternative, would retain the current trip limit system. Because of the proposed boundary change in Action 1, maintaining the current trip limit system would leave certain areas in the Florida east coast that used to be under the Gulf Council jurisdiction without trip limits during the winter months. This would open opportunities for higher harvests that could result in a

shorter king mackerel season in the Atlantic southern zone. Vessels fishing in the area with no trip limits would benefit, but any benefit would be at the expense of vessels fishing in areas with trip limits, as allowing unrestricted harvest would likely lead to earlier quota closures. The overall net effects on vessel revenues cannot be determined, but if a commercial quota closure occurs due to increased, unrestricted harvest, overall annual vessel revenues may decrease.

The second alternative would establish a year-round trip limit of 75 fish for Atlantic migratory group king mackerel in the area south of the Flagler/Volusia county line. This alternative would provide for a greater trip limit than the preferred alternative for certain months of the year, and thus may be expected to result in slightly higher landings and revenues than the preferred alternative. However, this alternative may lead to shorter commercial seasons, as it does not include a mechanism to slow down harvests to avoid exceeding the area's quota for the first or second seasons in the Atlantic southern zone.

The third alternative, which would apply only to the first season, would establish a trip limit of 50 fish from March 1–March 31, and 75 fish for the remainder of the season 1, for the area south of the Flagler/Volusia county line. Alternative three has two options, one of which is the preferred option. The non-preferred option would reduce the trip limit for the first season if 75 percent of the first season has been landed, but to occur no earlier than August 1 each fishing year. The preferred option would reduce the trip limit anytime during the first season when 75 percent of the first seasons quota has been landed. The non-preferred option would in principle allow for a higher trip limit over a longer period in the first season and would be expected to result in higher per trip revenues and profits than the preferred option. However, analysis of the landings data shows that both options would have the same effects, because the 75 percent trigger is expected to be met at the same date under both options, which would occur after August 1.

The fourth alternative would establish a 50 fish trip limit for the second season. The fourth alternative has three options, one of which is the preferred option. The preferred option would increase the trip limit to 75 fish during the month of February, but if 70 percent of the second season's commercial quota had been landed, the trip limit would remain 50 fish. The second option would increase the trip limit to 75 fish during January and February as long as less than 70 percent of the second season's quota had been landed. In principle, this second option would be expected to increase vessel revenues per trip in January as compared to the preferred option, but the second option would also increase the likelihood of an earlier closure in the second season. The third option is similar to the preferred option, except that the trigger for increasing the trip limit would be landings less than 80 percent, instead of less than 70 percent, of the second season's quota. In theory, this option has a greater likelihood than the preferred option for increasing the commercial trip limit in February, but it would also increase the likelihood of an early closure in the second season. However, because the greatest historical landings have been well below the proposed second season quota, all three options would be expected to have the same effects on vessel revenues.

List of Subjects in 50 CFR Part 622

Annual catch limits, Fisheries, Fishing, Gulf of Mexico, King Mackerel, South Atlantic.

Dated: December 19, 2016.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 622 is proposed to be amended as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF OF MEXICO, AND SOUTH ATLANTIC

■ 1. The authority citation for part 622 continues to read as follows:

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

■ 2. Revise the heading of subpart Q in part 622 to read as follows:

Subpart Q—Coastal Migratory Pelagic Resources (Gulf of Mexico, South Atlantic, and Mid-Atlantic)

■ 3. In § 622.7, revise paragraph (b)(1) to read as follows:

§ 622.7 Fishing years.

* * * * *

(b) * * *

(1) *Gulf migratory group king mackerel*—(i) *Southern zone*— July 1 through June 30.

(ii) *Northern zone*—October 1 through September 30.

(iii) *Western zone*—July 1 through June 30.

* * * * *

■ 4. Revise § 622.369 to read as follows:

§ 622.369 Description of zones.

(a) *Migratory groups of king mackerel.* In the EEZ, king mackerel are divided into the Gulf migratory group and the Atlantic migratory group. The Gulf migratory group is bound by a line extending east of the U.S./Mexico border and a line extending east of the Miami-Dade/Monroe County, FL boundary. The Atlantic migratory group is bound by a line extending east of the Miami-Dade/Monroe County, FL boundary and a line from the intersection point of Connecticut, Rhode Island, and New York (as described in § 600.105(a) of this chapter). The zone boundaries remain in place year round. See Table 1 of this section for the boundary coordinates. See Figure 1 in Appendix G of this part for illustration.

(1) *Gulf migratory group.* The Gulf migratory group is divided into western, northern, and southern zones. See Table 1 of this section for the boundary coordinates. See Figure 1 in Appendix G of this part for illustration.

(i) *Western zone.* The western zone encompasses an area of the EEZ north of a line extending east of the U.S./Mexico border, and west of a line extending due south of the Alabama/Florida border, including the EEZ off Texas, Louisiana, Mississippi, and Alabama.

(ii) *Northern zone.* The northern zone encompasses an area of the EEZ east of a line extending due south of the Florida/Alabama border, and north of a line extending due west of the Lee/Collier County, Florida, boundary.

(iii) *Southern zone.* The southern zone encompasses an area of the EEZ south of a line extending due west of the Lee/Collier County, Florida, boundary on the Florida west coast, and south of a line extending due east of the Monroe/Miami-Dade County, Florida, boundary on the Florida east coast, which includes the EEZ off Collier and Monroe Counties, Florida.

(2) *Atlantic migratory group.* The Atlantic migratory group is divided into the northern and southern zones separated by a line extending from the North Carolina/South Carolina border, as specified in § 622.2. See Table 1 of this section for the boundary coordinates. See Figure 1 in Appendix G of this part for illustration. See § 622.385(a)(1) for a description of the areas for Atlantic migratory group king mackerel commercial trip limits.

(i) *Northern zone.* The northern zone encompasses an area of the EEZ south of a line extending from the intersection point of New York, Connecticut, and Rhode Island (as described in

§ 600.105(a) of this chapter), and north of a line extending from the North Carolina/South Carolina border, as specified in § 622.2, including the EEZ off each state from North Carolina to New York. This zone remains the same year round.

(ii) *Southern zone.* The southern zone encompasses an area of the EEZ south of a line extending from the North Carolina/South Carolina border, as specified in § 622.2, and north of a line extending due east of the Monroe/Miami-Dade County, Florida, boundary.

TABLE 1 TO § 622.369—KING MACKEREL DESCRIPTION OF ZONES

[For illustration, see Figure 1 in Appendix G of this part]

Area	Boundary 1	Boundary 2
Gulf Migratory Group—Western Zone.	U.S./Mexico A line east of the intersection of 25°58′30.57″ N. lat. and 96°55′27.37″ W. long.	AL/FL 87°31′6″ W. long.
Gulf Migratory Group—Northern Zone.	AL/FL 87°31′6″ W. long	Lee/Collier 26°19′48″ N. lat.
Gulf Migratory Group—Southern Zone.	Lee/Collier 26°19′48″ N. lat	Monroe/Miami-Dade 25°20′24″ N. lat.
Atlantic Migratory Group—Northern Zone.	NY/CT/RI 41°18′16.249″ N. lat. and 71°54′28.477″ W. long. southeast to 37°22′32.75″ N. lat. and the intersection point with the outward boundary of the EEZ.	NC/SC, a line extending in a direction of 135°34′55″ from true north beginning at 33°51′07.9″ N. lat. and 78°32′32.6″ W. long. to the intersection point with the outward boundary of the EEZ.
Atlantic Migratory Group—Southern Zone.	NC/SC, a line extending in a direction of 135°34′55″ from true north beginning at 33°51′07.9″ N. lat. and 78°32′32.6″ W. long. to the intersection point with the outward boundary of the EEZ.	Monroe/Miami-Dade 25°20′24″ N. lat.

(b) *Migratory groups of Spanish mackerel*—(1) *Gulf migratory group.* In the EEZ, the Gulf migratory group is bounded by a line extending east of the U.S./Mexico border and a line extending due east of the Monroe/Miami-Dade County, FL, boundary. See Table 2 of this section for the boundary coordinates. See Figure 2 in Appendix G of this part for illustration.

(2) *Atlantic migratory group.* In the EEZ, the Atlantic migratory group is bounded by a line extending due east of the Monroe/Miami-Dade County, FL, boundary and a line extending from the intersection point of New York, Connecticut, and Rhode Island (as described in § 600.105(a) of this chapter). The Atlantic migratory group is divided into the northern and southern zones. See Table 2 of this section for the boundary coordinates. See Figure 2 in Appendix G of this part for illustration. See § 622.385(b)(1) for a description of the areas for Atlantic migratory group Spanish mackerel commercial trip limits.

(i) *Northern zone.* The northern zone encompasses an area of the EEZ south of a line extending from the intersection point of New York, Connecticut, and Rhode Island (as described in § 600.105(a) of this chapter), and north of a line extending from the North Carolina/South Carolina border, as specified in § 622.2, including the EEZ off each state from North Carolina to New York.

(ii) *Southern zone.* The southern zone encompasses an area of the EEZ south of a line extending from the North Carolina/South Carolina border, as specified in § 622.2, and north of a line extending due east of the Monroe/Miami-Dade County, FL, boundary, including the EEZ off South Carolina, Georgia, and Florida.

TABLE 2 TO § 622.369—SPANISH MACKEREL DESCRIPTION OF ZONES

[For illustration, see Figure 2 in Appendix G of this part]

Area	Boundary 1	Boundary 2
Gulf Migratory Group	U.S./Mexico A line east of the intersection of 25°58′30.57″ N. lat. and 96°55′27.37″ W. long.	Monroe/Miami-Dade 25°20′24″ N. lat.
Atlantic Migratory Group—Northern Zone.	NY/CT/RI 41°18′16.249″ N. lat. and 71°54′28.477″ W. long. southeast to 37°22′32.75″ N. lat. and the intersection point with the outward boundary of the EEZ.	NC/SC, a line extending in a direction of 135°34′55″ from true north beginning at 33°51′07.9″ N. lat. and 78°32′32.6″ W. long. to the intersection point with the outward boundary of the EEZ.
Atlantic Migratory Group—Southern Zone.	NC/SC, a line extending in a direction of 135°34′55″ from true north beginning at 33°51′07.9″ N. lat. and 78°32′32.6″ W. long. to the intersection point with the outward boundary of the EEZ.	Monroe/Miami-Dade 25°20′24″ N. lat.

(c) *Migratory groups of cobia*—(1) *Gulf migratory group.* In the EEZ, the Gulf migratory group is bounded by a line extending east from the U.S./Mexico border and a line extending due east from the Florida/Georgia border. See Table 3 of this section for the boundary coordinates. (See Figure 3 in Appendix G of this part for illustration.)

(i) *Gulf zone.* The Gulf zone encompasses an area of the EEZ north of a line extending east of the U.S./Mexico border, and north and west of the line of demarcation between the Atlantic Ocean and the Gulf of Mexico (the Council boundary, as described in § 600.105(c) of this chapter).

(ii) *Florida east coast zone.* The Florida east coast zone encompasses an area of the EEZ south and east of the line of demarcation between the Atlantic Ocean and the Gulf of Mexico (as described in § 600.105(c) of this chapter), and south of a line extending due east from the Florida/Georgia border.

(2) *Atlantic migratory group.* In the EEZ, the Atlantic migratory group is bounded by a line extending from the intersection point of New York, Connecticut, and Rhode Island (as described in § 600.105(a) of this chapter) and a line extending due east of the Florida/Georgia border. See Table 3 of this section for the boundary coordinates. (See Figure 3 in Appendix G of this part for illustration.)

TABLE 3 TO § 622.369—COBIA DESCRIPTION OF ZONES

[For illustration, see Figure 3 in Appendix G of this part]

Area	Boundary 1	Boundary 2
Gulf Migratory Group—Gulf Zone.	U.S./Mexico A line east of the intersection of 25°58′30.57″ N. lat. and 96°55′27.37″ W. long.	Council Boundary—the intersection of the outer boundary of the EEZ and 83°00′ W. long., north to 24°35′ N. lat., (near the Dry Tortugas Islands), then east to the mainland.
Gulf Migratory Group—Florida East Coast Zone.	Council Boundary—the intersection of the outer boundary of the EEZ and 83°00′ W. long., north to 24°35′ N. lat., (near the Dry Tortugas Islands), then east to the mainland.	FL/GA 30°42′45.6″ N. lat.
Atlantic Migratory Group	NY/CT/RI 41°18′16.249″ N. lat. and 71°54′28.477″ W. long. southeast to 37°22′32.75″ N. lat. and the intersection point with the outward boundary of the EEZ.	FL/GA 30°42′45.6″ N. lat.

■ 5. In § 622.370, revise paragraph (a)(2), paragraph (b)(1) introductory text, and paragraph (c)(1) to read as follows:

§ 622.370 Permits.

* * * * *

(a) * * *

(2) *Gillnets for king mackerel in the Gulf southern zone.* For a person aboard a vessel to use a run-around gillnet for king mackerel in the southern zone (see § 622.369(a)(1)(iii)), a commercial vessel permit for king mackerel and a king mackerel gillnet permit must have been issued to the vessel and must be on board. See § 622.372 regarding a limited access system applicable to king mackerel gillnet permits in the southern zone and restrictions on transferability of king mackerel gillnet permits.

* * * * *

(b) * * *

(1) For a person aboard a vessel that is operating as a charter vessel or headboat to fish for or possess, in or from the EEZ, Gulf coastal migratory pelagic fish or Atlantic coastal migratory pelagic fish, a valid charter vessel/headboat permit for Gulf coastal migratory pelagic fish or Atlantic coastal migratory pelagic fish, respectively, must have been issued to the vessel and must be on board.

* * * * *

(c) * * *

(1) *Permits.* For a dealer to first receive Gulf or Atlantic coastal migratory pelagic fish harvested in or from the EEZ, a Gulf and South Atlantic dealer permit must be issued to the dealer.

■ 6. In § 622.372, revise the section heading to read as follows:

§ 622.372 Limited access system for king mackerel gillnet permits applicable in the Gulf southern zone.

* * * * *

■ 7. In § 622.374, revise paragraphs (b)(1)(i) and (ii), and (c)(1) to read as follows:

§ 622.374 Recordkeeping and reporting.

* * * * *

(b) * * *

(1) * * *

(i) *Charter vessels.* The owner or operator of a charter vessel for which a charter vessel/headboat permit for Gulf or Atlantic coastal migratory pelagic fish has been issued, as required under § 622.370(b)(1), or whose vessel fishes for or lands Gulf or Atlantic coastal migratory fish in or from state waters adjoining the Gulf, South Atlantic, or Mid-Atlantic EEZ, who is selected to report by the SRD must maintain a fishing record for each trip, or a portion of such trips as specified by the SRD, on forms provided by the SRD and must submit such record as specified in paragraph (b)(2)(i) of this section.

(ii) *Headboats.* The owner or operator of a headboat for which a charter vessel/headboat permit for Gulf coastal migratory fish or Atlantic coastal migratory pelagic fish has been issued, as required under § 622.370(b)(1), or whose vessel fishes for or lands Gulf or Atlantic coastal migratory pelagic fish in or from state waters adjoining the Gulf, South Atlantic, or Mid-Atlantic EEZ, who is selected to report by the SRD must submit an electronic fishing record for each trip of all fish harvested within the time period specified in paragraph (b)(2)(ii) of this section, via the Southeast Region Headboat Survey.

* * * * *

(c) * * *

(1) A dealer who first receives Gulf or Atlantic coastal migratory pelagic fish must maintain records and submit information as specified in § 622.5(c).

* * * * *

■ 8. In § 622.375, revise paragraphs (a)(1)(ii) and (b)(4) to read as follows:

§ 622.375 Authorized and unauthorized gear.

(a) * * *

(1) * * *

(ii) *King mackerel, Gulf migratory group*—hook-and-line gear and, in the southern zone only, run-around gillnet. (See § 622.369(a)(1)(iii) for a description of the southern zone.)

* * * * *

(b) * * *

(4) *Exception for king mackerel in the Gulf EEZ.* The provisions of this paragraph (b)(4) apply to king mackerel taken in the Gulf EEZ and to such king mackerel possessed in the Gulf. Paragraph (b)(3) of this section notwithstanding, a person aboard a vessel that has a valid commercial permit for king mackerel is not subject to the bag limit for king mackerel when the vessel has on board on a trip unauthorized gear other than a drift gillnet in the Gulf EEZ, a long gillnet, or a run-around gillnet in an area other than the southern zone. Thus, the following applies to a vessel that has a commercial permit for king mackerel:

(i) Such vessel may not use unauthorized gear in a directed fishery for king mackerel in the Gulf EEZ.

(ii) If such a vessel has a drift gillnet or a long gillnet on board or a run-around gillnet in an area other than the southern zone, no king mackerel may be possessed.

(iii) If such a vessel has unauthorized gear on board other than a drift gillnet in the Gulf EEZ, a long gillnet, or a run-

around gillnet in an area other than the southern zone, the possession of king mackerel taken incidentally is restricted only by the closure provisions of § 622.384(e) and the trip limits specified in § 622.385(a). See also § 622.379 regarding the purse seine catch allowances of king mackerel.

* * * * *

■ 9. In § 622.378, revise paragraph (a) to read as follows:

§ 622.378 Seasonal closures of the Gulf group king mackerel gillnet fishery.

(a) *Seasonal closures of the gillnet component for Gulf migratory group king mackerel.* The gillnet component for Gulf migratory group king mackerel in or from the southern zone is closed each fishing year from July 1 until 6 a.m. on the day after the Martin Luther King Jr. Federal holiday. The gillnet component is open on the first weekend following the Martin Luther King Jr. holiday, provided a notification of closure has not been filed under § 622.8(b). The gillnet component is closed all subsequent weekends and observed Federal holidays. Weekend closures are effective from 6 a.m. Saturday to 6 a.m. Monday. Holiday closures are effective from 6 a.m. on the observed Federal holiday to 6 a.m. the following day. All times are eastern standard time. During these closures, a person aboard a vessel using or possessing a gillnet with a stretched-mesh size of 4.75 inches (12.1 cm) or larger in the southern zone may not fish for or possess Gulf migratory group king mackerel. (See § 622.369(a)(1)(iii) for a description of the southern zone.)

* * * * *

■ 10. Amend § 622.379 as follows:

§ 622.379 Incidental catch allowances.

(a) *Purse seine incidental catch allowance.* A vessel in the EEZ, or having fished in the EEZ, with a purse seine on board will not be considered as fishing, or having fished, for king or Spanish mackerel in violation of a prohibition of purse seines under § 622.375(b), in violation of the possession limits under § 622.375(b)(3), or, in the case of king mackerel from the Atlantic migratory group, in violation of a closure effected in accordance with § 622.8(b), provided the king mackerel on board does not exceed 1 percent, or the Spanish mackerel on board does not exceed 10 percent, of all fish on board the vessel. Incidental catch will be calculated by number and/or weight of fish. Neither calculation may exceed the allowable percentage. Incidentally caught king or Spanish mackerel are counted toward the quotas provided for under § 622.384 and are subject to the prohibition of sale under § 622.384(e)(3).

(b) *Shark gillnet incidental catch allowance.* A vessel in the Atlantic EEZ with a valid Federal Atlantic commercial shark directed permit and a valid Federal king mackerel commercial permit that is engaged in directed shark fishing with gillnets that are not an authorized gear for Atlantic migratory group king mackerel (See § 622.375(a)(1)(i)), may retain and sell a limited number of king mackerel. Any king mackerel retained must be sold to a dealer with a valid Federal Gulf and South Atlantic dealer permit.

(i) *Northern zone.* No more than three king mackerel per crew member may be retained or sold per trip (See § 622.385(a)(1)(i) for the commercial trip limit for directed king mackerel trips using authorized gillnets (in the Atlantic EEZ north of 34°37.3′ N. lat, the latitude of Cape Lookout, NC)).

(ii) *Southern zone.* No more than two king mackerel per crew member may be retained or sold per trip.

■ 11. In § 622.382, revise paragraph (a)(1)(ii) to read as follows:

§ 622.382 Bag and possession limits.

* * * * *

(a) * * *

(1) * * *

(ii) Gulf migratory group king mackerel—3.

* * * * *

■ 12. In § 622.384:

■ A. Revise paragraphs (b) and (e) to read as follows:

§ 622.384 Quotas.

* * * * *

(b) King mackerel—(1) *Gulf migratory group.* The Gulf migratory group is divided into zones. The description of the zones is specified in § 622.369(a). Quotas for the western, northern, and southern zones are as follows:

(i) *Western zone.* The quota is 1,180,000 lb (535,239 kg) for the 2016–2017 fishing year, 1,136,000 lb (515,281 kg) for the 2017–2018 fishing year, 1,116,000 lb (506,209 kg) for the 2018–2019 fishing year, and 1,096,000 lb (497,137 kg) for the 2019–2020 fishing year and subsequent fishing years.

(ii) *Northern zone.* The quota is 531,000 lb (240,858 kg) for the 2016–2017 fishing year, 511,200 lb (231,876 kg) for the 2017–2018 fishing year, 502,200 lb (227,794 kg) for the 2018–2019 fishing year, and 493,200 lb (223,712 kg) for the 2019–2020 fishing year and subsequent fishing years.

(iii) *Southern zone.* (A) The hook-and-line quota is 619,500 lb (281,000 kg) for the 2016–2017 fishing year, 596,400 lb (270,522 kg) for the 2017–2018 fishing year, 585,900 lb (265,760 kg) for the 2018–2019 fishing year, and 575,400 lb (260,997 kg) for the 2019–2020 fishing year and subsequent fishing years.

(B) The run-around gillnet quota is 619,500 lb (281,000 kg) for the 2016–2017 fishing year, 596,400 lb (270,522 kg) for the 2017–2018 fishing year, 585,900 lb (265,760 kg) for the 2018–2019 fishing year, and 575,400 lb (260,997 kg) for the 2019–2020 fishing year and subsequent fishing years.

(2) *Atlantic migratory group.* The Atlantic migratory group is divided into northern and southern zones. The descriptions of the zones are specified in § 622.369(a). Quotas for the northern and southern zones for the 2016–2017 fishing year and subsequent years are as follows:

(i) *Northern zone*—The quota is 1,497,600 lb (679,300 kg) for the 2016–2017 fishing year, 1,259,360 lb (571,236 kg) for the 2017–2018 fishing year, 1,198,080 lb (543,440 kg) for the 2018–2019 fishing year and 1,082,880 lb (491,186 kg) for the 2019–2020 fishing year and subsequent fishing years. No more than 0.40 million lb (0.18 million kg) may be harvested by purse seine gear.

(ii) *Southern zone.* The annual quota is 5,002,400 lb (2,269,050 kg) for the 2016–2017 fishing year, 4,540,640 lb (2,059,600 kg) for the 2017–2018 fishing year, 4,001,920 lb (1,815,240 kg) for the 2018–2019 fishing year and 3,617,120 lb (1,640,698 kg) for the 2019–2020 fishing year and subsequent fishing years.

(A) For the period March 1 through September 30, each year, the seasonal quota is 3,001,440 lb (1,361,430 kg) for the 2016–2017 fishing year, 2,724,384 lb (1,235,760 kg) for the 2017–2018 fishing year, 2,401,152 lb (1,089,144 kg) for the 2018–2019 fishing year and 2,170,272 lb (984,419 kg) for the 2019–2020 fishing year and subsequent fishing years.

(B) For the period October 1 through the end of February each year, the seasonal quota is 2,000,960 lb (907,620 kg) for the 2016–2017 fishing year, 1,816,256 lb (823,840 kg) for the 2017–2018 fishing year, 1,600,768 lb (726,096 kg) for the 2018–2019 fishing year and 1,446,848 lb (656,279 kg) for the 2019–2020 fishing year and subsequent fishing years.

(C) Any unused portion of the quota specified in paragraph (b)(2)(ii)(A) of this section will be added to the quota specified in paragraph (b)(2)(ii)(B) of this section. Any unused portion of the quota specified in paragraph (b)(2)(ii)(B) of this section, including any addition of quota specified in paragraph (b)(2)(ii)(A) of this section that was unused, will become void at the end of

the fishing year and will not be added to any subsequent quota.

(iii) *Quota transfers.* North Carolina or Florida, in consultation with the other states in their respective zones, may request approval from the RA to transfer part or all of their respective zone's annual commercial quota to the other zone. Requests for transfer of commercial quota for king mackerel must be made by a letter signed by the principal state official with marine fishery management responsibility and expertise of the state requesting the transfer, or his/her previously named designee. The letter must certify that all pertinent state requirements have been met and identify the states involved and the amount of quota to be transferred. For the purposes of quota closures as described in § 622.8, the receiving zone's quota will be the original quota plus any transferred amount, for that fishing season only. Landings associated with any transferred quota will be included in the total landings for the Atlantic migratory group, which will be evaluated relative to the total ACL.

(A) Within 10 working days following the receipt of the letter from the state requesting the transfer, the RA shall notify the appropriate state officials of the disposition of the request. In evaluating requests to transfer a quota, the RA shall consider whether:

(*1*) The transfer would allow the overall annual quota to be fully harvested; and

(*2*) The transfer is consistent with the objectives of the FMP and the Magnuson-Stevens Act.

(B) The transfer of quota will be valid only for the fishing year for which the request was made and does not permanently alter the quotas specified in paragraphs (b)(2)(i) and (b)(2)(ii) of this section.

(3) *Transit provisions applicable in areas closed due to a quota closure for king mackerel.* A vessel with a valid commercial vessel permit for king mackerel that has onboard king mackerel harvested in an open area of the EEZ may transit through areas closed to the harvest of king mackerel due to a quota closure, if fishing gear is appropriately stowed. For the purpose of paragraph (b) of this section, transit means direct and non-stop continuous course through the area. To be appropriately stowed fishing gear means—

(i) A gillnet must be left on the drum. Any additional gillnets not attached to the drum must be stowed below deck.

(ii) A rod and reel must be removed from the rod holder and stowed securely on or below deck. Terminal gear (*i.e.,* hook, leader, sinker, flasher, or bait) must be disconnected and stowed separately from the rod and reel. Sinkers must be disconnected from the down rigger and stowed separately.

* * * * *

(e) *Restrictions applicable after a quota closure.* (1) A person aboard a vessel for which a commercial permit for king or Spanish mackerel has been issued, as required under § 622.370(a)(1) or (3), may not fish for king or Spanish mackerel in the EEZ or retain king or Spanish mackerel in or from the EEZ under a bag or possession limit specified in § 622.382(a) for the closed species, migratory group, zone, or gear, except as provided for under paragraph (e)(2) of this section.

(2) A person aboard a vessel for which valid charter vessel/headboat permits for Gulf coastal migratory pelagic fish or Atlantic coastal migratory pelagic fish and a valid commercial vessel permit for king or Spanish mackerel have been issued may continue to retain fish under a bag and possession limit specified in § 622.382(a), provided the vessel is operating as a charter vessel or headboat.

(3) The sale or purchase of king mackerel, Spanish mackerel, or cobia of the closed species, migratory group, zone, or gear type, is prohibited, including any king or Spanish mackerel taken under the bag limits, or cobia taken under the limited-harvest species possession limit specified in § 622.383(b). The prohibition on sale/purchase during a closure for coastal migratory pelagic fish does not apply to coastal migratory pelagic fish that were harvested, landed ashore, and sold prior to the effective date of the closure and were held in cold storage by a dealer or processor.

■ 13. In § 622.385, revise paragraph (a) to read as follows:

§ 622.385 Commercial trip limits.

(a) *King mackerel*—(1) *Atlantic migratory group.* The following trip limits apply to vessels for which commercial permits for king mackerel have been issued, as required under § 622.370(a)(1):

(i) North of 29°25′ N. lat., which is a line directly east from the Flagler/Volusia County, FL, boundary, king mackerel in or from the EEZ may not be possessed on board or landed from a vessel in a day in amounts exceeding 3,500 lb (1,588 kg).

(ii) In the area between 29°25′ N. lat., which is a line directly east from the Flagler/Volusia County, FL, boundary, and 29°25′ N. lat., which is a line directly east from the Miami-Dade/Monroe County, FL boundary king mackerel in or from the EEZ may not be possessed on board or landed from a vessel in a day in amounts not to exceed:

(A) From March 1 through March 31—50 fish.

(B) From April through September—75 fish, unless NMFS determines that 75 percent or more of the quota specified in 622.384(b)(2)(ii)(A) has been landed, then, 50 fish.

(C) From October 1 through January 31—50 fish.

(D) From February 1 through the end of February—50 fish, unless NMFS determines that less than 70 percent of the quota specified in § 622.384(b)(2)(ii)(B) has been landed, then, 75 fish.

(2) *Gulf migratory group.* Commercial trip limits are established in the southern, northern, and western zones as follows. (See § 622.369(a) for descriptions of the southern, northern, and western zones.)

(i) *Southern zone*—(A) *Gillnet gear.* (*1*) King mackerel in or from the EEZ may be possessed on board or landed from a vessel for which a commercial vessel permit for king mackerel and a king mackerel gillnet permit have been issued, as required under § 622.370(a)(2), in amounts not exceeding 45,000 lb (20,411 kg) per day.

(*2*) King mackerel in or from the EEZ may be possessed on board or landed from a vessel that uses or has on board a run-around gillnet on a trip only when such vessel has on board a commercial vessel permit for king mackerel and a king mackerel gillnet permit.

(*3*) King mackerel from the southern zone landed by a vessel for which a commercial vessel permit for king mackerel and a king mackerel gillnet permit have been issued will be counted against the run-around gillnet quota specified in § 622.384(b)(1)(iii)(B).

(*4*) King mackerel in or from the EEZ harvested with gear other than run-around gillnet may not be retained on board a vessel for which a commercial vessel permit for king mackerel and a king mackerel gillnet permit have been issued.

(B) *Hook-and-line gear.* King mackerel in or from the EEZ may be possessed on board or landed from a vessel with a commercial permit for king mackerel, as required by § 622.370(a)(1), and operating under the hook-and-line gear quotas in § 622.384(b)(1)(iii)(A) in amounts not exceeding 1,250 lb (567 kg) per day.

(ii) *Northern zone.* King mackerel in or from the EEZ may be possessed on board or landed from a vessel for which a commercial permit for king mackerel has been issued, as required under

§ 622.370(a)(1), in amounts not exceeding 1,250 lb (567 kg) per day.

(iii) *Western zone.* King mackerel in or from the EEZ may be possessed on board or landed from a vessel for which a commercial permit for king mackerel has been issued, as required under § 622.370(a)(1), in amounts not exceeding 3,000 lb (1,361 kg) per day.

* * * * *

■ 14. In § 622.388, revise paragraphs (a), (b), (d)(2)(i), and (f)(2)(i) to read as follows:

§ 622.388 Annual catch limits (ACLs), annual catch targets (ACTs), and accountability measures.

* * * * *

(a) *Gulf migratory group king mackerel*—(1) *Commercial sector*—(i) If commercial landings, as estimated by the SRD, reach or are projected to reach the applicable quota specified in § 622.384(b)(1), the AA will file a notification with the Office of the Federal Register to close the commercial sector for that zone, or gear type for the remainder of the fishing year.

(ii) The commercial ACL for the Gulf migratory group of king mackerel is 2.95 million lb (1.34 million kg) for the 2016–2017 fishing year, 2.84 million lb (1.29 million kg) for the 2017–2018 fishing year, 2.79 million lb (1.27 million kg) for the 2018–2019 fishing year, and 2.74 million lb (1.24 million kg) for the 2019–2020 and subsequent fishing years. This ACL is further divided into a commercial ACL for vessels fishing with hook-and-line and a commercial ACL for vessels fishing with run-around gillnets. The hook-and-line ACL (which applies to the entire Gulf) is 2,330,500 lb (1,057,097 kg) for 2016–2017 fishing year, 2,243,600 lb (1,017,680 kg) for the 2017–2018 fishing year, 2,204,100 lb (999,763 kg) for the 2018–2019 fishing year, and 2,164,600 lb (981,846 kg) for the 2019–2020 and subsequent fishing years. The run-around gillnet ACL (which applies to the southern zone) is 619,500 lb (281,000 kg) for the 2016–2017 fishing year, 596,400 lb (270,522 kg) for the 2017–2018 fishing year, 585,900 lb (265,760 kg) for the 2018–2019 fishing year, and 575,400 lb (260,997 kg) for 2019–2020 and subsequent fishing years.

(iii) If commercial landings of Gulf migratory group king mackerel caught by run-around gillnet in the southern zone, as estimated by the SRD, exceed the commercial ACL, the AA will file a notification with the Office of the Federal Register to reduce the commercial ACL for king mackerel harvested by run-around gillnet in the southern zone in the following fishing year by the amount of the commercial ACL overage in the prior fishing year.

(2) *Recreational sector.* If recreational landings, as estimated by the SRD, reach or are projected to reach the recreational ACL of 6.26 million lb (2.84 million kg) for the 2016–2017 fishing year, 6.04 million lb (2.74 million kg) for the 2017–2018 fishing year, 5.92 million lb (2.69 million kg) for the 2018–2019 fishing year, and 5.81 million lb (2.64 million kg) for the 2019–2020 and subsequent fishing years, the AA will file a notification with the Office of the Federal Register to implement bag and possession limits for Gulf migratory group king mackerel of zero, unless the best scientific information available determines that a bag limit reduction is unnecessary.

(3) For purposes of tracking the ACL, recreational landings will be monitored based on the commercial fishing year.

(b) Atlantic migratory group king mackerel—(1) Commercial sector—(i) If commercial landings, as estimated by the SRD, reach or are projected to reach the applicable quota for the zone or season specified in § 622.384(b)(2), the AA will file a notification with the Office of the Federal Register to close the commercial sector for that zone for the remainder of the applicable fishing season or fishing year.

(ii) In addition to the measures specified in paragraph (b)(1)(i) of this section, if the sum of the commercial and recreational landings, as estimated by the SRD, exceeds the stock ACL, as specified in paragraph (b)(3) of this section, and Atlantic migratory group king mackerel are overfished, based on the most recent status of U.S. Fisheries Report to Congress, the AA will file a notification with the Office of the Federal Register, at or near the beginning of the following fishing year to reduce the commercial quota for that zone for that following year by the amount of any commercial sector overage in the prior fishing year for that zone.

(iii) The commercial ACL for the Atlantic migratory group of king mackerel is 6.5 million lb (2.9 million kg) for the 2016–2017 fishing year, 5.9 million lb (2.7 million kg) for the 2017–2018 fishing year, 5.2 million lb (2.4 million kg) for the 2018–2019 fishing year, and 4.7 million lb (2.1 million kg) for the 2019–2020 fishing year and subsequent fishing years.

(2) *Recreational sector.* (i) If the recreational landings, exceed the recreational ACL as specified in this paragraph and the sum of the commercial and recreational landings, as estimated by the SRD, exceeds the stock ACL, as specified in paragraph (b)(3) of this section, the AA will file a notification with the Office of the Federal Register, at or near the beginning of the following fishing year to reduce the bag limit by the amount necessary to ensure recreational landings may achieve the recreational ACT, but do not exceed the recreational ACL, in the following fishing year.

The recreational ACT is 10.1 million lb (4.6 million kg) for the 2016–2017 fishing year, 9.2 million lb (4.2 million kg) for the 2017–2018 fishing year, 8.3 million lb (3.8 million kg) for the 2018–2019 fishing year, and 7.4 million lb (3.4 million kg) for the 2019–2020 fishing year and subsequent fishing years. The recreational ACL is 10.9 million lb (4.9 million kg) for the 2016–2017 fishing year, 9.9 million lb (4.5 million kg) for the 2017–2018 fishing year, 8.9 million lb (4.0 million kg) for the 2018–2019 fishing year, and 8.0 million lb (3.6 million kg) for the 2019–2020 fishing year and subsequent fishing years.

(ii) In addition to the measures specified in paragraph (b)(2)(i) of this section, if the sum of the commercial and recreational landings, as estimated by the SRD, exceeds the stock ACL, as specified in paragraph (b)(3) of this section, and Atlantic migratory group king mackerel are overfished, based on the most recent status of U.S. Fisheries Report to Congress, the AA will file a notification with the Office of the Federal Register, at or near the beginning of the following fishing year to reduce the recreational ACL and ACT for that following year by the amount of any recreational sector overage in the prior fishing year.

(iii) For purposes of tracking the ACL, recreational landings will be evaluated based on the commercial fishing year, March through February. Recreational landings will be evaluated relative to the ACL based on a moving multi-year average of landings, as described in the FMP.

(3) The stock ACL for Atlantic migratory group king mackerel is 17.4 million lb (7.9 million kg) for the 2016–2017 fishing year, 15.8 million lb (7.2 million kg) for the 2017–2018 fishing year, 14.1 million lb (6.4 million kg) for the 2018–2019 fishing year, and 12.7 million lb (5.8 million kg) for the 2019–2020 fishing year and subsequent fishing years.

* * * * *

(d) * * *

(2) * * *

(i) If the recreational landings exceed the recreational ACL as specified in this paragraph and the sum of the commercial and recreational landings, as estimated by the SRD, exceeds the

stock ACL, as specified in paragraph (d)(3) of this section, the AA will file a notification with the Office of the Federal Register, at or near the beginning of the following fishing year to reduce the bag limit by the amount necessary to ensure recreational landings may achieve the recreational ACT, but do not exceed the recreational ACL, in the following fishing year. The recreational ACT for the Atlantic migratory group is 2.364 million lb (1.072 million kg). The recreational ACL for the Atlantic migratory group is 2.727 million lb (1.236 million kg).

* * * * *

(f) * * *

(2) * * *

(i) If landings of cobia that are not sold exceed the ACL specified in this paragraph and the sum of the cobia landings that are sold and not sold, as estimated by the SRD, exceeds the stock ACL, as specified in paragraph (f)(3) of this section, the AA will file a notification with the Office of the Federal Register, at or near the beginning of the following fishing year to reduce the length of the following fishing season by the amount necessary to ensure landings may achieve the applicable ACT, but do not exceed the applicable ACL in the following fishing year. The applicable ACTs for the Atlantic migratory group of cobia are 550,000 lb (249,476 kg) for 2014, 520,000 lb (235,868 kg) for 2015, and 500,000 lb (226,796 kg) for 2016 and subsequent fishing years. The applicable ACLs for the Atlantic migratory group of cobia are 670,000 lb (303,907 kg) for 2014, 630,000 lb (285,763 kg) for 2015, and 620,000 lb (281,227 kg) for 2016 and subsequent fishing years.

* * * * *

■ 15. Revise Appendix G to Part 622 to read as follows:

BILLING CODE 3510–22–P

Appendix G to Part 622 Coastal Migratory Pelagics Zone Illustration

BILLING CODE 3510–22–P

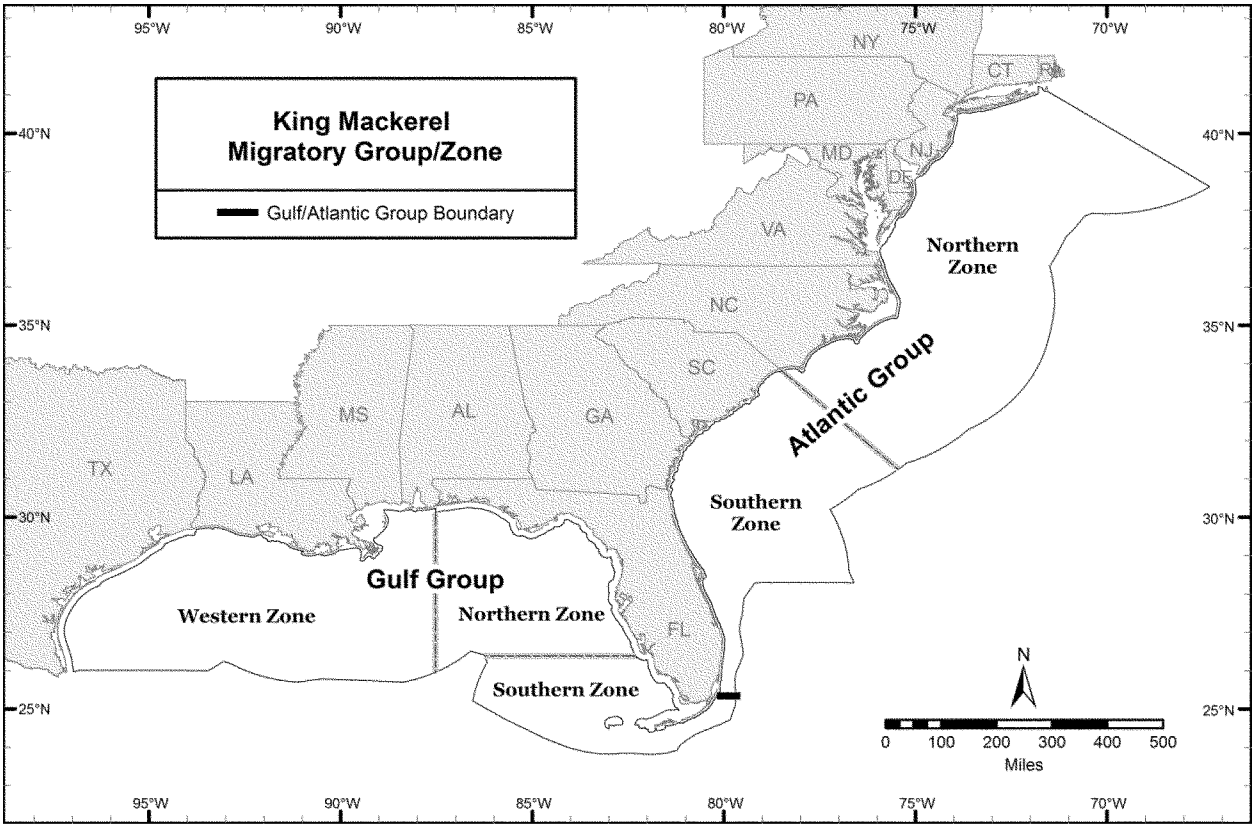

Figure 1 of Appendix G to Part 622--King Mackerel

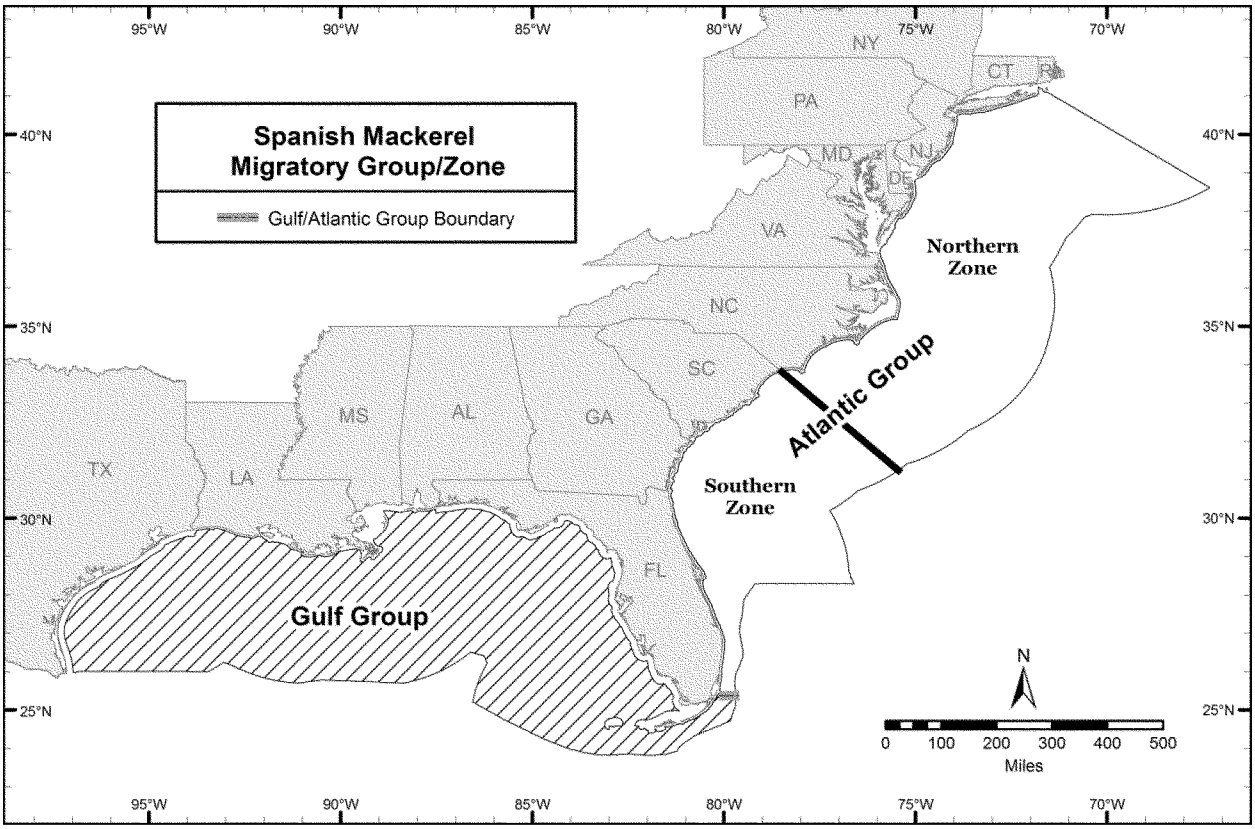

Figure 2 of Appendix G to Part 622--Spanish Mackerel

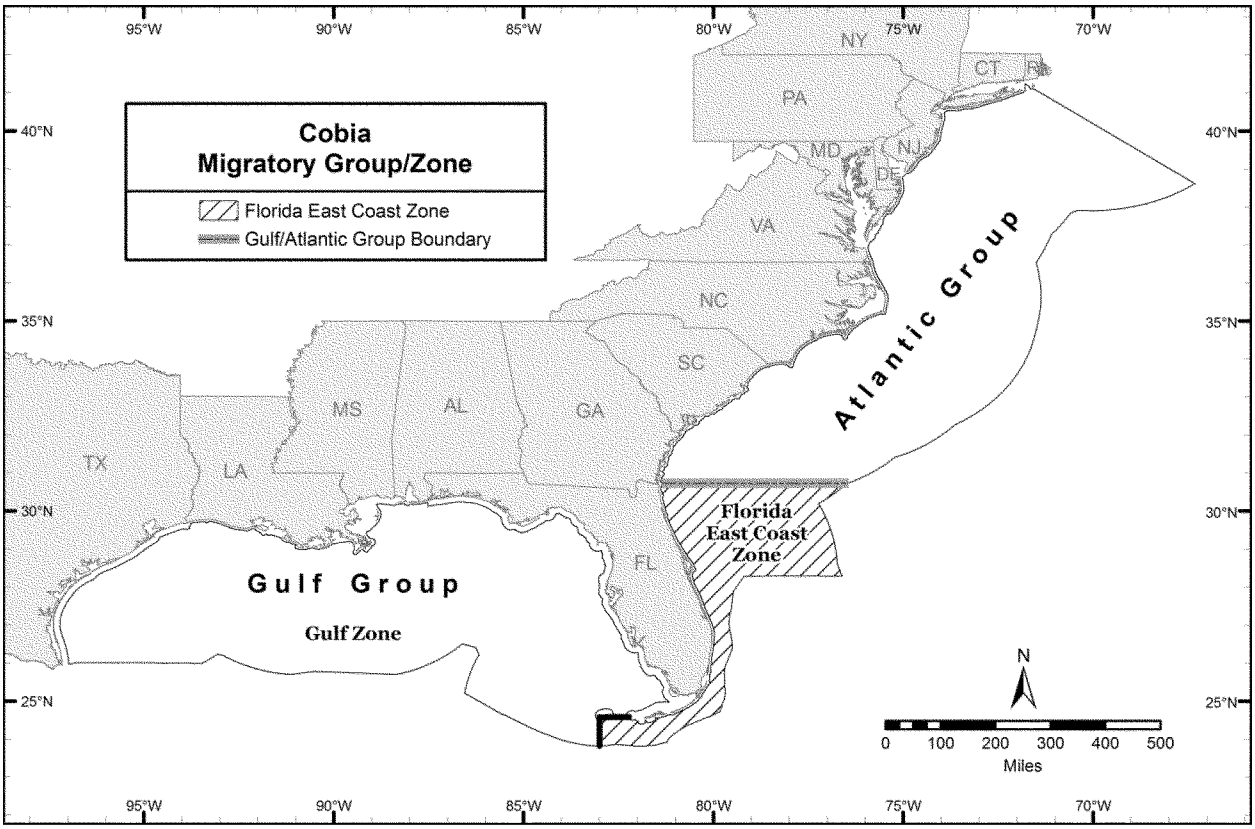

Figure 3 of Appendix G to Part 622--Cobia

[FR Doc. 2016–31066 Filed 12–28–16; 8:45 am]
BILLING CODE 3510–22–C

Notices

Federal Register

Vol. 81, No. 250

Thursday, December 29, 2016

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

Commodity Credit Corporation

Notice of Funds Availability (NOFA); Farm-to-Fleet Feedstock Program Biofuel Production Incentive (BPI)

AGENCY: Commodity Credit Corporation and Farm Service Agency, USDA.

ACTION: Notice.

SUMMARY: In support and for the purposes of the Farm-to-Fleet Program, the U.S. Department of Agriculture (USDA) Commodity Credit Corporation (CCC) is announcing that funding is available to pay a BPI to companies that are refining biofuel in the United States from certain domestically grown feedstocks converted to drop-in biofuel. If eligibility requirements are met, subject to availability of funds, the USDA Farm Service Agency (FSA) will use CCC funds to pay a per gallon incentive amount for JP–5 and F–76 blended biofuels produced from eligible feedstocks and delivered to the U.S. Department of Navy (U.S. Navy). Up to $50 million of CCC funds is available for obligation through fiscal year (FY) 2018. USDA does not expect funding to be a constraint through FY 2018; however, should there be a demand in excess of $50 million, USDA would consider requesting additional funds be made available for BPI payments. As explained in this NOFA, the BPI payment rate will range between 8.335 to 25 cents per blended gallon of biofuel depending on the blended rate; the payment rate will not be based on which eligible feedstock is used to produce the biofuel. The total BPI payment will be determined by multiplying the payment rate by the number of gallons of qualifying biofuel blend delivered under a Defense Logistics Agency (DLA) Energy contract. Biofuel vendors that deliver blended biofuel under a DLA Energy contract on behalf of the U.S. Navy that was refined in the United States and was produced from a domestically grown eligible feedstock are referred to in this NOFA as ''claimants'' for the BPI payment. As further specified in the Background of this NOFA and subject to the availability of funds, FSA will make a BPI payment to the claimant upon receipt of the following information: Quantity of delivered biofuel blend, identification of the U.S. produced feedstock from which the biofuel was produced, and the blend rate.

FOR FURTHER INFORMATION CONTACT: Kelly Novak, (202) 720–4053.

ADDRESSES: As a claimant, submit your information to request a BPI Payment to Farm Service Agency, USDA, Attn: Kelly Novak, (202) 720–4053; 1400 Independence Ave SW., Room 4765, Washington, DC 20250; or *kelly.novak@wdc.usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

The joint USDA and U.S. Navy Farm-to-Fleet Program was announced in December 2013 and added the purchase of biofuel blends into Department of Defense (DOD) domestic solicitations for JP–5 and F–76 fuels. Funds from USDA's CCC are used for this effort to help increase the domestic consumption of agricultural commodities in the biofuel market. The CCC Charter Act (15 U.S.C. 714c(e)) authorizes CCC to use its general powers to increase the domestic consumption of agricultural commodities (other than tobacco) by expanding or aiding in the expansion of domestic markets or by developing or aiding in the development of new and additional markets, marketing facilities, and uses for such commodities. CCC funding is available to pay a BPI for delivered blended biofuel that used certain feedstocks converted to drop-in biofuel. USDA is issuing this NOFA to improve transparency and simplify the process by which CCC funds are administered in support and for the purposes of expanding markets for bioenergy feedstocks through the increased use of eligible feedstocks to produce biofuel for the U.S. Navy. If eligibility requirements are met as specified below in the Eligibility Requirements section and subject to availability of funds, CCC will pay a per gallon incentive amount for JP–5 and F–76 blended biofuels produced from eligible feedstock.

The BPI is administered by the Farm Service Agency (FSA); the FSA Administrator also serves as the Executive Vice-President of CCC.

To date, the BPI has had limited use by claimants and minimal impact expanding or developing biofuel markets for agricultural commodities. As a result, through this NOFA, USDA is simplifying the use of CCC funds in the BPI. This simplification increases transparency by identifying a specific BPI payment rate. This allows claimants to quantify the BPI on a per gallon basis, thus making it easier for potential claimants to understand how the BPI funding process works when they consider submitting an offer to provide JP–5 and F–76 blended biofuels on DLA Energy domestic bulk fuel procurements.

Those biofuel vendors that are awarded a contract by DLA Energy and deliver eligible blended F–76 or JP–5 biofuel, produced using an eligible feedstock, may submit a claim to receive a per gallon payment from FSA, subject to the availability of funds. As part of the pre-award acquisition process, DLA Energy will confirm the supplier's biofuel delivery capability, including quality review of the fuel specification (including feedstock type), ability to produce designated blended biofuel, and the specified blend rate.

The BPI payment rate will be 8.335 cents per gallon of F–76 or JP–5 fuel that contains a minimum of 10 percent biofuel; the BPI payment rate will increase in a linear fashion; the amount of the increase is 0.8335 cents for every 1 percent biofuel content above 10 percent, up to a maximum BPI payment rate of 25 cents, per gallon. Table 1 shows examples of how the BPI payment rate will be determined based on the blended rate of the biofuel. The payment rate will not be based on which eligible feedstock is used to produce the biofuel. The total BPI payment will be determined by multiplying the BPI payment rate by the number of gallons of qualifying biofuel blend delivered under a DLA Energy contract.

TABLE 1—EXAMPLE OF BPI DETERMINATION BASED ON BLENDED RATE OF BIOFUEL

For every 1% biofuel content above 10%, the BPI payment rate will increase 0.8335 cents, up to a maximum payment rate of 25 cents, per gallon, as shown in the examples:

If the blended rate is:	Then the BPI payment rate, per gallon, will be:
10%	8.3350 cents.
11%	9.1685 cents.
15%	12.5025 cents.
20%	16.6700 cents.
25%	20.8375 cents.
30% and up to a maximum as permitted by the MILSPEC	25.0000 cents.

Up to $50 million is presently available for obligation through FY 2018. USDA does not expect funding to be a constraint through FY 2018; however, should there be a demand in excess of $50 million, USDA would consider requesting additional funds be made available for BPI payments.

BPI Payment Eligibility Requirements

For a claimant to be eligible to receive a BPI payment with CCC funds through this NOFA, all three of the following requirements must be satisfied:

1. Delivery of a biofuel blend for use by the U.S. Navy that is contractually accepted by DLA Energy and produced in the United States from an eligible feedstock;

2. Use of a U.S. produced eligible feedstock or feedstocks to produce the biofuel used in the blended product (see Table 2—Qualified Feedstocks below for the list of eligible and ineligible feedstocks); and

3. Minimum of 10 percent blended biofuel to a maximum as permitted by the revision of MIL–DTL–16884 (F–76) or MIL–DTL–5624 (JP–5).

TABLE 2—QUALIFIED FEEDSTOCK OR FEEDSTOCKS TO PRODUCE THE BIOFUEL USED IN THE BLENDED PRODUCT

Eligible	Non-eligible
Agricultural residues such as rice hulls, nut shells	Food waste.
Algae or Algal oil	Municipal solid waste.
Animal waste and by-products of animal waste including fats, oils greases (not recycled)	Yard waste.
Annual cover crops or oil produced from these cover crops *.	
Camelina or camelina oil.	
Canola or Rapeseed oil.	
Cellulosic Biomass from crop residues (that is, stover, wheat straw, rice straw, etc.).	
Energy cane.	
Eucalyptus.	
Hybrid Poplars.	
Jatropha.	
Mill residues or waste.	
Miscanthus.	
Non-food grade corn oil.	
Pennycress.	
Shrub willows.	
Slash, pre-commercial thinnings, and tree residue, forest residues.	
Sorghum or sorghum oil (non-food grade).	
Sorghum, Biomass.	
Sorghum, Energy.	
Sunflower oil.	
Switchgrass.	
Other agricultural product approved by CCC.	

* **Note:** Cover crops must be approved by the FSA Administrator on a case-by-case basis. Generally, however, ''cover crop'' means crops, including grasses, legumes, and forbs, for seasonal cover and other conservation purposes. Cover crops are primarily used for erosion control, soil health improvement, and water quality improvement. The cover crop may be terminated by natural causes, such as frost, or intentionally terminated through chemical application, crimping, rolling, tillage, or cutting.

BPI Payment Claim Submission Requirements

It is the claimant's responsibility to invoice DLA-Energy for the blended biofuel delivered under the contract to the U.S. Navy and to submit necessary documentation to FSA to receive a BPI payment. Claimant will submit documentation indicating amount of blended biofuel delivered to the U.S. Navy, the blend rate of that biofuel delivery, and the feedstock used to produce the biofuel blend, such as a signed DLA Energy Receiving Report with applicable attachments or other equivalent documentation. The claimant will provide the Energy Receiving Report or equivalent document with the information listed below to USDA for the CCC funded BPI payment. All of the following items will be included in the information provided by the claimant to USDA:

1. The amount of the delivered blended biofuel, as the affirmed blended quantity of delivered blended biofuel, the delivery date, and the name and address of the claimant;

2. The U.S. produced feedstock from which the biofuel was produced; and

3. The blended rate.

Distribution of Funds

Following receipt and review of the complete documentation submitted to USDA by the claimant, as described above in the BPI Payment Claim Submission Requirements section, and satisfaction of the requirements specified above in the BPI Payment Eligibility Requirements section, FSA will make payments directly to claimants of the BPI for qualified biofuel, subject to the availability of funds. In the event the claimant delivers fuel that is produced from an ineligible feedstock, or otherwise fails to comply with any eligibility requirement, the claimant will not receive a payment.

The claimant will receive the earned total BPI payment from FSA following FSA's receipt of the information, as specified above.

Paperwork Reduction Act Requirements

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. chapter 35), FSA is not required to submit the information collection request to OMB for approval because the information is expected to come from less than 10 biofuel companies, which does not meet the 10 or more entities requirement, and therefore, the PRA requirements do not apply.

Catalog of Federal Domestic Assistance

The BPI payment is not required to be in the Catalog of Federal Domestic Assistance.

Environmental Review

The environmental impacts of this NOFA have been considered in a manner consistent with the provisions of the National Environmental Policy Act (NEPA, 42 U.S.C. 4321–4347), the regulations of the Council on Environmental Quality (40 CFR parts 1500–1508), and the FSA regulations for compliance with NEPA (7 CFR part 799). As previously stated, this program uses CCC funds in coordination with DLA Energy purchases. This NOFA initiates a relatively minor change in the application of the CCC funds; the general scope of the BPI modification for DLA Energy bulk fuel solicitations, as implemented previously, is unchanged.

The purpose of the BPI is to provide an incentive to fuel providers for biofuel that is produced from a domestic feedstock approved by CCC. FSA's participation in the program and the minor, discretionary change to the program (that is, simplifying the program by providing a per gallon incentive that varies per blend) are administrative in nature. The discretionary aspects of the program (for example, solicitation acceptance and certification of delivery, etc.) were designed and are implemented by DLA Energy and are not proposed to be substantively changed. As such, the Categorical Exclusions in 7 CFR part 799.31 apply, specifically 7 CFR 799.31(b)(6)(c) (that is, financial assistance to supplement income). No Extraordinary Circumstances (7 CFR 799.33) exist. As such, FSA has determined that this NOFA does not constitute a major Federal action that would significantly affect the quality of the human environment, individually or cumulatively. Therefore, FSA will not prepare an environmental assessment or environmental impact statement for this action.

Val Dolcini,

Executive Vice President, Commodity Credit Corporation.

[FR Doc. 2016–31582 Filed 12–28–16; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF AGRICULTURE

Forest Service

Sitka/Tenakee Springs/Port Alexander Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Sitka/Tenakee Springs/Port Alexander Resource Advisory Committee (RAC) will meet in Sitka, Alaska. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110–343) (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with the title II of the Act. The meeting is open to the public. The purpose of the meeting is to provide training to the public regarding Title II of the Secure Rural Act and the process for new project proposals

DATES: The meeting will be held on Febuary 16, 2017, from 5 p.m. to 7 p.m.

All RAC meetings are subject to cancellation. For status of meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: The meeting will be held at the Sitka Ranger District, 2108 Halibut Point Road, Sitka Alaska, Katlian Conference Room.

Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION**. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at the Sitka Ranger District, 2108 Halibut Point Road, Sitka Alaska. Please call ahead to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Lisa Hirsch, RAC Coordinator by phone at 907–747–4214 or via email at *lisahirsch@fs.fed.us.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday. Please make requests in advance for sign language interpreting, assistive listening devices or other reasonable accomodation for access to the facility or procedings by contacting the person listed **FOR FURTHER INFORMATION**.

SUPPLEMENTARY INFORMATION: Additional RAC information, including the meeting agenda and the meeting summary/minutes can be found at the following Web site: *https://fsplaces.fs.fed.us/fsfiles/unit/wo/secure_rural_schools.nsf/RAC/07924D017A51AEC5882575440062EFB1?OpenDocument.* The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing by Febuary 9, 2017, to be scheduled on the agenda. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. Written comments and requests for time for oral comments must be sent to Lisa Hirsch, RAC Coordinator, 2108 Halibut Point Road, Sitka, Alaska 99835 or by email to *lisahirsch@fs.fed.us,* or via facsimile to 907–747–4253.

Meeting Accommodations: If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpreting, assistive listening devices or other reasonable accommodation for access to the facility or proceedings by contacting the person listed in the section titled **FOR FURTHER INFORMATION CONTACT**. All reasonable accommodation requests are managed on a case by case basis.

Dated: December 20, 2016.

Perry Edwards,

Designated Federal Officer.

[FR Doc. 2016–31509 Filed 12–28–16; 8:45 am]

BILLING CODE 3410–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

Okanogan-Wenatchee National Forest; Okanogan, Chelan and Skagit Counties, Washington; Pack Stock Outfitter Guide Special Use Permits Supplemental Environmental Impact Statement

AGENCY: Forest Service, USDA.

ACTION: Notice to extend the public comment period for the Pack and Saddle Stock Outfitter Guide Special Use Permit Issuance Draft Supplemental Environmental Impact Statement.

SUMMARY: The Okanogan-Wenatchee National Forest is issuing this notice to advise the public of a 30-day extension to the public comment period on the Pack and Saddle Stock Outfitter Guide Special Use Permit Issuance Draft Supplemental Environmental Impact Statement (SEIS). The initial Notice of Availability was published in the **Federal Register** on November 25, 2016, and established a public comment period from November 25, 2016 through January 9, 2017. The Okanogan-Wenatchee National Forest is hereby extending the deadline for submitting public comments on this matter to February 8, 2017.

DATES: The Okanogan-Wenatchee National Forest is accepting public comments through February 8, 2017. The forest is soliciting the views of interested persons and organizations on the adequacy of the DSEIS. All relevant comments received during the extended public commenter period ending February 8, 2017, will be considered in the preparation of the Final Supplemental Environmental Impact Statement (FSEIS).

ADDRESSES: Comments may be submitted by any one of the following methods:

• *Electronic Submissions:* Submit all electronic public comments via the Forest Service ecosystem management database. Go to: *https://cara.ecosystem-management.org/Public//CommentInput?Project=3752,* and click the ''Comment Now'' icon, complete the required fields and enter or attach your comments.

• *Mail:* Written, specific comments must be submitted to Forest Supervisor, Okanogan-Wenatchee National Forest, c/o Jennifer Zbyszewski, 24 West Chewuch Road, Winthrop, WA 98862; Fax (509) 996–2208.

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 the forest. All comments received are part of the public record and will generally be posted for public viewing 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.

FOR FURTHER INFORMATION CONTACT: Jennifer Zbyszewski, Project Team Leader, Methow Valley Ranger District, Okanogan-Wenatchee National Forest, (509) 996–4021, *jzbysewski@fs.fed.us,* or Paul Willard, Recreation Program Manager, Chelan Ranger District, Okanogan-Wenatchee National Forest, (509) 682–4960, *pwillard@fs.fed.us.* Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday. Electronic copies of the Draft Supplemental Environmental Impact Statement may be found on the Forest Service Web site at *www.fs.usda.gov/project/?project=3752.*

Michael R. Williams,

Forest Supervisor.

[FR Doc. 2016–31574 Filed 12–28–16; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

Newspapers Used for Publication of Legal Notices in the Pacific Northwest Region Which Includes Washington and Oregon

AGENCY: Forest Service, USDA.

ACTION: Notice of newspapers of record, Pacific Northwest Region.

SUMMARY: This notice provides the list of newspapers that will be used by the Pacific Northwest Region to publish legal notices required under 36 CFR part 218 and 36 CFR part 219. The intended effect of this action is to inform interested members of the public which newspapers will be used by the Forest Service to publish legal notices for public comment, notices for draft decisions and the opportunity to file an administrative review on USDA Forest Service proposals.

DATES: Publication of legal notices in the listed newspapers begins on the date of this publication. This list of newspapers will remain in effect until it is superceded by a new list, published in the **Federal Register**.

ADDRESSES: USDA Forest Service, Pacific Northwest Region; ATTN: Regional Administrative Review Coordinator; 1220 SW. Third Avenue, (P.O. Box 3623), Portland, Oregon 97204.

FOR FURTHER INFORMATION CONTACT: Debbie Anderson, Regional Administrative Review Coordinator, 503–808–2286.

SUPPLEMENTARY INFORMATION: The newspapers to be used in the Pacific Northwest Region are as follows:

Pacific Northwest Regional Office

Regional Forester decisions on Oregon National Forests
The Oregonian, Portland, Oregon
Regional Forester decisions on Washington National Forests
The Seattle Times, Seattle, Washington

Columbia River Gorge National Scenic Area

Area Manager decisions
Hood River News, Hood River, Oregon

Oregon National Forests and Grassland

Deschutes National Forest

Forest Supervisor decisions
Bend/Fort Rock District Ranger decisions
Crescent District Ranger decisions
Redmond Air Center Manager decisions
Sisters District Ranger decisions
The Bulletin, Bend, Oregon

Fremont-Winema National Forests

Forest Supervisor decisions
Bly District Ranger decisions
Lakeview District Ranger decisions
Paisley District Ranger decisions
Silver Lake District Ranger decisions
Chemult District Ranger decisions
Chiloquin District Ranger decisions
Klamath District Ranger decisions
Herald and News, Klamath Falls, Oregon

Malheur National Forest

Forest Supervisor decisions
Blue Mountain District Ranger decisions
Prairie City District Ranger decisions
Blue Mountain Eagle, John Day, Oregon
Emigrant Creek District Ranger decisions
Burns Times Herald, Burns, Oregon

Mt. Hood National Forest

Forest Supervisor decisions
Clackamas River District Ranger decisions
Zigzag District Ranger decisions

Hood River District Ranger decisions
Barlow District Ranger decisions
The Oregonian, Portland, Oregon

Ochoco National Forest and Crooked River National Grassland

Forest Supervisor decisions
Crooked River National Grassland Area Manager decisions
Lookout Mountain District Ranger decisions
Paulina District Ranger decisions
The Bulletin, Bend, Oregon

Rogue River-Siskiyou National Forests

Forest Supervisor decisions
High Cascades District Ranger decisions
J. Herbert Stone Nursery Manager decisions
Siskiyou Mountains District Ranger decisions
Mail Tribune, Medford, Oregon
Wild Rivers District Ranger decisions
Grants Pass Daily Courier, Grants Pass, Oregon
Gold Beach District Ranger decisions
Curry County Reporter, Gold Beach, Oregon
Powers District Ranger decisions
The World, Coos Bay, Oregon

Siuslaw National Forest

Forest Supervisor decisions
Corvallis Gazette-Times, Corvallis, Oregon
Central Coast Ranger District—Oregon Dunes National Recreation Area District Ranger decisions
The Register-Guard, Eugene, Oregon
Hebo District Ranger decisions
Tillamook Headlight Herald, Tillamook, Oregon

Umatilla National Forest

Forest Supervisor decisions
North Fork John Day District Ranger decisions
Heppner District Ranger decisions
Pomeroy District Ranger decisions
Walla Walla District Ranger decisions
East Oregonian, Pendleton, Oregon

Umpqua National Forest

Forest Supervisor decisions
Cottage Grove District Ranger decisions
Diamond Lake District Ranger decisions
North Umpqua District Ranger decisions
Tiller District Ranger decisions
Dorena Genetic Resource Center Manager decisions
The News-Review, Roseburg, Oregon

Wallowa-Whitman National Forest

Forest Supervisor decisions
Whitman District Ranger decisions
Baker City Herald, Baker City, Oregon
La Grande District Ranger decisions
The Observer, La Grande, Oregon
Hells Canyon National Recreation Area Manager decisions
Eagle Cap District Ranger decisions
Wallowa Valley District Ranger decisions
Wallowa County Chieftain, Enterprise, Oregon

Willamette National Forest

Forest Supervisor decisions
Middle Fork District Ranger decisions
McKenzie River District Ranger decisions
Sweet Home District Ranger decisions
The Register Guard, Eugene, Oregon
Detroit District Ranger decisions
Statesman Journal, Salem, Oregon

Washington National Forests

Colville National Forest

Forest Supervisor decisions
Three Rivers District Ranger decisions
Statesman-Examiner, Colville, Washington
Sullivan Lake District Ranger decisions
Newport District Ranger decisions
The Newport Miner, Newport, Washington
Republic District Ranger decisions
Ferry County View, Republic, Washington

Gifford Pinchot National Forest

Forest Supervisor decisions
Mount Adams District Ranger decisions
Mount St. Helens National Volcanic Monument Manager decisions
The Columbian, Vancouver, Washington
Cowlitz Valley District Ranger decisions
The Chronicle, Chehalis, Washington

Mt. Baker-Snoqualmie National Forest

Forest Supervisor decisions
Darrington District Ranger decisions
Skykomish District Ranger decisions
Everett Herald, Everett, Washington
Mt. Baker District Ranger decisions
Skagit Valley Herald, Mt. Vernon, Washington (south half of the district)
Bellingham Herald, Bellingham, Washington (north half of the district)
Snoqualmie District Ranger decisions
Snoqualmie Valley Record, North Bend, Washington (north half of district)
Enumclaw Courier Herald, Enumclaw, Washington (south half of district)

Okanogan-Wenatchee National Forests

Forest Supervisor decisions
Chelan District Ranger decisions
Entiat District Ranger decisions
Tonasket District Ranger decisions
Wenatchee River District Ranger decisions
The Wenatchee World, Wenatchee, Washington
Naches District Ranger decisions
Yakima Herald, Yakima, Washington
Methow Valley District Ranger decisions
Methow Valley News, Twisp, Washington
Cle Elum District Ranger decisions
Ellensburg Daily Record, Ellensburg, Washington

Olympic National Forest

Forest Supervisor decisions
The Olympian, Olympia, Washington
Hood Canal District Ranger decisions
Peninsula Daily News, Port Angeles, Washington
Pacific District Ranger decisions (south portion of district)
The Daily World, Aberdeen, Washington
Pacific District Ranger decisions (north portion of district)
Peninsula Daily News, Port Angeles, Washington

James M. Peña,
Regional Forester.

[FR Doc. 2016–31623 Filed 12–28–16; 8:45 am]
BILLING CODE 3411–15–P

DEPARTMENT OF COMMERCE

Economic Development Administration

Notice of Petitions by Firms for Determination of Eligibility To Apply for Trade Adjustment Assistance

AGENCY: Economic Development Administration, Department of Commerce.

ACTION: Notice and Opportunity for Public Comment.

Pursuant to Section 251 of the Trade Act 1974, as amended (19 U.S.C. 2341 *et seq.*), the Economic Development Administration (EDA) has received petitions for certification of eligibility to apply for Trade Adjustment Assistance from the firms listed below. Accordingly, EDA has initiated investigations to determine whether increased imports into the United States of articles like or directly competitive with those produced by each of these firms contributed importantly to the total or partial separation of the firm's workers, or threat thereof, and to a decrease in sales or production of each petitioning firm.

LIST OF PETITIONS RECEIVED BY EDA FOR CERTIFICATION ELIGIBILITY TO APPLY FOR TRADE ADJUSTMENT ASSISTANCE

[12/17/2016 through 12/23/2016]

Firm name	Firm address	Date accepted for investigation	Product(s)
Federal Tool & Engineering, LLC.	2150 Stonebridge Road, West Bend, WI 53095.	12/20/2016	The firm manufactures stamped metal components and tooling used in production of components for commercial lighting, commercial ovens, engines, power generation and lawn/snow equipment.
Vance Metal Fabricators, Inc ..	251 Gambee Road, Geneva, NY 14456.	12/21/2016	This firm is a manufacturer of a variety of different fabricated, welded and machine components that are used by OEM's in their finished products.
Aztec Plastic Company	1747 West Carroll Avenue, Chicago, IL 60612.	12/22/2016	The firm manufactures plastic injection molded screws and bushings made from special thermoplastic, thermosetting, and composite materials.

Any party having a substantial interest in these proceedings may request a public hearing on the matter. A written request for a hearing must be submitted to the Trade Adjustment Assistance for Firms Division, Room 71030, Economic Development Administration, U.S. Department of Commerce, Washington, DC 20230, no later than ten (10) calendar days following publication of this notice.

Please follow the requirements set forth in EDA's regulations at 13 CFR 315.9 for procedures to request a public hearing. The Catalog of Federal Domestic Assistance official number and title for the program under which these petitions are submitted is 11.313, Trade Adjustment Assistance for Firms.

Miriam Kearse,

Lead Program Analyst.

[FR Doc. 2016–31542 Filed 12–28–16; 8:45 am]

BILLING CODE 3510–WH–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–86–2016]

Foreign-Trade Zone (FTZ) 38—Spartanburg County, South Carolina; Notification of Proposed Production Activity; Black & Decker (U.S.) Inc.; Subzone 38E, (Power Tools), Fort Mill, South Carolina

Black & Decker (U.S.) Inc. (Black & Decker) submitted a notification of proposed production activity to the FTZ Board for its facility in Fort Mill, South Carolina, within Subzone 38E. The notification conforming to the requirements of the regulations of the FTZ Board (15 CFR 400.22) was received on December 15, 2016.

Black & Decker already has authority to produce power tools and their parts and components, the packaging and kitting of power tools, and the repair and rework of power tools, parts and accessories within Subzone 38E. The current request would add finished products and foreign-status materials/components to the scope of authority. Pursuant to 15 CFR 400.14(b), additional FTZ authority would be limited to the specific foreign-status materials/components and specific finished products described in the submitted notification (as described below) and subsequently authorized by the FTZ Board.

Production under FTZ procedures could exempt Black & Decker from customs duty payments on the foreign-status materials/components used in export production. On its domestic sales, Black and Decker would be able to choose the duty rates during customs entry procedures that apply to: tube expander tools; pavement breakers; crimping tools; cable cutters; caulk guns; grease guns; sink augers—cordless; drain snakes; impact wrenches; anvil subassemblies; front end mechanisms/subassemblies; nose cone subassemblies; housing subassemblies; transmission assemblies for power tools; electronic control and motor subassemblies; bulk packed motors; lasers; and, laser detectors (duty rates range from free to 3.3%) for the foreign-status materials/components noted below and in the existing scope of authority. Customs duties also could possibly be deferred or reduced on foreign-status production equipment.

The materials/components sourced from abroad include: plastic hoses and couplers; steel pipe plugs; copper washers; machined pump housings; sink augers; grease guns; cordless crimping tools; cordless cable cutters; cordless caulk guns; steel thrust rings; impactors; expansion heads; drum covers (steel, aluminum or plastic); subassemblies—outer drum; inner drums (steel, aluminum or plastic); pump housing assemblies; purge valves; valve bodies; valve plungers; cam carriers; motors; bulk packed motors; modules for drain augers/snakes—electronic; LED housings with LED lights; safety glasses; rotary lasers, lasers; and, laser detectors (duty rates range from free to 3.3%).

Public comment is invited from interested parties. Submissions shall be addressed to the FTZ Board's Executive Secretary at the address below. The closing period for their receipt is February 7, 2017.

A copy of the notification will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 21013, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230–0002, and in the ''Reading Room'' section of the FTZ Board's Web site, which is accessible via *www.trade.gov/ftz.*

For further information, contact Diane Finver at *Diane.Finver@trade.gov* or (202) 482–1367.

Dated: December 22, 2016.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2016–31617 Filed 12–28–16; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–831]

Fresh Garlic From the People's Republic of China: Initiation of Antidumping Duty New Shipper Review; 2015–2016

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) is initiating a new shipper review (NSR) with respect to Qingdao Joinseafoods Co. Ltd. and Join

Food Ingredient Inc. (''Join'') in the context of the antidumping duty order on Fresh Garlic from the People's Republic of China (PRC). The period of review (POR) is November 1, 2015, through October 31, 2016.

DATES: Effective December 29, 2016.

FOR FURTHER INFORMATION CONTACT: Chien-Min Yang, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–5484.

SUPPLEMENTARY INFORMATION:

Background

The Department published the antidumping duty order on fresh garlic from the PRC in the **Federal Register** on November 16, 1994.[1] On November 30, 2016, the Department received a timely request for a NSR from Join.[2] Join certified that it is the exporter and producer of the fresh garlic upon which the request for a NSR is based.[3] Pursuant to section 751(a)(2)(B)(i)(I) of the Act and 19 CFR 351.214(b)(2)(i), Join certified that it did not export fresh garlic for sale to the United States during the period of investigation (POI).[4] Moreover, pursuant to section 751(a)(2)(B)(i)(II) of the Act and 19 CFR 351.214(b)(2)(iii)(A), Join certified that, since the investigation was initiated, it has never been affiliated with any exporter or producer which exported the subject merchandise to the United States during the POI, including those not individually examined during the investigation.[5] Further, as required by 19 CFR 351.214(b)(2)(iii)(B), it certified that its export activities are not controlled by the central government of the PRC.[6] Join also certified it had no shipments of subject merchandise subsequent to the POR.[7]

In addition to the certifications described above, pursuant to 19 CFR 351.214(b)(2)(iv), Join submitted documentation establishing the following: (1) The date of its first sale to an unaffiliated customer in the United States; (2) the date on which the fresh garlic was first entered; and (3) the volume of that shipment.[8]

The Department queried the database of U.S. Customs and Border Protection (CBP) in an attempt to confirm that the shipment reported by Join had entered the United States for consumption and that liquidation had been properly suspended for antidumping duties. The information which the Department examined was consistent with that provided by Join in its request.[9]

Period of Review

Pursuant to 19 CFR 351.214(c), an exporter or producer may request a NSR within one year of the date on which its subject merchandise was first entered. Moreover, 19 CFR 351.214(d)(1) states that if the request for the review is made during the twelve-month period ending with the end of the anniversary month, the Secretary will initiate a NSR in the calendar month immediately following the anniversary month. Further, 19 CFR 315.214(g)(1)(i)(A) states that if the NSR was initiated in the month immediately following the anniversary month, the POR will be 12-month period immediately preceding the anniversary month. Join made the request for a NSR, that included all documents and information required by the statute and regulations, within one year of the date on which its fresh garlic first entered. Its request was filed in November, which is the anniversary month of the order. Therefore, the POR is November 1, 2015, through October 31, 2016. *Id.*

Initiation of New Shipper Review

Pursuant to section 751(a)(2)(B) of the Act and 19 CFR 351.214(b), and the information on the record, the Department finds that Join's request meets the threshold requirements for initiation of a NSR for shipments of fresh garlic from the PRC produced and exported by Join, and, therefore, is initiating a NSR of Join. Absent a determination that the new shipper review is extraordinarily complicated, the Department intends to issue the preliminary results within 180 days after the date on which this review is initiated and the final results within 90 days after the date on which we issue the preliminary results.[10] If the information supplied by Join is found to be incorrect or insufficient during the course of this proceeding, the Department may rescind the review for Join or apply facts available pursuant to section 776 of the Act, depending on the facts on the record.

It is the Department's usual practice in cases involving non-market economies to require that a company seeking to establish eligibility for an antidumping duty rate separate from the country-wide rate (*i.e.,* a separate rate) provide evidence of *de jure* and *de facto* absence of government control over the company's export activities.[11] Accordingly, the Department will issue questionnaires to Join, which will include a section requesting information with regard to its export activities for the purpose of establishing its eligibility for a separate rate. The review will proceed if the responses provide sufficient indication that Join is not subject to either *de jure* or *de facto* government control with respect to its exports of fresh garlic from the PRC.

On February 24, 2016, the President signed into law the ''Trade Facilitation and Trade Enforcement Act of 2015,'' H.R. 644, which made several amendments to section 751(a)(2)(B) of the Act. We will conduct this new shipper review in accordance with section 751(a)(2)(B) of the Act, as amended by the Trade Facilitation and Trade Enforcement Act of 2015.[12]

Interested parties requiring access to proprietary information in this proceeding should submit applications for disclosure under administrative protective order in accordance with 19 CFR 351.305 and 351.306.

This initiation and notice are in accordance with section 751(a)(2)(B) of the Act and 19 CFR 351.214 and 351.221(c)(1)(i).

Dated: December 22, 2016.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2016–31564 Filed 12–28–16; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Antidumping Duty Order: Fresh Garlic from the People's Republic of China,* 59 FR 59209 (November 16, 1994).

[2] *See* Join's request for a NSR dated November 30, 2016.

[3] *Id.* at Exhibit 1.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.* at page 2.

[8] *Id.* at Exhibit 2.

[9] *See* Memorandum to the File from Chien-Min Yang, ''New Shipper Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China: Customs Entries from November 1, 2015, to October 31, 2016,'' dated December 13, 2016.

[10] *See* section 751(a)(2)(B)(iv) of the Act.

[11] *See* Import Administration Policy Bulletin, Number: 05.1. (*http://ia.ita.doc.gov/policy/bull05-1.pdf*).

[12] The Trade Facilitation and Trade Enforcement Act of 2015 removed from section 751(a)(2)(B) of the Act the provision directing the Department to instruct Customs and Border Protection to allow an importer the option of posting a bond or security in lieu of a cash deposit during the pendency of a new shipper review.

DEPARTMENT OF COMMERCE

International Trade Administration

U.S.-Nigeria Commercial and Investment Dialogue

AGENCY: International Trade Administration (ITA), U.S. Department of Commerce (DOC).

ACTION: Notice of an opportunity to apply to participate in the U.S.-Nigeria Commercial and Investment Dialogue.

Authority: 22 U.S.C. 2395(b).

SUMMARY: The U.S. Department of Commerce is currently seeking applications for members of the U.S. private sector to participate in the newly established U.S.-Nigeria Commercial and Investment Dialogue (CID). The purpose of the CID is to deepen the trade and investment ties between the U.S. and Nigeria and to foster sustained engagement between our governments on concrete issues of importance to our private sectors.

DATES: All applications for immediate consideration for appointment must be received by the Office of Africa by 5:00 p.m. Eastern Standard Time (EST) on January 10, 2017 After that date, ITA will continue to accept applications under this notice for a period of up to three years from

ADDRESSES: Please submit applications by email to *Karen.Burress@trade.gov,* attention: Karen Burress, Office of Africa or by mail to Karen Burress, Office of Africa, 1401 Constitution Avenue NW., Suite 22004, Washington, DC 20230.

SUPPLEMENTARY INFORMATION: The CID has two key objectives which include: (1.) Encourage and promote deeper commercial and investment ties between the U.S. and Nigerian private sectors; and (2.) examine key regulatory reforms and policy elements that can help attract U.S. businesses and investors. Currently, the CID has five key areas of focus which are infrastructure, agriculture, digital economy, investment and regulatory reform.

The participants shall contribute information, analysis, and recommendations based on current in-country experience in the Nigerian market that address the five key areas of focus. The Department particularly seeks applicants who are active executives (Chief Executive Officer, Executive Chairman, President or comparable level of responsibility); however, for large companies, a person having substantial responsibility for the company's commercial activities in Nigeria will also be considered.

For eligibility purposes, a ''U.S. company'' is a for-profit firm incorporated in the United States or with its principal place of business in the United States that is (a) majority controlled (more than 50 percent ownership interest and/or voting stock) by U.S. citizens or by another U.S. entity or (b) majority controlled (more than 50 percent ownership interest and/or voting stock) directly or indirectly by a foreign parent company. Members are not required to be a U.S. citizen; however, members may not be registered as a foreign agent under the Foreign Agents Registration Act. Additionally, no member shall represent a company that is majority owned or controlled by a foreign government entity or entities.

Private sector participants will be selected, in accordance with applicable Department of Commerce guidelines, based on their ability to carry out the objectives of the CID as set forth above.

Private sector participants shall serve in a representative capacity, representing the views and interests of their particular industry sector. The private sector participants are not special government employees, and will receive no compensation for their participation in the CID activities. The private sector participants participating in CID meetings and events will be responsible for their travel, living and other personal expenses. Meetings will be held twice annually on an alternating basis between Washington, DC, and Nigeria. Teleconference meetings may also be held as needed.

To be considered, submit the following information by 5:00 p.m. EDT on January 10, 2017 to the email or mailing address listed in the **ADDRESSES** section:

1. Name and title of the individual requesting consideration.
2. The applicant's personal resume and short bio (less than 300 words).
3. Brief statement describing how the applicant will contribute to the work of the U.S.-Nigeria Commercial and Investment Dialogue based on his or her unique experience and perspective (not to exceed 100 words).
4. An affirmative statement that the applicant meets all eligibility criteria, including an affirmative statement that the applicant is not required to register as a foreign agent under the Foreign Agents Registration Act of 1938, as amended.
5. Information regarding the ownership and control of the company, including the stock holdings as appropriate, signifying compliance with the criteria set forth above.
6. The company's size, product or service line, and major markets in which the company operates.
7. A profile of the company's trade, investment, development, finance, partnership, or other commercial activities in or with African markets.

Statutory Authority: This program is funded under Section 632(a) of the Foreign Assistance Act of 1961, as amended (the ''FAA''), and the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2010 (Pub. L. 111–117) to carry out the provisions of the FAA and the FREEDOM Support Act, as amended.

Dated: December 22, 2016.

Fred Stewart,

Director, Office of Africa, U.S. Department of Commerce.

[FR Doc. 2016–31664 Filed 12–28–16; 8:45 am]

BILLING CODE 3510–HE–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Nautical Discrepancy Reporting System

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, 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.

DATES: Written comments must be submitted on or before February 27, 2017.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Dawn Forsythe, 301–713–2780 ext. 144, or *Dawn.Forsythe@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for extension of a currently approved information collection.

National Oceanic and Atmospheric Administration (NOAA) Office of Coast Survey is the nation's nautical chartmaker, maintaining and updating over a thousand charts covering the 3.5 million square nautical miles of coastal waters in the U.S. Exclusive Economic

Zone and the Great Lakes. Coast Survey also writes and publishes the *United States Coast Pilot®*, a series of nine nautical books that supplement nautical charts with essential marine information that cannot be shown graphically on the charts and are not readily available elsewhere.

Coast Survey solicits information through the online Nautical Discrepancy Reporting System (*http://ocsdata.ncd.noaa.gov/idrs/discrepancy.aspx*).

Data obtained through this system is used to update U.S. nautical charts and the *United States Coast Pilot.*

II. Method of Collection

Respondents can submit discrepancy reports electronically or by telephone (888–990–6622).

III. Data

OMB Control Number: 0648–0007.

Form Number: None.

Type of Review: Regular submission (extension of a current information collection).

Affected Public: Business or other for-profit; individuals or households; not-for-profit institutions; federal government; state, local or tribal government.

Estimated Number of Respondents: 300.

Estimated Time per Response: 30 minutes.

Estimated Total Annual Burden Hours: 150 hours.

Estimated Total Annual Cost to Public: $0 in recordkeeping/reporting costs.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: December 23, 2016.

Sarah Brabson,

NOAA PRA Clearance Officer.

[FR Doc. 2016–31614 Filed 12–28–16; 8:45 am]

BILLING CODE 3510–JE–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

National Estuarine Research Reserve System

AGENCY: Stewardship Division, Office for Coastal Management, National Ocean Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce.

ACTION: Notice of Public Comment Period for the Weeks Bay National Estuarine Research Reserve Management Plan revision.

SUMMARY: Notice is hereby given that the Stewardship Division, Office for Coastal Management, National Ocean Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce is announcing a thirty-day public comment period for the Weeks Bay National Estuarine Research Reserve Management Plan revision. Pursuant to 15 CFR Section 921.33(c), the revised plan will bring the reserve into compliance. The Weeks Bay Reserve revised plan will replace the plan approved in 2007.

The revised management plan outlines the administrative structure; the research/monitoring, stewardship, education, and training programs of the reserve; and the plans for future land acquisition and facility development to support reserve operations.

The Weeks Bay Reserve takes an integrated approach to management, linking research, education, coastal training, and stewardship functions. The Alabama Department of Conservation and Natural Resources has outlined how it will administer the Reserve and its core programs by providing detailed actions that will enable it to accomplish specific goals and objectives. Since the last management plan, the Reserve has built out its core programs and monitoring infrastructure; constructed several facilities including a Resource Center that supports education, training, and outreach events; participated in more than 35 research projects and conducted over 100 coastal training program events; convened a permanent Restoration Advisory Board; and built new partnerships with organizations within the Mobile Bay of Alabama.

With the approval of this management plan, the Weeks Bay Reserve will increase their total acreage from, 6,594 acres to 9,317. The change is attributable to the recent acquisitions of several parcels by the Reserve, totaling 933 acres, as well as the incorporation of 1,790 acres of water bottoms adjacent to the newly acquired land. These parcels have high ecological value and will enhance the Reserve's ability to provide increased opportunities for research, education, and stewardship. The revised management plan will serve as the guiding document for the expanded 9,317 acre Weeks Bay Reserve for the next five years.

View the Weeks Bay Reserve Management Plan revision at (*http://www.weeksbayreserve.com*) and provide comments to the Reserve's Manager, LG Adams (*LG.Adams@dcnr.alabama.gov*).

FOR FURTHER INFORMATION CONTACT: Hank Hodde at (251) 544–5016 or Erica Seiden at (240) 533–0781 of NOAA's National Ocean Service, Stewardship Division, Office for Coastal Management, 1305 East-West Highway, N/ORM5, 10th floor, Silver Spring, MD 20910.

Dated: December 16, 2016.

John King,

Senior Project Advisor, Office for Coastal Management, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. 2016–31573 Filed 12–28–16; 8:45 am]

BILLING CODE 3510–08–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF121

New England Fishery Management Council; Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Scientific and Statistical Committee (SSC) to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This meeting will be held on Tuesday, January 17, 2017, beginning at 9 a.m.

ADDRESSES: The meeting will be held at the Courtyard Marriott, Boston Logan, 225 McClellan Highway, Boston, MA 02128; phone: (617) 561–0971.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Agenda

The SSC Committee will review information provided by the Council's Groundfish Plan Development Team (PDT) and recommend the overfishing levels (OFLs) and acceptable biological catches (ABCs) for witch flounder for fishing years 2017 and 2018. They will receive a presentation on the revisions to the Magnuson Stevens Fishery Management and Conservation Act (MSA) National Standard 1 guidelines. Also on the agenda will be an update from the Council staff on the Council's efforts to develop a worked example of an Ecosystem-Based Fishery Management approach to fisheries management for Georges Bank. Other business will be discussed as needed.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

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

Dated: December 23, 2016.

Tracey L. Thompson,

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

[FR Doc. 2016–31612 Filed 12–28–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration.

RIN 0648–XE477

SAW–SARC 63 Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: NMFS and the Northeast Regional Stock Assessment Workshop (SAW) will convene the 63rd SAW Stock Assessment Review Committee for the purpose of reviewing the stock assessment of Ocean Quahog. The Northeast Regional SAW is a formal scientific peer-review process for evaluating and presenting stock assessment results to managers for fish stocks in the offshore U.S. waters of the northwest Atlantic. Assessments are prepared by SAW working groups and reviewed by an independent panel of stock assessment experts called the Stock Assessment Review Committee, or SARC. The public is invited to attend the presentations and discussions between the review panel and the scientists who have participated in the stock assessment process.

DATES: The public portion of the Stock Assessment Review Committee Meeting will be held from February 21, 2017–February 23, 2017. The meeting will commence on February 21, 2017 at 10 a.m. Eastern Standard Time. Please see **SUPPLEMENTARY INFORMATION** for the daily meeting agenda.

ADDRESSES: The meeting will be held in the S.H. Clark Conference Room in the Aquarium Building of the National Marine Fisheries Service, Northeast Fisheries Science Center (NEFSC), 166 Water Street, Woods Hole, MA 02543.

FOR FURTHER INFORMATION CONTACT: Sheena Steiner, 508–495–2177; email: *sheena.steiner@noaa.gov;* or, James Weinberg, 508–495–2352; email: *james.weinberg@noaa.gov.*

SUPPLEMENTARY INFORMATION: For further information, please visit the NEFSC Web site at *http://www.nefsc.noaa.gov.* For additional information about the SARC meeting and the stock assessment review of Ocean Quahog, please visit the NMFS/NEFSC SAW Web page at *http://www.nefsc.noaa.gov/saw/.*

DAILY MEETING AGENDA—SAW/SARC 63 BENCHMARK STOCK ASSESSMENT FOR OCEAN QUAHOG

[Subject to change; all times are approximate and may be changed at the discretion of the SARC Chair]

Tuesday, February 21, 2017:		
10 a.m.–10:30 a.m	Welcome Introductions	James Weinberg, SAW Chair.
10:30 a.m.–12:30 p.m	Ocean Quahog (OQ) Assessment Presentation	Dan Hennen.
12:30 p.m.–1:30 p.m	Lunch.	
1:30 p.m.–3:30 p.m	OQ Presentation (cont.)	Dan Hennen.
3:30 p.m.–3:45 p.m	Break.	
3:45 p.m.–5:45 p.m	OQ SARC Discussion	Ed Houde, SARC Chair.
5:45 p.m.–6 p.m	Public Comment Period.	
Wednesday, February 22, 2017:		
9:00 a.m.–10:45 a.m	Revisit with OQ presenters	Ed Houde.
10:45 a.m.–11:00 a.m	Break.	
11:00 a.m.–11:45 a.m	OQ presentation (cont.)	Ed Houde.
11:45 a.m.–12:00 p.m	Public Comment.	
12:00–1:15 p.m	Lunch.	
1:15–4:00 p.m	Review/Edit Assessment Summary Report	Ed Houde.
4:00 p.m.–4:15 p.m	Break.	
4:15 p.m.–5:00 p.m.	SARC Report Writing.	
Thursday, February 23, 2017:		
9 a.m.–5 p.m	SARC Report Writing.	

The meeting is open to the public; however, during the ''SARC Report Writing'' sessions on February 22nd and 23rd, the public should not engage in discussion with the SARC.

Special Accommodations

This meeting is physically accessible to people with disabilities. Special requests should be directed to Sheena Steiner at the NEFSC, 508–495–2177, at least 5 days prior to the meeting date.

Dated: December 20, 2016.

Alan D. Risenhoover,

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

[FR Doc. 2016–31087 Filed 12–28–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF120

Magnuson-Stevens Act Provisions; Fisheries Off West Coast States; Pacific Coast Groundfish Fishery; Trawl Rationalization Program; 2017 Cost Recovery

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

ACTION: Notice; 2017 cost recovery fee percentages and mothership (MS) pricing.

SUMMARY: This action provides participants in the Pacific coast groundfish trawl rationalization program with the 2017 fee percentages and ''MS pricing'' needed to calculate the required payments for trawl rationalization program cost recovery fees due in 2017. It also provides a redetermination of previous years' fees. For calendar year 2017, NMFS announces the following fee percentages by sector: 3.0 percent for the Shorebased Individual Fishing Quota (IFQ) Program, 0 percent for the MS Coop Program, 0 percent for the Catcher/Processer (C/P) Coop Program. For 2017, the MS pricing to be used as a proxy by the C/P Coop Program is: $0.08/lb for Pacific whiting.

DATES: Effective January 1, 2017.

FOR FURTHER INFORMATION CONTACT: Christopher Biegel, Cost Recovery Program Coordinator, (503) 231–6291, fax (503) 872–2737, email *Christopher.Biegel@NOAA.gov.*

SUPPLEMENTARY INFORMATION: The Magnuson-Stevens Fishery Conservation and Management Act (MSA) requires NMFS to collect fees to recover the costs directly related to the management, data collection, and enforcement of a limited access privilege program (LAPP) (16 U.S.C. 1854(d)(2)), also called ''cost recovery.'' The Pacific coast groundfish trawl rationalization program is a LAPP, implemented in 2011, and consists of three sectors: The Shorebased IFQ Program, the MS Coop Program, and the C/P Coop Program. In accordance with the MSA, and based on a recommended structure and methodology developed in coordination with the Pacific Fishery Management Council, NMFS began collecting mandatory fees of up to three percent of the ex-vessel value of groundfish from each sector (Shorebased IFQ Program, MS Coop Program, and C/P Coop Program) in 2014. NMFS collects the fees to recover the incremental costs of management, data collection, and enforcement of the trawl rationalization program. Additional background can be found in the cost recovery proposed and final rules, 78 FR 7371 (February 1, 2013) and 78 FR 75268 (December 11, 2013), respectively. The details of cost recovery for the groundfish trawl rationalization program are in regulation at 50 CFR 660.115 (trawl fishery cost recovery program), § 660.140 (Shorebased IFQ Program), § 660.150 (MS Coop Program), and § 660.160 (C/P Coop Program).

By December 31 of each year, NMFS must announce the next year's fee percentages, and the applicable MS pricing for the C/P Coop Program. NMFS calculated the 2017 fee percentages by sector using the best available information. In addition, NMFS revisited the methodology used to determine the direct program costs (DPC) attributable to each sector for fiscal years 2013, 2014, and 2015. NMFS' redetermination of the DPCs for those fiscal years resulted in a decrease in the DPCs used to determine the fee percentages for calendar years 2014, 2015, and 2016. For 2017, the fee percentages by sector, taking into account the redetermined DPCs and any adjustments, are:

- 3.0 percent for the Shorebased IFQ Program,
- 0 percent for the MS Coop Program,
- 0 percent for the C/P Coop Program.

To calculate the fee percentages, NMFS used the formula specified in regulation at § 660.115(b)(1), where the fee percentage by sector equals the lower of three percent or DPC for that sector divided by total ex-vessel value (V) for that sector multiplied by 100 (Fee percentage = the lower of 3 percent or (DPC/V) × 100).

''DPC,'' as defined in the regulations at § 660.115(b)(1)(i), are the actual incremental costs for the previous fiscal year directly related to the management, data collection, and enforcement of each sector (Shorebased IFQ Program, MS Coop Program, and C/P Coop Program). Actual incremental costs means those net costs that would not have been incurred but for the implementation of the trawl rationalization program, including both increased costs for new requirements of the program and reduced costs resulting from any program efficiencies. NMFS only included the cost of employees' time (salary and benefits) spent working on the program in calculating DPC rather than all incremental costs of management, data collection, and enforcement. NMFS is still evaluating how to incorporate additional costs and may, in coordination with the Pacific Fishery Management Council, do so in the future.

''V'', as specified at § 660.115(b)(1)(ii), is the total ex-vessel value, as defined at § 660.111, for each sector from the previous calendar year. To calculate ''V'' for use in determining 2017 fee percentages, NMFS used the ex-vessel value for 2015 as reported in Pacific Fisheries Information Network (PacFIN) from electronic fish tickets. The electronic fish ticket data in PacFIN is for the Shorebased IFQ Program. Therefore, the ex-vessel value for both the MS Coop Program and the C/P Coop Program is a proxy based on the Shorebased IFQ Program ex-vessel price and on the retained catch estimates (weight) from the observer data for the MS and C/P Coop Programs.

Ex-vessel values and amounts landed each year fluctuate, and the amount NMFS collects each year in cost recovery fees also fluctuate accordingly. When the cost recovery fees collected by NMFS are greater or less than the actual net incremental costs incurred for a given year, the fee percentage for the following year will be adjusted as specified at § 660.115(b)(1)(i).

Redetermination of Past DPCs

On August 10, 2016, the U.S. Court of Appeals for the Ninth Circuit issued its opinion in *Glacier Fish Co. LLC* v. *Pritzker,* 832 F.3d 1113 (9th Cir. 2016), a case involving a challenge to NMFS' authority to recover cost recovery fees from members of the C/P Coop Program and the reasonableness of NMFS' calculation of the C/P Coop Program's 2014 fee percentage. The court upheld NMFS' authority to recover cost recovery fees from members of the C/P Coop Program because the C/P coop permit is a limited access privilege and

Glacier Fish Co. and other C/P coop members are reasonably considered a ''holder'' of that privilege. The court also concluded that NMFS' cost recovery regulations were consistent with statutory requirements. However, the court held that the calculation of the 2014 CP Coop Program fee was inconsistent with NMFS' cost recovery regulations and the court remanded to NMFS to re-determine the 2014 fee.

In response, NMFS has reevaluated and modified the methodology used to determine the C/P Coop Program's DPC for the 2014 fee calculation. The redetermination of the C/P Coop Program's 2014 fee also took into consideration discussions with Glacier Fish Co. and other representatives of C/P Coop members with respect to what costs should be considered actual incremental costs. One key change to the C/P Coop program's 2014 fee is the elimination of all time that was originally coded as ''general'' time and split evenly among the three sectors. Additional costs that NMFS determined to be more appropriately categorized as non-incremental were also removed. NMFS also made some adjustments to ensure contractor and employee time was appropriately distributed among the sectors to reflect the actual incremental costs. Finally, NMFS elected to apply a similar revised methodology for all sectors for all years, resulting in a reduction in each sector's DPCs. However, the Shorebased IFQ Program DPC remained above the 3 percent cap.

NMFS' internal process for categorizing and tracking employee time in the trawl rationalization program has been refined over the years. For example, the use of the ''general'' time coding option was phased out by the West Coast Region and, with the exception of limited use by the Northwest Fisheries Science Center, was no longer used as of fiscal year 2015. NMFS will continue its efforts to ensure that employee time is only tracked for time spent on tasks that would not have been incurred but for the implementation of the trawl rationalization program, taking into account reduced costs resulting from any program efficiencies. A comparison of the original DPCs and the recalculated DPCs is below.

	Initial DPC (excluding adjustments)	Redetermined DPC (excluding adjustments)
Shorebased IFQ Program:		
2014	$1,877,752.00	$1,599,610.25
2015	2,028,859.04	1,936,907.83
2016	2,339,529.95	1,887,535.24
2017	2,021,490.55	N/A
MS Coop Program:		
2014	274,936.05	77,659.47
2015	233,300.78	129,565.98
2016	291,144.05	185,814.34
2017	167,549.51	N/A
C/P Coop Program:		
2014	176,460.05	12,931.29
2015	158,631.88	40,487.70
2016	184,267.26	45,080.17
2017	63,448.85	N/A

The DPC values used to determine the 2017 fee percentages reflect the redetermined DPCs and any adjustments for past over or under payment. The adjustments can be seen here:

	2014		
	DPC	Fees	Adjustment
IFQ	$1,599,610.25	$1,356,285.28	N/A
MS	77,659.47	347,450.65	−$269,791.18
CP	12,931.29	350,387.25	−337,455.96

	2015			
	DPC	DPC w/adjustment	Fees	Adjustment
IFQ	$1,936,907.83	N/A	$1,260,450.63	N/A
MS	129,565.98	−$140,225.20	94,467.65	−$234,692.85
CP	40,487.70	−296,968.26	0.00	−296,968.26

	2016			
	DPC	DPC w/adjustment	Fees (est)	Adjustment (est)
IFQ	$1,887,535.24	N/A	$1,561,574.00	N/A
MS	185,814.34	−$48,878.51	379,731.00	−$428,609.51
CP	45,080.17	−251,888.09	0.00	−251,888.09

	2017	
	DPC	DPC w/adjustment
IFQ	$2,021,490.55	N/A
MS	167,549.51	−$261,060.01
CP	63,448.85	−188,439.24

Based on total fees paid to date and estimated fees received in 2016, the adjusted DPCs for 2017 are:

Shorebased IFQ Program: *$2,021,490.55*
MS Coop Program: *−$261,060.01*
C/P Coop Program: *−$188,439.24*

And the fee calculations using the adjusted 2017 DPCs are:

Shorebased IFQ Program: 3.0 percent = the lower of 3 percent or ($2,021,490.55/$41,605,012.42) × 100
MS Coop Program: −6.0 percent = the lower of 3 percent or −$261,060.01/$4,373,922.34) × 100
C/P Coop Program: −1.7 percent = the lower of 3 percent or (−$188,439.24/$11,120,803.07) × 100

As a fee cannot be set using a negative percentage, the 2017 fee percentages for the MS Coop Program and the C/P Coop Program will be set at 0.0 percent.

MS pricing is the average price per pound that the C/P Coop Program will use to determine their fee amount due (MS pricing multiplied by the value of the aggregate pounds of all groundfish species harvested by the vessel registered to a C/P-endorsed limited entry trawl permit, multiplied by the C/P fee percentage, equals the fee amount due). In past years, MS pricing was based on the average price per pound of Pacific whiting as reported in PacFIN from the Shorebased IFQ Program. In other words, data from the IFQ fishery was used as a proxy for the MS average price per pound to determine the ''MS pricing'' used in the calculation for the C/P sector's fee amount due. For 2017 MS pricing, NMFS used values derived from those reported on the MS Coop Program cost recovery form from calendar year 2015 as this was determined to be the best information available. NMFS has calculated the 2017 MS pricing to be used as a proxy by the C/P Coop Program as: $0.08/lb for Pacific whiting.

Cost recovery fees are submitted to NMFS by Fish buyers via *Pay.gov* (*https://www.pay.gov/paygov/*). Fish buyers registered with *Pay.gov* can login in the upper left-hand corner of the screen. Fish buyers not registered with *Pay.gov* can go to the cost recovery forms directly from the Web site below. Click on the link to Pacific Coast Groundfish Cost Recovery for your sector (IFQ, MS, or C/P): *https://www.pay.gov/public/search/global?searchString=pacific+cost+recovery&formToken=4e5bc6b4-6ba8-4db4-9850-e73756a06775.*

As stated in the preamble to the cost recovery proposed and final rules, in the spring of each year, NMFS will release an annual report documenting the details and data used for the above calculations. The report will include information such as the fee percentage calculation, program costs, and ex-vessel value by sector. Annual reports are available at: *http://www.westcoast.fisheries.noaa.gov/fisheries/groundfish_catch_shares/rules_regulations/cost recovery.html.*

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

Dated: December 23, 2016.

Alan D. Risenhoover,

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

[FR Doc. 2016–31624 Filed 12–28–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Natural Resource Damage Assessment Restoration Project Information Sheet.

OMB Control Number: 0648–0497.

Form Number(s): None.

Type of Request: Regular (extension of a currently approved information collection).

Number of Respondents: 47.

Average Hours Per Response: Reports, 20 minutes; updates; 10 minutes.

Burden Hours: 37.

Needs and Uses: This request is for an extension of a currently approved information collection.

The purpose of this information collection is to assist state and federal Natural Resource Trustees in more efficiently carrying out the restoration planning phase of Natural Resource Damage Assessments (NRDA), in compliance with the National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. 4321–4370d; 40 CFR 1500–1500 and other federal and local statutes and regulations as applicable. The NRDA Restoration Project Information Sheet is designed to facilitate the collection of information on existing, planned, or proposed restoration projects. This information will be used by the Natural Resource Trustees to develop potential restoration alternatives for natural resource injuries and service losses requiring restoration, during the restoration planning phase of the NRDA process.

Affected Public: State, local, or tribal governments; individuals or households; business or other for-profits organizations; not-for-profit institutions; farms; and the federal government.

Frequency: Annually and on occasion.

Respondent's Obligation: Voluntary.

This information collection request may be viewed at reginfo.gov. Follow the instructions to view Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov* or fax to (202) 395–5806.

Dated: December 23, 2016.

Sarah Brabson,

NOAA PRA Clearance Officer.

[FR Doc. 2016–31585 Filed 12–28–16; 8:45 am]

BILLING CODE 3510–22–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

Academic Research Council Solicitation of Applications for Membership

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice of solicitation of applications.

SUMMARY: The Consumer Financial Protection Act establishes the Consumer Financial Protection Bureau's (Bureau) Office of Research and assigns to it the responsibility of researching, analyzing, and reporting on topics relating to the Bureau's mission, including developments in markets for consumer financial products and services, consumer awareness, and consumer behavior. The Bureau established the Academic Research Council (Council) as a technical advisory body comprised of scholars to provide the Office of Research with guidance as it performs its responsibilities. Director Richard Cordray invites qualified individuals to apply for appointment to the Council. Appointments to the Council are typically for four years. However, the Director may amend the Council charter from time to time during the charter terms as the Director deems necessary to accomplish the purpose of the Council. The Bureau expects to announce the selection of new members in April 2017.

DATES: The application will be available on January 16, 2017 here, *https://goo.gl/RYLDHq.* Only complete application packets received on or before 5 p.m. eastern standard time on February 14, 2017, will be given consideration for membership on the Council.

ADDRESSES: Complete application packets must include a curriculum vitae or résumé for each applicant and a completed application.

All applications for membership on the Council should be sent:

• *Electronically: https://goo.gl/RYLDHq.* We strongly encourage electronic submissions.

Mail:

• Julian Alcazar, Outreach and Engagement Specialist, Consumer Financial Protection Bureau, 1700 G Street NW., Washington, DC 20552. Submissions must be postmarked on or before February 14, 2017.

• *Hand Delivery/Courier in Lieu of Mail:* Julian Alcazar, Outreach and Engagement Specialist, Consumer Financial Protection Bureau, 1275 First Street NE., 1223–C, Washington, DC 20002. Submissions must be received on or before 5 p.m. eastern standard time on February 14, 2017.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Julian Alcazar, Outreach and Engagement Specialist, Consumer Financial Protection Bureau, (202) 435–9885.

SUPPLEMENTARY INFORMATION:

I. Background

Section 1013(b)(1) of the Consumer Financial Protection Act, 12 U.S.C. 5493(b)(1), establishes the Consumer Financial Protection Bureau's (Bureau) Office of Research and assigns to it the responsibility of researching, analyzing, and reporting on topics relating to the Bureau's mission, including developments in markets for consumer financial products and services, consumer awareness, and consumer behavior. The Bureau established the Academic Research Council (Council) as a technical advisory body comprised of scholars to provide the Office of Research with guidance as it performs its responsibilities.

The Bureau is charged with regulating ''the offering and provision of consumer financial products or services under the Federal consumer financial laws,'' so as to ensure that ''all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.'' Pursuant to section 1021(c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203 (Dodd-Frank Act), the Bureau's primary functions are:

1. Conducting financial education programs;
2. Collecting, investigating, and responding to consumer complaints;
3. Collecting, researching, monitoring, and publishing information relevant to the function of markets for consumer financial products and services to identify risks to consumers and to the proper functioning of such markets;
4. Supervising persons covered under the Dodd-Frank Act for compliance with Federal consumer financial law, and taking appropriate enforcement action to address violations of Federal consumer financial law;
5. Issuing rules, orders, and guidance implementing Federal consumer financial law; and
6. Performing such support activities as may be needed or useful to facilitate the other functions of the Bureau.

II. Academic Research Council

Section 1013(b)(1) of the Consumer Financial Protection Act, 12 U.S.C. 5493(b)(1), establishes the Consumer Financial Protection Bureau's Office of Research and assigns to it the responsibility of researching, analyzing, and reporting on topics relating to the Bureau's mission, including developments in markets for consumer financial products and services, consumer awareness, and consumer behavior. The Bureau established the Council as a technical advisory body comprised of scholars to provide the Office of Research with methodological and technical advice and feedback on its research work by framing research questions; suggesting new data collection strategies and methods of analysis; providing feedback, both backward and forward looking, on the Office of Research's research program; providing input into its research strategic planning process and research agenda; collaborating with the Bureau's research staff on high value research projects which will allow for transfer of specialized expertise; and supporting high quality recruitment.

III. Qualifications

In appointing members of the Council, the Office of Research seeks to recruit tenured academics with a world class research and publishing background, and a record of public or academic service. We are seeking prominent experts who are recognized for their professional achievements and objectivity in economics, statistics, psychology or behavioral science. In particular, academics with strong methodological and technical expertise in structural or reduced form econometrics, modeling of consumer decision-making, behavioral economics, experimental economics, program evaluation, psychology, and financial choice. The members of the Council will collectively provide a balance of expertise across these areas. You can learn more about current Academic Research Council members *http://www.consumerfinance.gov/about-us/advisory-groups/academic-research-council/.*

The Bureau has a special interest in ensuring that the perspectives of women and men, all racial and ethnic groups, and individuals with disabilities are adequately represented on the Council and therefore encourages applications from qualified candidates from these groups. The Bureau also has a special interest in establishing a Council that is represented by a diversity of viewpoints and constituencies, and therefore encourages nominations for qualified candidates who:

1. Represent the United States' geographic diversity; and
2. Understand the interests of special populations identified in the Dodd-Frank Act, including servicemembers, older Americans, students, and traditionally underserved consumers and communities.

IV. Application Procedures

Any interested person may apply for membership on the Council.

A complete application packet may include a cover letter and must include:

1. A complete résumé or curriculum vitae for the applicant; and

2. Completed application

To evaluate potential sources of conflicts of interest, the Bureau will ask potential candidates to provide information related to financial holdings and/or professional affiliations, and to allow the Bureau to perform a background check. The Bureau will not review nominations and will not answer questions from internal or external parties regarding applications until the application period has closed.

The Bureau will not entertain nominations of federally registered lobbyists and individuals who have been convicted of a felony for a position on the Council.

Only complete applications will be given consideration for review of membership on the Council.

Dated: December 20, 2016.

Elizabeth Corbett,

Acting Chief of Staff, Bureau of Consumer Financial Protection.

[FR Doc. 2016–31398 Filed 12–28–16; 8:45 am]

BILLING CODE 4810–AM–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Proposed Information Collection; Comment Request

AGENCY: Corporation for National and Community Service.

ACTION: Notice.

SUMMARY: The Corporation for National and Community Service (CNCS), as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirement on respondents can be properly assessed.

Currently, CNCS is soliciting comments concerning its proposed renewal of the President's Higher Education Community Service Honor Roll. The President's Higher Education Community Service Honor Roll recognizes higher education institutions that reflect the values of exemplary community service and achieve meaningful outcomes in their communities. The Honor Roll is part of the Corporation for National and Community Service's strategic commitment to engage millions of college students in service and celebrate the critical role of higher education in strengthening communities. This information collection does not result in grant funding from the Corporation for National and Community Service or other federal agencies.

Copies of the information collection request can be obtained by contacting the office listed in the Addresses section of this notice.

DATES: February 27, 2017.

ADDRESSES: You may submit comments, identified by the title of the information collection activity, by any of the following methods:

(1) By mail sent to: Corporation for National and Community Service, President's Higher Education Community Service Honor Roll. Attention: Rhonda Taylor, Director of Partnerships and Program Engagement, Room #2121 250 E Street SW., Washington, DC 20525.

(2) By hand delivery or by courier to the CNCS mailroom at Room 4200 at the mail address given in paragraph (1) above, between 9:00 a.m. and 4:00 p.m. Eastern Time, Monday through Friday, except Federal holidays.

(3) By email to: *engagement@cns.gov* Attention: Rhonda Taylor.

(4) Electronically through *www.regulations.gov.*

Individuals who use a telecommunications device for the deaf (TTY–TDD) may call 1–800–833–3722 between 8:00 a.m. and 8:00 p.m. Eastern Time, Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Rhonda Taylor, 202–606–6721 or via email *engagement@cns.gov.*

SUPPLEMENTARY INFORMATION: CNCS is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of CNCS, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are expected to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.,* permitting electronic submissions of responses).

Background

The information collected is provided electronically by accredited institutions of higher education through the application Web site of the President's Higher Education Community Service Honor Roll.

Current Action

CNCS seeks to revise the current information collection. The revised collection consists of questions not only related to general community service, but also community service that relates to education, economic opportunity, and interfaith community service.

The information collection will otherwise be used in the same manner as the existing application. CNCS also seeks to continue using the current application until the revised application is approved by OMB. The current application is due to expire on December 31, 2016.

Type of Review: Renewal.

Agency: Corporation for National and Community Service.

Title: President's Higher Education Community Service Honor Roll.

OMB Number: 3045–0120.

Agency Number: None.

Affected Public: The affected publics are accredited institutions of higher education.

Total Respondents: 4,500.

Frequency: Annual.

Average Time per Response: Averages 10 Hours.

Estimated Total Burden Hours: 45,000.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintenance): None.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: December 22, 2016.

Robert L. Bisi,

Senior Public Affairs Manager.

[FR Doc. 2016–31576 Filed 12–28–16; 8:45 am]

BILLING CODE 6050–28–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID USA–2016–HQ–0038]

Proposed Collection; Comment Request

AGENCY: Department of the Army, DoD.

ACTION: Notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Department of the Army announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by February 27, 2017.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Department of Defense, Office of the Deputy Chief Management Officer, Directorate for Oversight and Compliance, Regulatory and Advisory Committee Division, 4800 Mark Center Drive, Mailbox #24, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

Any associated form(s) for this collection may be located within this same electronic docket and downloaded for review/testing. Follow the instructions at *http://www.regulations.gov* for submitting comments. Please submit comments on any given form identified by docket number, form number, and title.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Office of the Product Manager for Force Protection Systems (PdM–FPS), 5900 Putnam Road, Building 365/Suite 1, (SFAE–IEW–TF), ATTN: Mark Shuler, Fort Belvoir, VA 22060–5420, or call PdM–FPS at 703–704–2402.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Automated Installation Entry (AIE) System; OMB Control Number 0702–0125.

Needs and Uses: The information collection requirement is necessary to verify the identity of an individual and determine the fitness of an individual requesting and/or requiring access to installations, and issuance of local access credentials. The information collection methodology involves the employment of technological collection of data via an electronic physical access control system (PACS) which provides the capability to rapidly and electronically authenticate credentials and validate and individual's authorization to enter an installation.

Affected Public: Individuals or Households; Business or Other For-Profit.

Annual Burden Hours: 44,315 hours.

Number of Respondents: 886,294.

Responses per Respondent: 1.

Annual Responses: 886,294.

Average Burden per Response: 3 minutes.

Frequency: On occasion.

Personal data is required to support HQDA physical security/access control programs. Data is collected within the AIE system registration database to facilitate automated access control as specified in DTM 09–012, Interim Policy for DoD Physical Access Control and AR 190–13, Army Physical security. Data is employed to ensure positive identification of individuals authorized access to installations. AIE supports military personnel (Active/Reserve/Guard/retired); DoD civilian/contractor employees; corporate employees; vendors and visitors enrollment and access.

Dated: December 23, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2016–31605 Filed 12–28–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Innovation Board: Notice of Federal Advisory Committee Meeting

AGENCY: Office of the Deputy Chief Management Officer, Department of Defense (DoD).

ACTION: Notice of Federal Advisory Committee Meeting.

SUMMARY: The DoD is publishing this notice to announce the following Federal Advisory Committee Meeting of the Defense Innovation Board (''the Board''). This meeting is partially closed to the public.

DATES: The public meeting of the Board will be held on Monday, January 9, 2017. The open portion of the meeting will begin at 9:00 a.m. and end at 10:30 a.m. (Escort is required for attendees who do not have Pentagon credentials. See guidance in the **SUPPLEMENTARY INFORMATION** section.) The closed portion of the meeting will be held from 11:00 a.m. to 2:30 p.m.

ADDRESSES: The open portion of the meeting will be held at The Pentagon, Washington, DC, in the Pentagon Conference Center—Room B6. (Escort is required for attendees who do not have Pentagon credentials. See guidance in the **SUPPLEMENTARY INFORMATION** section.) The closed portion of the meeting will be held at the Pentagon, Washington, DC, in the Nunn-Lugar Conference Room.

FOR FURTHER INFORMATION CONTACT: The Board's Alternate Designated Federal Officer, Michael Gable, at Defense Innovation Board, 9000 Defense Pentagon, Room 5E572, Washington, DC 20350, *michael.l.gable.civ@mail.mil.*

For meeting information and to submit written comments or questions to the Board, email *osd.innovation@mail.mil.* Please include in the subject line ''DIB January 2017 Meeting''.

SUPPLEMENTARY INFORMATION: Due to circumstances beyond the control of the Department of Defense, the Defense Innovation Board is unable to provide public notification, as required by 41 CFR 102–3.150(a), for its meeting on Monday, January 9, 2017. Accordingly, 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.

This meeting is being held under the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C. Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.140.

Purpose of the Meeting. The mission of the Board is to examine and provide the Secretary of Defense and the Deputy Secretary of Defense independent advice and recommendations on innovative means to address future challenges in terms of integrated change to organizational structure and

processes, business and functional concepts, and technology applications. The Board focuses on (a) technology and capabilities, (b) practices and operations, and (c) people and culture.

Meeting Agenda. During the open portion of the meeting, the Board will deliberate and propose observations on how to expand and advance innovation across the Department of Defense. These findings will be based upon discussions and preliminary recommendations from the October 2016 Public Meeting, and observations since that gathering. The Board is scheduled to vote on these recommendations.

Specifically, the Board will deliberate and vote on each of the following interim recommendations: (1) Assess Cyber Security Vulnerabilities; (2) Catalyze Innovations in Artificial Intelligence and Machine Learning; (3) Align Risk and Incentives for Acquisition; (4) Sustain and Increase Support for Promising Approaches to Innovation; (5) Promote Access of DoD Computer Code; (6) Push Software Development to the ''Front Line;'' (7) Modernize Information Technology; and (8) Reward Bureaucracy Busting. The Board will also deliberate on a potential new recommendation to build a data center to collect all DoD data in a central location for ease of access and analysis.

In addition, the Board will be briefed on the Secretary's announcement to adopt the following three preliminary recommendations and comment on the Department's draft implementation planning: (1) Make computer science a core competency of the Department by increasing the focus on recruiting talented computer scientists and software engineers into the military and civilian workforce; (2) invest more broadly in machine learning through targeted challenges, prize competitions, and a virtual center of excellence model that establishes stretch goals and incentivizes academic and private sector researchers to achieve them; and (3) create a DoD Chief Innovation Officer to act as a senior advisor to the Secretary of Defense and serve as a spearhead for innovation activities.

Lastly, the Board will discuss potential recommendations and advice for the incoming Secretary of Defense to help keep DoD imbued with a culture of innovation to better protect the nation and its allies, and stay ahead of future threats.

During the closed portion of the meeting, the Board will present more detailed discussions of their observations and recommendations to senior leaders from the Office of the Secretary of Defense. They will also receive informational briefings from staff members in the Office of the Secretary of Defense. These presentations and resulting discussions will include classified information.

Public Accessibility to the Meeting. Pursuant to federal statutes 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 9:00 a.m. to 10:30 a.m. Seating is on a first-come basis. Anyone wishing to attend the meeting must send a request to *osd.innovation@mail.mil.* Please include your full name, title, email address, phone number, organization, and whether you require an escort or not. The subject line should read ''Registration for DIB January 2017 Meeting''. Requests for registration must be submitted in writing by January 3, 2017.

Public attendees requiring an escort should arrive at the Pentagon Visitors Center, located near the Pentagon Metro Station's south exit (the escalators to the left upon exiting through the turnstiles) and adjacent to the Pentagon Transit Center bus terminal, with sufficient time to complete security screening no later than 8:15 a.m. on January 9, 2017. Please note that Pentagon tour groups also enter through the Visitors Center, so attendees should be prepared to stand in line. To complete security screening, you must present two forms of government-issued identification, of which, one must include a photograph. While some federal government and military employees are Common Access Card holders and are not required to have an escort, they may be required to pass through the Visitors Center to gain access to the Pentagon.

Special Accommodations: Individuals requiring special accommodations to access the public meeting should include this information when registering so that appropriate arrangements can be made.

Pursuant to 5 U.S.C. 552b(c)(1), the DoD has determined that the portion of the meetings from 11:00 a.m. to 2:30 p.m. shall be closed to the public. The Assistant Deputy Chief Management Officer, in consultation with the Office of the DoD General Counsel, has determined in writing that this portion of the committee's meeting will be closed as the discussions may involve classified matters of national security. Such classified material is so inextricably intertwined with the unclassified material that it cannot reasonably be segregated into separate discussions without disclosing matters that are classified SECRET or higher.

Procedures for Providing Public Comments. Pursuant to section 10(a)(3) of the Federal Advisory Committee Act of 1972 and 41 CFR 102–3.140, the public or interested organizations may submit written comments to the Board about its approved agenda pertaining to this meeting or at any time regarding the Board's mission. Individuals submitting a written statement must submit their statement to the Executive Director at *osd.innovation@mail.mil.* Written comments that do not pertain to a scheduled meeting may be submitted at any time. However, if individual comments pertain to a specific topic being discussed at the planned meeting, then such comments must be received in writing not later than January 4, 2017. The Executive Director will compile all written submissions received by the deadline, and provide them to Board Members prior to the meeting. Comments received after this date may not be provided to or considered by the Board until a later date.

Dated: December 23, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2016–31577 Filed 12–28–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2016–ICCD–0146]

Agency Information Collection Activities; Comment Request; Loan Rehabilitation: Reasonable and Affordable Payments

AGENCY: Federal Student Aid (FSA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a revision of an existing information collection.

DATES: Interested persons are invited to submit comments on or before February 27, 2017.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2016–ICCD–0146. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. *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 Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 224–84, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Ian Foss, 202–377–3681.

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: Loan Rehabilitation: Reasonable and Affordable Payments.

OMB Control Number: 1845–0120.

Type of Review: A revision of an existing information collection.

Respondents/Affected Public: Individuals or Households.

Total Estimated Number of Annual Responses: 35,282.

Total Estimated Number of Annual Burden Hours: 35,282.

Abstract: Borrowers who have defaulted on their Direct Loan or FFEL Program loans may remove those loans from default through a process called rehabilitation. Loan rehabilitation requires the borrower to make 9 payments within 10 months. The payment amount is set according to one of two formulas. The second of the two formulas uses the information that is collected in this form. The form is being revised to make it easier for borrowers to complete by either eliminating unnecessary language or simplifying language already on the form.

Dated: December 22, 2016.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2016–31441 Filed 12–28–16; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2016–ICCD–0120]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; National Professional Development Program: Grantee Performance Report

AGENCY: Office of English Language Acquisition (OELA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before January 30, 2017.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2016–ICCD–0120. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. *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 Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 226–62, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Samuel Lopez, 202–401–1423.

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: National Professional Development Program: Grantee Performance Report.

OMB Control Number: 1885–0555.

Type of Review: An extension of an existing information collection.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 138.

Total Estimated Number of Annual Burden Hours: 6,900.

Abstract: The National Professional Development (NPD) program provides professional development activities intended to improve instruction for students with limited English proficiency and assists education personnel working with such children to meet high professional standards. The NPD program office is submitting this application to request approval to collect information from NPD grantees. This data collection serves two purposes; the data are necessary to assess the performance of the NPD program on Government Performance Results Act measures, also, budget information and data on project-specific performance measures are collected from NPD grantees for project-monitoring information.

Dated: December 22, 2016.

Tomakie Washington,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2016–31467 Filed 12–28–16; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2016–ICCD–0117]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Credit Enhancement for Charter School Facilities Program Performance Report

AGENCY: Office of Innovation and Improvement (OII), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a revision of an existing information collection.

DATES: Interested persons are invited to submit comments on or before January 30, 2017.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2016–ICCD–0117. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. *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 Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 226–62, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Clifton Jones, 202–205–2204.

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: Credit Enhancement for Charter School Facilities Program Performance Report.

OMB Control Number: 1855–0010.

Type of Review: A revision of an existing information collection.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 34.

Total Estimated Number of Annual Burden Hours: 850.

Abstract: The Credit Enhancement for Charter School Facilities Program and its virtually identical antecedent program, the Charter Schools Facilities Financing Demonstration Program, authorized as part of the reauthorization of the Elementary and Secondary Education Act, to have a statutory mandate for an annual report (respectively, Section 5227 and Section 10227). This reporting is a requirement in order to obtain or retain benefits according to section 5527 part b of the Elementary and Secondary Education Act of 1965. ED will use the information through this report to monitor and evaluate competitive grants. These grants are made to private, non-profits; governmental entities; and consortia of these organizations. These organizations will use the funds to leverage private capital to help charter schools construct, acquire, and renovate school facilities.

Dated: December 22, 2016.

Tomakie Washington,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2016–31466 Filed 12–28–16; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project Nos. 2362–039, 2454–080 and 2532–079]

Allete, Inc.; Notice of Application Accepted for Filing, Soliciting Comments, Protests and Motions To Intervene

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Proceeding:* Extension of License Term.

b. *Project Nos.:* P–2362–039, P–2454–080, & P–2532–079.

c. *Date Filed:* November 21, 2016.

d. *Licensee:* Allete, Inc.

e. *Names and Locations of Projects:* Grand Rapids Project (P–2362), located on the Mississippi River in Itasca County, Minnesota. Sylvan Project (P–2454), located on the Gull and Crow Wing rivers, in Cass, Crow Wing, and Morrison counties, Minnesota. Little Falls Project (P–2532), located on the Mississippi River, in Morrison County, Minnesota.

f. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

g. *Licensee Contact Information:* Ms. Nora Rosemore, Minnesota Power, 30 West Superior Street, Duluth, Minnesota 55802, Phone: (218) 725–2101, Email: *nrosemore@mnpower.com.*

h. *FERC Contact:* Mr. Ashish Desai, (202) 502–8370, *Ashish.Desai@ferc.gov.*

i. Deadline for filing comments, motions to intervene and protests, is 30 days from the issuance date of this notice by the Commission. The Commission strongly encourages electronic filing. Please file motions to intervene, protests, comments, and recommendations, using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866)

208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. The first page of any filing should include docket numbers P–2436–039, P–2454–080, and P–2532–079.

j. *Description of Proceeding:* The licensee, Allete, Inc., requests the Commission extend the term of the license for three of its projects to synchronize the license expiration dates with the licensee's two other projects located nearby, so that they could be relicensed in two groups based on their location. The licensee received a 30-year license for the Grand Rapids Project No. 2362 on February 26, 1993, effective February 1, 1993. The licensee requests the license expiration date for the Grand Rapids Project be extended from January 31, 2023 to December 31, 2023, to match the license expiration date of the licensee's nearby Prairie River Project No. 2361.

In addition, the licensee received 30-year licenses for the Sylvan Project No. 2454 on October 29, 1993, and Little Falls Project No. 2532 on October 27, 1993, both effective January 1, 1994. The licensee requests the expiration dates for both projects be extended to March 31, 2038, to match the license expiration date of the licensee's nearby Pillager Project No. 2663. The licensee states that the consolidation of the relicensing proceedings for the five projects into two groups would reduce redundancy and allow for better stakeholder participation.

k. This notice is available for review and reproduction at the Commission in the Public Reference Room, Room 2A, 888 First Street NE., Washington, DC 20426. The filing may also be viewed on the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the Docket number (P–2362–039, P–2454–080, and P–2532–079) excluding the last three digits in the docket number field to access the notice. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call toll-free 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov.* For TTY, call (202) 502–8659.

l. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

m. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, and .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

n. *Filing and Service of Responsive Documents:* Any filing must (1) bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'' as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). All comments, motions to intervene, or protests should relate to the license term extension request. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. If an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

Dated: December 22, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–31539 Filed 12–28–16; 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 exempt wholesale generator filings:

Docket Numbers: EG17–35–000.

Applicants: Grady Wind Energy Center, LLC.

Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Grady Wind Energy Center, LLC.

Filed Date: 12/21/16.

Accession Number: 20161221–5418.

Comments Due: 5 p.m. ET 1/11/17.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1790–014; ER10–1821–014; ER11–2029–005.

Applicants: BP Energy Company, Cedar Creek II, LLC, Goshen Phase II LLC.

Description: Updated Market Power Analysis for Northwest Region of BP Energy Company, et al.

Filed Date: 12/21/16.

Accession Number: 20161221–5459.

Comments Due: 5 p.m. ET 2/21/17.

Docket Numbers: ER10–2759–006; ER10–2631–006; ER10–2732–012; ER10–2733–012; ER10–2734–012; ER10–2736–012; ER10–2737–012; ER10–2741–012; ER10–2749–012; ER10–2752–012; ER12–2492–008; ER12–2493–008; ER12–2494–008; ER12–2495–008; ER12–2496–008; ER13–815–004; ER14–264–003; ER16–2455–002; ER16–2456–002; ER16–2457–002; ER16–2458–002; ER16–2459–002.

Applicants: Bridgeport Energy LLC, Emera Energy Services, Inc., Emera Energy U.S. Subsidiary No. 1, Inc., Emera Energy U.S. Subsidiary No. 2, Inc., Emera Energy Services Subsidiary No. 1 LLC, Emera Energy Services Subsidiary No. 2 LLC, Emera Energy Services Subsidiary No. 3 LLC, Emera Energy Services Subsidiary No. 4 LLC, Emera Energy Services Subsidiary No. 5 LLC, Emera Energy Services Subsidiary No. 6 LLC, Emera Energy Services Subsidiary No. 7 LLC, Emera Energy Services Subsidiary No. 8 LLC, Emera Energy Services Subsidiary No. 9 LLC, Emera Energy Services Subsidiary No. 10 LLC, Emera Energy Services Subsidiary No. 11 LLC, Emera Energy Services Subsidiary No. 12 LLC, Emera Energy Services Subsidiary No. 13 LLC, Emera Energy Services Subsidiary No. 14 LLC, Emera Energy Services Subsidiary No. 15 LLC, Emera Maine, Rumford Power Inc., Tiverton Power LLC.

Description: Triennial Update for the Northeast Region of Bridgeport Energy LLC, et al.

Filed Date: 12/21/16.

Accession Number: 20161221–5467.

Comments Due: 5 p.m. ET 2/21/17.

Docket Numbers: ER12–540–007; ER10–1346–006; ER10–1348–006; ER12–539–007.

Applicants: APDC, Inc., Atlantic Power Energy Services (US) LLC, Frederickson Power L.P., ManChief Power Company LLC.
Description: Triennial market power update for Northwest region of APDC, Inc., et al.
Filed Date: 12/21/16.
Accession Number: 20161221–5462.
Comments Due: 5 p.m. ET 2/21/17.

Docket Numbers: ER13–1944–006.
Applicants: PJM Interconnection, L.L.C.
Description: Compliance filing: Errata to Correct MISO–PJM JOA section 9.4 effective May 30, 2016 to be effective 5/30/2016.
Filed Date: 12/22/16.
Accession Number: 20161222–5085.
Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER15–2589–000.
Applicants: CPV Shore, LLC.
Description: Report Filing: Informational Filing Regarding Planned Transfer to be effective N/A.
Filed Date: 12/21/16.
Accession Number: 20161221–5241.
Comments Due: 5 p.m. ET 1/11/17.

Docket Numbers: ER16–771–001.
Applicants: Midcontinent Independent System Operator, Inc., Consumers Energy Company.
Description: Compliance filing: 2016–12–22_Consumers Energy WDS Agreements (Compliance) to be effective 4/1/2016.
Filed Date: 12/22/16.
Accession Number: 20161222–5065.
Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–110–001.
Applicants: California Independent System Operator Corporation.
Description: Compliance filing: 2016–12–22 Aliso Canyon Gas-Electric Coordination Enhancement Phase 2 Compliance to be effective 11/30/2016.
Filed Date: 12/22/16.
Accession Number: 20161222–5167.
Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–423–000.
Applicants: Rubicon NYP Corp.
Description: Amendment to November 29, 2016 Rubicon NYP Corp tariff filing [Asset Appendix B].
Filed Date: 12/22/16.
Accession Number: 20161222–5348.
Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–615–000.
Applicants: Albany Green Energy, LLC.
Description: Baseline eTariff Filing: Albany Green Energy LLC MBR Application Filing to be effective 2/20/2017.
Filed Date: 12/22/16.
Accession Number: 20161222–5452.
Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–630–000.
Applicants: North Wind Turbines LLC.
Description: § 205(d) Rate Filing: Market-Based Rate Tariff Revisions to be effective 12/23/2016.
Filed Date: 12/22/16.
Accession Number: 20161222–5114.
Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–631–000.
Applicants: Norwalk Power LLC.
Description: § 205(d) Rate Filing: Market-Based Rate Tariff Revisions to be effective 12/23/2016.
Filed Date: 12/22/16.
Accession Number: 20161222–5117.
Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–632–000.
Applicants: NRG Power Marketing LLC.
Description: § 205(d) Rate Filing: Market-Based Rate Tariff Revisions to be effective 12/23/2016.
Filed Date: 12/22/16.
Accession Number: 20161222–5122.
Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–633–000.
Applicants: Reliant Energy Northeast LLC.
Description: § 205(d) Rate Filing: Market-Based Rate Tariff Revisions to be effective 12/23/2016.
Filed Date: 12/22/16.
Accession Number: 20161222–5125.
Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–634–000.
Applicants: RRI Energy Services, LLC.
Description: § 205(d) Rate Filing: Market-Based Rate Tariff Revisions to be effective 12/23/2016.
Filed Date: 12/22/16.
Accession Number: 20161222–5126.
Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–635–000.
Applicants: Saguaro Power Company, A Limited Partner.
Description: § 205(d) Rate Filing: Market-Based Rate Tariff Revisions to be effective 12/23/2016.
Filed Date: 12/22/16.
Accession Number: 20161222–5131.
Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–636–000.
Applicants: Southern California Edison Company.
Description: § 205(d) Rate Filing: DSA 5149 Lancaster Energy Project SA No. 915 to be effective 2/21/2017.
Filed Date: 12/22/16.
Accession Number: 20161222–5138.
Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–637–000.
Applicants: Pennsylvania Electric Company, Mid-Atlantic Interstate Transmission, LLC, PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Pennsylvania Electric Company and MAIT submit Service Agreement No. 4555 to be effective 1/1/2017.
Filed Date: 12/22/16.
Accession Number: 20161222–5205.
Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–638–000.
Applicants: Southern California Edison Company.
Description: § 205(d) Rate Filing: True Up of Costs for the Grand Crossing WDLA to be effective 2/23/2017.
Filed Date: 12/22/16.
Accession Number: 20161222–5304.
Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–639–000.
Applicants: Trans Bay Cable LLC.
Description: § 205(d) Rate Filing: Annual TRBAA filing to be effective 1/1/2017.
Filed Date: 12/22/16.
Accession Number: 20161222–5332.
Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–640–000.
Applicants: Duke Energy Progress, LLC.
Description: § 205(d) Rate Filing: Waynesville NITSA Amendment SA No. 303 to be effective 1/1/2017.
Filed Date: 12/22/16.
Accession Number: 20161222–5352.
Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–641–000.
Applicants: Florida Power & Light Company.
Description: Notice of Cancellation of Second Revised Service Agreement No. 194 of Florida Power & Light Company.
Filed Date: 12/21/16.
Accession Number: 20161221–5465.
Comments Due: 5 p.m. ET 1/11/17.

Docket Numbers: ER17–642–000.
Applicants: Florida Power & Light Company.
Description: Notice of Cancellation of Rate Schedule No. 305\4 of Florida Power & Light Company.
Filed Date: 12/21/16.
Accession Number: 20161221–5466.
Comments Due: 5 p.m. ET 1/11/17.

Docket Numbers: ER17–643–000.
Applicants: New Brunswick Energy Marketing Corporation.
Description: § 205(d) Rate Filing: Revisions to Market-Based Rate Tariff to be effective 12/23/2016.
Filed Date: 12/22/16.
Accession Number: 20161222–5437.
Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–644–000.
Applicants: Talen Energy Marketing, LLC.
Description: § 205(d) Rate Filing: Revised Market-Based Rate Tariff to be effective 2/22/2017.
Filed Date: 12/22/16.
Accession Number: 20161222–5455.
Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–645–000.
Applicants: Talen Montana, LLC.
Description: § 205(d) Rate Filing: Revised Market-Based Rate Tariff to be effective 2/22/2017.
Filed Date: 12/22/16.
Accession Number: 20161222–5456.
Comments Due: 5 p.m. ET 1/12/17.

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: December 22, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–31534 Filed 12–28–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER17–582–000]

Westside Solar, 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 Westside Solar, 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 January 11, 2017.

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 electronic 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: December 22, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–31537 Filed 12–28–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2496–276]

Eugene Water and Electric Board; Notice of Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Application To Amend Project Boundary, Relocate Existing Substation, and Delete Portions of Existing Transmission Lines.

b. *Project No:* 2496–276.

c. *Date Filed:* October 18, 2016.

d. *Applicant:* Eugene Water and Electric Board (EWEB).

e. *Name of Project:* Leaburg-Walterville Hydroelectric Project.

f. *Location:* The project comprises two developments, Leaburg and Walterville, which are both located on the Mackenzie River, a tributary to the Willamette River, in Lane County, Oregon. The project does not occupy any federal lands.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r

h. *Applicant Contact:* Laurie Elliott, FERC License Coordinator, EWEB, 500 East 4th Avenue, P.O. Box 10148, Eugene, Oregon, (541) 685–7000, *Laurie.Elliott@EWEB.org.*

i. *FERC Contact:* Kurt Powers, (202) 502–8949, *kurt.powers@ferc.gov* or Steven Sachs, (202) 502–8666, *steven.sachs@ferc.gov.*

j. *Deadline for filing comments, motions to intervene, and protests:* January 23, 2017.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, and protests using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. The first page of any filing should include docket number P–2496–276.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Request:* The EWEB is seeking to modify the project boundary by expanding it to include the relocation of Leaburg's existing substation to the highly disturbed, unconstructed location referred to as the Holden Creek substation project area (approximately 2,000 feet down Highway 126 and away from the

McKenzie River from its current location). Relocating the substation would allow EWEB to connect to an adjacent Bonneville Power Administration transmission line and eliminate approximately eight miles of two parallel, existing EWEB transmission lines.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above. Agencies may obtain copies of the application directly from the applicant.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions To Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214, respectively. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Documents:* Any filing must (1) bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'' as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person commenting, protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis. Any filing made by an intervenor must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 385.2010.

Dated: December 22, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–31540 Filed 12–28–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP16–486–000; PF16–3–000]

Millennium Pipeline Company, LLC; Notice of Schedule for Environmental Review of the Eastern System Upgrade Project

On July 29, 2016, Millennium Pipeline Company, LLC (Millennium) filed an application in Docket No. CP16–486–000 requesting a Certificate of Public Convenience and Necessity pursuant to Section 7(c) of the Natural Gas Act to construct and operate certain natural gas pipeline facilities. The proposed project is known as the Eastern System Upgrade Project (Project), and it would transport additional natural gas from Millennium's existing Corning Compressor Station to an existing interconnect with Algonquin Gas Transmission, LLC in Ramapo, New York.

On August 11, 2016, the Federal Energy Regulatory Commission (Commission or FERC) issued its Notice of Application for the Project. Among other things, that notice alerted agencies issuing federal authorizations of the requirement to complete all necessary reviews and to reach a final decision on a request for a federal authorization within 90 days of the date of issuance of the Commission staff's Environmental Assessment (EA) for the Project. This instant notice identifies the FERC staff's planned schedule for the completion of the EA for the Project.

Schedule for Environmental Review

Issuance of EA, April 7, 2017.
90-day Federal Authorization Decision Deadline, July 6, 2017.

If a schedule change becomes necessary, additional notice will be provided so that the relevant agencies are kept informed of the Project's progress.

Project Description

The proposed Project includes (i) approximately 7.8-miles of 30- and 36-inch-diameter pipeline loop in Orange County, New York; (ii) a new 22,400 horsepower (HP) compressor station in Sullivan County, New York (Highland Compressor Station); (iii) additional 22,400 HP at the existing Hancock Compressor Station in Delaware County, New York; (iv) modifications to the existing Ramapo Meter and Regulator Station in Rockland County, New York; (v) modifications to the Wagoner Interconnect in Orange County, New York; (vi) additional pipeline appurtenant facilities at the existing Huguenot and Westtown Meter and Regulator Stations in Orange County, New York; and (vii) an alternate interconnect to the 16-inch-diameter Valley Lateral at milepost 7.6 of the Project. The Project would allow Millennium to transport an additional 233,000 dekatherms per day of additional natural gas service.

Background

On May 11, 2016, the Commission issued a *Notice of Intent to Prepare an Environmental Assessment for the Planned Eastern System Upgrade Project and Request for Comments on Environmental Issues* (NOI). The NOI was issued during the pre-filing review of the Project in Docket No. PF16–3–000 and was sent to affected landowners; federal, state, and local government agencies; elected officials; environmental and public interest groups; Native American tribes; other interested parties; and local libraries and newspapers. In response to the NOI, the Commission received comments from the New York State Department of Agriculture (NYSDAM), the Delaware Tribe of Indians, the U.S. Environmental Protection Agency (EPA), environmental and public interest groups, and individual stakeholders. The primary issues raised by commentors addressed concerns specific to the Highland Compressor Station, including health risks associated with air and greenhouse gas emissions, and socioeconomic impacts. Commentors also expressed concerns regarding Project impacts on surface and groundwater; wetlands; threatened and endangered species; cultural resources and historic structures; soils; property values; safety, including strains on local emergency services; pollution prevention practices; and climate change.

The EPA, NYSDAM, Stockbridge-Munsee Band of Mohicans, and Delaware Tribe of Indians are

participating as cooperating agencies in the preparation of this EA.

Additional Information

In order to receive notification of the issuance of the EA and to keep track of all formal issuances and submittals in specific dockets, the Commission offers a free service called eSubscription. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *www.ferc.gov/docs-filing/esubscription.asp.*

Additional information about the Project is available from the Commission's Office of External Affairs at (866) 208–FERC or on the FERC Web site (*www.ferc.gov*). Using the ''eLibrary'' link, select ''General Search'' from the eLibrary menu, enter the selected date range and ''Docket Number'' excluding the last three digits (*i.e.,* CP16–486), and follow the instructions. For assistance with access to eLibrary, the helpline can be reached at (866) 208–3676, TTY (202) 502–8659, or at *FERCOnlineSupport@ferc.gov.* The eLibrary link on the FERC Web site also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rule makings.

Dated: December 22, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–31536 Filed 12–28–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1325–007; ER10–1330–005; ER10–1333–007; ER10–2032–006; ER10–2033–006; ER12–1946–007; ER12–2313–003; ER15–190–004; ER15–255–002; ER16–141–003; ER16–355–001; ER17–543–001.

Applicants: CinCap V LLC, Colonial Eagle Solar, LLC, Conetoe II Solar, LLC, Duke Energy Beckjord, LLC, Duke Energy Beckjord Storage, LLC, Duke Energy Commercial Enterprises, Inc., Duke Energy Kentucky, Inc., Duke Energy Ohio, Inc., Duke Energy Renewable Services, LLC, Duke Energy SAM, LLC, Laurel Hill Wind Energy, LLC, North Allegheny Wind, LLC.

Description: Triennial Market Power Analysis for the Northeast Region of Duke Energy Corporation subsidiaries.

Filed Date: 12/21/16.

Accession Number: 20161221–5457.

Comments Due: 5 p.m. ET 2/21/17.

Docket Numbers: ER11–2552–003; ER11–2554–003; ER11–2555–002; ER11–2556–003; ER11–2557–003; ER11–2558–003.

Applicants: Massachusetts Electric Company, Niagara Mohawk Power Corporation, New England Power Company, National Grid-Glenwood Energy Center, LLC, National Grid-Port Jefferson Energy Center, LLC, The Narragansett Electric Company.

Description: Updated Triennial Market Power Analysis of National Grid USA.

Filed Date: 12/20/16.

Accession Number: 20161220–5386.

Comments Due: 5 p.m. ET 2/21/17.

Docket Numbers: ER15–644–002.

Applicants: Idaho Power Company.

Description: Compliance filing: Order No. 676–H Compliance Filing Effective Tariff Version Correction to be effective 5/15/2015.

Filed Date: 12/22/16.

Accession Number: 20161222–5008.

Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER16–2602–002.

Applicants: 4C Acquisition, LLC.

Description: Tariff Amendment: Supplement to Application for Market-Based Rate Authorization of 4C Acquisition to be effective 1/9/2017.

Filed Date: 12/21/16.

Accession Number: 20161221–5414.

Comments Due: 5 p.m. ET 1/3/17.

Docket Numbers: ER17–604–000.

Applicants: NorthWestern Corporation.

Description: § 205(d) Rate Filing: SA 591 5th Rev—NITSA with Benefis Health System to be effective 3/1/2017.

Filed Date: 12/21/16.

Accession Number: 20161221–5403.

Comments Due: 5 p.m. ET 1/11/17.

Docket Numbers: ER17–605–000.

Applicants: NorthWestern Corporation.

Description: § 205(d) Rate Filing: SA 605 6th Rev—NITSA with Bonneville Power Administration to be effective 3/1/2017.

Filed Date: 12/21/16.

Accession Number: 20161221–5405.

Comments Due: 5 p.m. ET 1/11/17.

Docket Numbers: ER17–606–000.

Applicants: NorthWestern Corporation.

Description: § 205(d) Rate Filing: SA 642 4th Rev—NITSA with General Mills Operations LLC to be effective 3/1/2017.

Filed Date: 12/21/16.

Accession Number: 20161221–5406.

Comments Due: 5 p.m. ET 1/11/17.

Docket Numbers: ER17–607–000.

Applicants: NorthWestern Corporation.

Description: § 205(d) Rate Filing: SA 666 4th Rev—NITSA with Suiza Dairy to be effective 3/1/2017.

Filed Date: 12/21/16.

Accession Number: 20161221–5408.

Comments Due: 5 p.m. ET 1/11/17.

Docket Numbers: ER17–608–000.

Applicants: NorthWestern Corporation.

Description: § 205(d) Rate Filing: SA 760 2nd Rev—NITSA with Beartooth Electric Cooperative to be effective 3/1/2017.

Filed Date: 12/22/16.

Accession Number: 20161222–5005.

Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–609–000.

Applicants: NorthWestern Corporation.

Description: § 205(d) Rate Filing: SA 767 3rd Rev—NITSA with Basin Electric Power Cooperative to be effective 3/1/2017.

Filed Date: 12/22/16.

Accession Number: 20161222–5007.

Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–610–000.

Applicants: NorthWestern Corporation.

Description: § 205(d) Rate Filing: SA 243 11th Rev—NITSA with CHS Inc. to be effective 3/1/2017.

Filed Date: 12/22/16.

Accession Number: 20161222–5009.

Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–611–000.

Applicants: Pacific Gas and Electric Company.

Description: § 205(d) Rate Filing: Amendment to SMUD Fringe Area Service Agreement (RS 244) to be effective 1/1/2017.

Filed Date: 12/22/16.

Accession Number: 20161222–5015.

Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–612–000.

Applicants: Pacific Gas and Electric Company.

Description: § 205(d) Rate Filing: Revisions to City and County of San Francisco Hunters Point WDT SA (SA 36) to be effective 12/22/2016.

Filed Date: 12/22/16.

Accession Number: 20161222–5017.

Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–613–000.

Applicants: New York State Reliability Council, L.L.C., Whiteman Osterman & Hanna LLP.

Description: Informational Filing of the Revised Installed Capacity Requirement for the New York Control

Area by the New York State Reliability Council, L.L.C.

Filed Date: 12/20/16.

Accession Number: 20161220–5390.

Comments Due: 5 p.m. ET 1/10/17.

Docket Numbers: ER17–614–000.

Applicants: Southwestern Public Service Company.

Description: § 205(d) Rate Filing: SPS GSEC-Cntrl Ld Intrpt Equip Agrmt 691 0.0.0 to be effective 4/16/2016.

Filed Date: 12/22/16.

Accession Number: 20161222–5052.

Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–616–000.

Applicants: NorthWestern Corporation.

Description: Tariff Cancellation: Notice of Cancellation—SA 777, Agreement with Western Energy Company to be effective 12/23/2016.

Filed Date: 12/22/16.

Accession Number: 20161222–5066.

Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–617–000.

Applicants: Midcontinent Independent System Operator, Inc., Consumers Energy Company.

Description: § 205(d) Rate Filing: 2016–12–22_SA 2892 Consumers Energy-Wolverine Power Supply 2nd Rev. WDS to be effective 3/31/2017.

Filed Date: 12/22/16.

Accession Number: 20161222–5070.

Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–618–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Queue Position #AB2–004, Original Service Agreement No. 4584 to be effective 11/30/2016.

Filed Date: 12/22/16.

Accession Number: 20161222–5081.

Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–619–000.

Applicants: GenConn Energy LLC.

Description: § 205(d) Rate Filing: Revised Market-Based Rate Tariff to be effective 12/23/2016.

Filed Date: 12/22/16.

Accession Number: 20161222–5093.

Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–620–000.

Applicants: Boston Energy Trading and Marketing LLC.

Description: § 205(d) Rate Filing: Market-Based Rate Tariff Revisions to be effective 12/23/2016.

Filed Date: 12/22/16.

Accession Number: 20161222–5094.

Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–621–000.

Applicants: Energy Plus Holdings LLC.

Description: § 205(d) Rate Filing: Market-Based Rate Tariff Revisions to be effective 12/23/2016.

Filed Date: 12/22/16.

Accession Number: 20161222–5095.

Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–622–000.

Applicants: GenOn Energy Management, LLC.

Description: § 205(d) Rate Filing: Market-Based Rate Tariff Revisions to be effective 12/23/2016.

Filed Date: 12/22/16.

Accession Number: 20161222–5097.

Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–623–000.

Applicants: Rubicon NYP Corp.

Description: Baseline eTariff Filing: Initial MBR to be effective 1/30/2017.

Filed Date: 12/22/16.

Accession Number: 20161222–5099.

Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–624–000.

Applicants: Green Mountain Energy Company.

Description: § 205(d) Rate Filing: Market-Based Rate Tariff Revisions to be effective 12/23/2016.

Filed Date: 12/22/16.

Accession Number: 20161222–5100.

Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–625–000.

Applicants: Independence Energy Group LLC.

Description: § 205(d) Rate Filing: Market-Based Rate Tariff Revisions to be effective 12/23/2016.

Filed Date: 12/22/16.

Accession Number: 20161222–5101.

Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–626–000.

Applicants: Long Beach Peakers LLC.

Description: § 205(d) Rate Filing: Market-Based Rate Tariff Revisions to be effective 12/23/2016.

Filed Date: 12/22/16.

Accession Number: 20161222–5102.

Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–627–000.

Applicants: Mountain Wind Power, LLC.

Description: § 205(d) Rate Filing: Market-Based Rate Tariff Revisions to be effective 12/23/2016.

Filed Date: 12/22/16.

Accession Number: 20161222–5104.

Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–628–000.

Applicants: Mountain Wind Power II LLC.

Description: § 205(d) Rate Filing: Market-Based Rate Tariff Revisions to be effective 12/23/2016.

Filed Date: 12/22/16.

Accession Number: 20161222–5106.

Comments Due: 5 p.m. ET 1/12/17.

Docket Numbers: ER17–629–000.

Applicants: North Community Turbines LLC.

Description: § 205(d) Rate Filing: Market-Based Rate Tariff Revisions to be effective 12/23/2016.

Filed Date: 12/22/16.

Accession Number: 20161222–5111.

Comments Due: 5 p.m. ET 1/12/17.

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: December 22, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–31533 Filed 12–28–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER17–583–000]

Whitney Point Solar, 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 Whitney Point Solar, 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 January 11, 2017.

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 electronic 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: December 22, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–31538 Filed 12–28–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP16–474–000]

High Point Gas Transmission, LLC; Notice of Schedule for Environmental Review of the Venice to Toca Pipeline Abandonment Project

On July 1, 2016, High Point Gas Transmission, LLC (High Point) filed an application in Docket No. CP16–474–000 requesting a Certificate of Public Convenience and Necessity pursuant to section 7(b) of the Natural Gas Act to abandon certain natural gas pipeline facilities. The proposed project is known as the Venice to Toca Pipeline Abandonment Project (Project). High Point proposes to abandon by sale to Cayenne Pipeline, LLC about 61.3 miles of pipeline facilities in Plaquemines and St. Bernard Parishes, Louisiana.

On July 14, 2016, the Federal Energy Regulatory Commission (Commission or FERC) issued its Notice of Application for the Project. Among other things, that notice alerted agencies issuing federal authorizations of the requirement to complete all necessary reviews and to reach a final decision on a request for a federal authorization within 90 days of the date of issuance of the Commission staff's Environmental Assessment (EA) for the Project. This instant notice identifies the FERC staff's planned schedule for the completion of the EA for the Project.

Schedule for Environmental Review

Issuance of EA: February 3, 2017
90-day Federal Authorization Decision Deadline: May 4, 2017

If a schedule change becomes necessary, additional notice will be provided so that the relevant agencies are kept informed of the Project's progress.

Project Description

High Point would abandon by sale nine segments (totaling 61.3 miles) of 12- to 22-inch-diameter natural gas pipeline on its Venice to Toca Transmission Pipeline. To continue use of the remainder of High Point's system and isolate it from the abandoned pipeline that Cayenne Pipeline, LLC plans to use for natural gas liquids, High Point would cut and cap the pipeline at nine locations and remove one meter. All of the abandonment activities, except for disconnecting cross-over and tie-in piping at the Venice, Toca, and Venice Gas Processing Plants and the use of three existing access roads, would occur within High Point's existing permanent right-of-way. Most of the work would take place on existing platforms. The abandonment would also include modifications of 15 associated aboveground valves to isolate the line to be abandoned from the rest of High Point's pipeline system.

Additional Information

In order to receive notification of the issuance of the EA and to keep track of all formal issuances and submittals in specific dockets, the Commission offers a free service called eSubscription. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *www.ferc.gov/docs-filing/esubscription.asp.*

Additional information about the Project is available from the Commission's Office of External Affairs at (866) 208–FERC or on the FERC Web site (*www.ferc.gov*). Using the ''eLibrary'' link, select ''General Search'' from the eLibrary menu, enter the selected date range and ''Docket Number'' excluding the last three digits (*i.e.,* CP16–474), and follow the instructions. For assistance with access to eLibrary, the helpline can be reached at (866) 208–3676, TTY (202) 502–8659, or at *FERCOnlineSupport@ferc.gov.* The eLibrary link on the FERC Web site also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rule makings.

Dated: December 22, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–31535 Filed 12–28–16; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9957–50–ORD]

Human Studies Review Board; Notification of Public Meetings

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) Office of the Science Advisor announces two separate public meetings of the Human Studies Review Board (HSRB) to advise the Agency on the ethical and scientific review of research involving human subjects.

DATES: A public virtual meeting will be held on January 25–26, 2017, from 1:00 p.m. to approximately 5:00 p.m. Eastern Time each day. A separate, subsequent teleconference meeting is planned for Thursday, March 17, 2017, from 2:00 p.m. to approximately 3:30 p.m. for the HSRB to finalize its Final Report of the January 25–26, 2017 meeting and review other possible topics.

ADDRESSES: Both of these meetings will be conducted entirely by telephone and on the Internet using Adobe Connect. For detailed access information visit the HSRB Web site: *http://www2.epa.gov/osa/human-studies-review-board.*

FOR FURTHER INFORMATION CONTACT: Any member of the public who wishes to receive further information should contact the HSRB Designated Federal Official (DFO), Jim Downing on telephone number (202) 564–2468; fax number: (202) 564–2070; email address: *downing.jim@epa.gov;* or mailing address: Environmental Protection

Agency, Office of the Science Advisor, Mail Code 8105R, 1200 Pennsylvania Avenue NW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION:

Meeting access: These meetings are open to the public. The full Agenda and Meeting materials are available at the HSRB Web site: *http://www2.epa.gov/osa/human-studies-review-board.* For questions on document availability, or if you do not have access to the Internet, consult with the DFO, Jim Downing listed under **FOR FURTHER INFORMATION CONTACT**.

Special accommodations. For information on access or services for individuals with disabilities, or to request accommodation of a disability, please contact the DFO listed under **FOR FURTHER INFORMATION CONTACT** at least 10 days prior to the meeting to give EPA as much time as possible to process your request.

How may I participate in this meeting?

The HSRB encourages the public's input. You may participate in these meetings by following the instructions in this section.

1. Oral comments. Requests to present oral comments during either conference call will be accepted up to Noon Eastern Time on Wednesday, January 18, 2017, for the January 25–26, 2017 meeting and up to Noon Eastern Time on Friday, March 10, 2017 for the March 17, 2017 conference call. To the extent that time permits, interested persons who have not pre-registered may be permitted by the HSRB Chair to present oral comments during either call at the designated time on the agenda. Oral comments before the HSRB are generally limited to five minutes per individual or organization. If additional time is available, further public comments may be possible.

2. Written comments. Submit your written comments prior to the meetings. For the Board to have the best opportunity to review and consider your comments as it deliberates, you should submit your comments by Noon Eastern Time on Wednesday, January 18, 2016, for the January 25–26, 2017 conference call, and by noon Eastern Time on Friday, March 10, 2017 for the March 17, 2017 teleconference. If you submit comments after these dates, those comments will be provided to the HSRB members, but you should recognize that the HSRB members may not have adequate time to consider your comments prior to their discussion. You should submit your comments to the DFO, Jim Downing listed under **FOR FURTHER INFORMATION CONTACT**. There is no limit on the length of written comments for consideration by the HSRB.

Background

The HSRB is a Federal advisory committee operating in accordance with the Federal Advisory Committee Act 5 U.S.C. App. 2 § 9. The HSRB provides advice, information, and recommendations on issues related to scientific and ethical aspects of human subjects research that are submitted to the Office of Pesticide Programs to be used for regulatory purposes. The major objectives of the HSRB are to provide advice and recommendations on: (1) Research proposals and protocols; (2) reports of completed research with human subjects; and (3) how to strengthen EPA's programs for protection of human subjects of research.

Topics for discussion. On Wednesday, January 25, 2017, EPA's Human Studies Review Board will consider three published articles:

1. Methylisothiazolinone contact allergy and dose-response relationships, authored by Michael D. Lundov, Claus Zachariae, and Jeanne D. Johansen. Contact Dermatitis (2011) 64, 330–336.

2. Methylisothiazolinone in rinse-off products causes allergic contact dermatitis: A repeated open-application study, authored by K Yazar, M.D. Lundov, A. Faurschou, M. Matura, A. Boman, J.D. Johansen, and C. Lidén. British Journal of Dermatology (2015) 173, 115–122.

3. An evaluation of dose/unit area and time as key factors influencing the elicitation capacity of methylchloroisothiazolinone/methylisothiazolinone (MCI/MI) in MCI/MI-allergic patients, authored by Claus Zachariae, Anne Lerbaek, Pauline M. McNamee, John E. Gray, Mike Wooder, and Torkil Menné. Contact Dermatitis (2006) 55, 160–166.

Then on Thursday, January 26, 2017 the HSRB will consider:

1. Published article: Cholinesterase Activity Resulting from Carbaryl Exposure.

2. Unpublished article: A randomized double blind study with malathion to determine the residues of malathion dicarboxylic acid (DCA), malathion monocarboxylic acid (MCA), dimethyl phosphate (DMP), dimethyl thiophosphate (DMTP), and dimethyl dithiophosphate (DMDTP) in human urine.

Meeting materials for these topics will be available in advance of the meeting at *http://www2.epa.gov/osa/human-studies-review-board.*

On March 17, 2017, the Human Studies Review Board will review and finalize their draft Final Report from the January 25–26, 2017 meeting in addition to other topics that may come before the Board. The HSRB may also discuss planning for future HSRB meetings. The agenda and the draft report will be available prior to the conference call at *http://www2.epa.gov/osa/human-studies-review-board.*

Meeting minutes and final reports. Minutes of these meetings, summarizing the matters discussed and recommendations made by the HSRB, will be released within 90 calendar days of the meeting. These minutes will be available at *http://www2.epa.gov/osa/human-studies-review-board.* In addition, information regarding the HSRB's Final Report, will be found at *http://www2.epa.gov/osa/human-studies-review-board* or from Jim Downing listed under **FOR FURTHER INFORMATION CONTACT**.

Dated: December 19, 2016.

Thomas A. Burke,

EPA Science Advisor.

[FR Doc. 2016–31640 Filed 12–28–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2016–0179; FRL–9957–70–OAR]

California State Motor Vehicle Pollution Control Standards; Greenhouse Gas Emissions From 2014 and Subsequent Model Year Medium- and Heavy-Duty Engines and Vehicles; Notice of Decision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of decision.

SUMMARY: The Environmental Protection Agency (EPA) is granting the California Air Resources Board's (''CARB's'') request for a waiver of Clean Air Act preemption for its greenhouse gas (''GHG'') emission regulation for the new 2014 and subsequent model year on-road medium- and heavy-duty engines and vehicles (''California Phase 1 GHG Regulation'') adopted in 2011. This regulation establishes requirements applicable to new motor vehicles with a gross vehicle weight rating exceeding 8,500 pounds and engines that power such motor vehicles, except for medium-duty passenger vehicles that are subject to California's Low Emission Vehicle Program. This regulation generally aligns California's GHG emission standards and test procedures with the federal GHG emission standards and test procedures that EPA

adopted in 2011. A deemed-to-comply provision is included in CARB's regulation whereby manufacturers may demonstrate compliance with California's Phase 1 GHG Regulation by complying with EPA's Phase 1 regulation. This decision is issued under the authority of the Clean Air Act (''CAA'' or ''the Act'').

DATES: Petitions for review must be filed by February 27, 2017.

ADDRESSES: EPA has established a docket for this action under Docket ID EPA–HQ–OAR–2016–0179. All documents relied upon in making this decision, including those submitted to EPA by CARB, are contained in the public docket. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Air and Radiation Docket in the EPA Headquarters Library, EPA West Building, Room 3334, 1301 Constitution Avenue NW., Washington, DC. The Public Reading Room is open to the public on all federal government working days from 8:30 a.m. to 4:30 p.m.; generally, it is open Monday through Friday, excluding holidays. The telephone number for the Reading Room is (202) 566–1744. The Air and Radiation Docket and Information Center's Web site is *http://www.epa.gov/oar/docket.html.* The email address for the Air and Radiation Docket is: *a-and-r-docket@epa.gov*, the telephone number is (202) 566–1742, and the fax number is (202) 566–9744. An electronic version of the public docket is available through the federal government's electronic public docket and comment system at *http://www.regulations.gov.* After opening the *www.regulations.gov* Web site, enter EPA–HQ–OAR–2016–0179 in the ''Enter Keyword or ID'' fill-in box to view documents in the record. Although a part of the official docket, the public docket does not include Confidential Business Information (''CBI'') or other information whose disclosure is restricted by statute.

EPA's Office of Transportation and Air Quality (''OTAQ'') maintains a Web page that contains general information on its review of California waiver and authorization requests. Included on that page are links to prior waiver **Federal Register** notices, some of which are cited in today's notice; the page can be accessed at *http://www.epa.gov/otaq/cafr.htm.*

FOR FURTHER INFORMATION CONTACT: David Dickinson, Office of Transportation and Air Quality, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Telephone: (202) 343–9256. Email: *dickinson.david@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

California's Phase 1 GHG Regulation complements CARB's existing Tractor-Trailer GHG regulation that was initially adopted in December 2008 and subsequently amended in 2010 and 2012. EPA granted California a waiver for the Tractor-Trailer GHG regulation in 2014.[1] The Tractor-Trailer GHG regulation requires new 2011 and subsequent model year (''MY'') sleeper-cab tractors that haul 53-foot or longer box-type trailers on California highways, and 53-foot and longer box-type trailers operating on California highways to be equipped with U.S. EPA SmartWay approved aerodynamic technologies and low-rolling resistance tires. California's Phase 1 GHG Regulation establishes emission standards for tractors that are also subject to the requirements of CARB's Tractor-Trailer GHG regulation. CARB amended the Tractor-Trailer GHG regulation in conjunction with its adoption of the Phase 1 GHG Regulation to make California's GHG requirements for new medium- and heavy-duty engines and vehicles consistent with corresponding requirements of EPA's Phase 1 GHG regulation.[2] The California Phase 1 GHG Regulation establishes GHG emission standards and associated test procedures for new 2014 and subsequent MY diesel-fueled medium- and heavy-duty engines and for new 2016 and subsequent MY gasoline-fueled medium- and heavy-duty engines used in combination tractors and vocational vehicles that are identical to the corresponding GHG emission standards and associated test procedures for diesel and gasoline-fueled heavy-duty engines in EPA's Phase 1 GHG regulation. The California Phase 1 GHG Regulation also contains ''deemed to comply'' provisions that allow engine manufacturers to demonstrate that 2014 through 2022 model year medium- and heavy-duty engines comply with California's GHG emission standards by showing compliance with EPA's Phase 1 regulation, *i.e.,* submitting to CARB the engine family's Certificate of Conformity issued by EPA.[3]

By letter dated January 29, 2016,[4] CARB submitted to EPA a request for a waiver of the preemption found at section 209(a) of Clean Air Act, 42 U.S.C. 7543(a), for the California Phase 1 GHG Regulation. CARB's submission provides analysis and evidence to support its finding that the California Phase 1 GHG Regulation satisfies the CAA section 209(b) criteria and that a waiver of preemption should be granted.

II. Principles Governing This Review

A. Scope of Review

Section 209(a) of the CAA provides:

> No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.[5]

Section 209(b)(1) of the Act requires the Administrator, after an opportunity for public hearing, to waive application of the prohibitions of section 209(a) for any state that has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the state determines that its state standards will be, in the aggregate, at least as protective of public health and welfare as applicable federal standards.[6] However, no such waiver shall be granted if the Administrator finds that: (A) The protectiveness determination of the state is arbitrary and capricious; (B) the state does not need such state standards to meet compelling and extraordinary conditions; or (C) such state standards and accompanying enforcement procedures are not consistent with section 202(a) of the Act.[7]

[1] 79 FR 46256 (August 7, 2014).

[2] 76 FR 57106 (September 15, 2011).

[3] *See* ''California Exhaust Emission Standards and Test Procedures for 2004 and Subsequent Model Heavy-Duty Diesel-Engines and Vehicles'', Part 1036, Subpart B, section 1036.108, and ''California Exhaust Emission Standards and Test Procedures for 2004 and Subsequent Model Heavy-Duty Otto-Cycle Engines and Vehicles'', Part 1036, Subpart B, section 1036.108. *See also* ''California Greenhouse Gas Exhaust Emission Standards and Test Procedures for 2014 and Subsequent Model Heavy-Duty Vehicles'', Part 1037, Subpart B, section 1037.101(b)(2).

[4] CARB, ''In the Matter of California's Request for Waiver Pursuant to Clean Air Act Section 209(b) for California's Greenhouse Gas Regulation for Medium- and heavy-Duty Engines and Vehicles,'' January 29, 2016 (''California Waiver Request Support Document'') *See www.regulations.gov* Web site, docket number EPA–HQ–OAR–2016–0179–0003.

[5] CAA § 209(a). 42 U.S.C. 7543(a).

[6] CAA § 209(b)(1). 42 U.S.C. 7543(b)(1). California is the only state that meets section 209(b)(1)'s requirement for obtaining a waiver. *See* S. Rep. No. 90–403 at 632 (1967).

[7] CAA § 209(b)(1). 42 U.S.C. 7543(b)(1).

Key principles governing this review are that EPA should limit its inquiry to the specific findings identified in section 209(b)(1) of the Clean Air Act, and that EPA will give substantial deference to the policy judgments California has made in adopting its regulations. In previous waiver decisions, EPA has stated that Congress intended the Agency's review of California's decision-making to be narrow. EPA has rejected arguments that are not specified in the statute as grounds for denying a waiver:

> The law makes it clear that the waiver requests cannot be denied unless the specific findings designated in the statute can properly be made. The issue of whether a proposed California requirement is likely to result in only marginal improvement in California air quality not commensurate with its costs or is otherwise an arguably unwise exercise of regulatory power is not legally pertinent to my decision under section 209, so long as the California requirement is consistent with section 202(a) and is more stringent than applicable Federal requirements in the sense that it may result in some further reduction in air pollution in California.[8]

This principle of narrow EPA review has been upheld by the U.S. Court of Appeals for the District of Columbia Circuit.[9] ''[T]he statute does not provide for any probing substantive review of the California standards by federal officials.'' *Ford Motor Co.* v. *EPA*, 606 F.2d 1293, 1300 (D.C. Cir. 1979). Thus, EPA's consideration of all the evidence submitted concerning a waiver decision is circumscribed by its relevance to those questions that may be considered under section 209(b)(1).

B. Burden and Standard of Proof

As the U.S. Court of Appeals for the D.C. Circuit has made clear in *MEMA I,* opponents of a waiver request by California bear the burden of showing that the statutory criteria for a denial of the request have been met:

> [T]he language of the statute and its legislative history indicate that California's regulations, and California's determinations that they must comply with the statute, when presented to the Administrator are presumed to satisfy the waiver requirements and that the burden of proving otherwise is on whoever attacks them. California must present its regulations and findings at the hearing and thereafter the parties opposing the waiver request bear the burden of persuading the Administrator that the waiver request should be denied.[10]

The Administrator's burden, on the other hand, is to make a reasonable evaluation of the information in the record in coming to the waiver decision. As the court in *MEMA I* stated: ''here, too, if the Administrator ignores evidence demonstrating that the waiver should not be granted, or if he seeks to overcome that evidence with unsupported assumptions of his own, he runs the risk of having his waiver decision set aside as 'arbitrary and capricious.' '' [11] Therefore, the Administrator's burden is to act ''reasonably.'' [12]

With regard to the standard of proof, the court in *MEMA I* explained that the Administrator's role in a section 209 proceeding is to:

> [. . .]consider all evidence that passes the threshold test of materiality and . . . thereafter assess such material evidence against a standard of proof to determine whether the parties favoring a denial of the waiver have shown that the factual circumstances exist in which Congress intended a denial of the waiver.[13]

In that decision, the court considered the standards of proof under section 209 for the two findings related to granting a waiver for an ''accompanying enforcement procedure.'' Those findings involve: (1) Whether the enforcement procedures impact California's prior protectiveness determination for the associated standards, and (2) whether the procedures are consistent with section 202(a). The principles set forth by the court are similarly applicable to an EPA review of a request for a waiver of preemption for a standard. The court instructed that ''the standard of proof must take account of the nature of the risk of error involved in any given decision, and it therefore varies with the finding involved. We need not decide how this standard operates in every waiver decision.'' [14]

With regard to the protectiveness finding, the court upheld the Administrator's position that, to deny a waiver, there must be ''clear and compelling evidence'' to show that proposed enforcement procedures undermine the protectiveness of California's standards.[15] The court noted that this standard of proof also accords with the congressional intent to provide California with the broadest possible discretion in setting regulations it finds protective of the public health and welfare.[16]

With respect to the consistency finding, the court did not articulate a standard of proof applicable to all proceedings, but found that the opponents of the waiver were unable to meet their burden of proof even if the standard were a mere preponderance of the evidence. Although *MEMA I* did not explicitly consider the standards of proof under section 209 concerning a waiver request for ''standards,'' as compared to a waiver request for accompanying enforcement procedures, there is nothing in the opinion to suggest that the court's analysis would not apply with equal force to such determinations. EPA's past waiver decisions have consistently made clear that: ''[E]ven in the two areas concededly reserved for Federal judgment by this legislation—the existence of 'compelling and extraordinary' conditions and whether the standards are technologically feasible—Congress intended that the standards of EPA review of the State decision to be a narrow one.'' [17]

C. Deference to California

In previous waiver decisions, EPA has recognized that the intent of Congress in creating a limited review based on specifically listed criteria was to ensure that the federal government did not second-guess state policy choices. As the Agency explained in one prior waiver decision:

> It is worth noting . . . I would feel constrained to approve a California approach to the problem which I might also feel unable to adopt at the federal level in my own capacity as a regulator. . . . Since a balancing of risks and costs against the potential benefits from reduced emissions is a central policy decision for any regulatory agency under the statutory scheme outlined above, I believe I am required to give very substantial deference to California's judgments on this score.[18]

Similarly, EPA has stated that the text, structure, and history of the California waiver provision clearly indicate both a congressional intent and appropriate EPA practice of leaving the decision on ''ambiguous and controversial matters of public policy'' to California's judgment.[19] This interpretation is supported by relevant discussion in the House Committee

[8] ''Waiver of Application of Clean Air Act to California State Standards,'' 36 FR 17458 (Aug. 31, 1971). Note that the more stringent standard expressed here, in 1971, was superseded by the 1977 amendments to section 209, which established that California must determine that its standards are, in the aggregate, at least as protective of public health and welfare as applicable federal standards.

[9] *See, e.g., Motor and Equip. Mfrs Assoc.* v. *EPA,* 627 F.2d 1095 (D.C. Cir. 1979) (''*MEMA I*'').

[10] *MEMA I,* note 19, at 1121.

[11] *Id.* at 1126.

[12] *Id.* at 1126.

[13] *Id.* at 1122.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *See, e.g.,* ''California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption,'' 40 FR 23102 (May 28, 1975), at 23103.

[18] 40 FR 23102, 23103–04 (May 28, 1975).

[19] 40 FR 23102, 23104 (May 28, 1975); 58 FR 4166 (January 13, 1993).

Report for the 1977 amendments to the CAA. Congress had the opportunity through the 1977 amendments to restrict the preexisting waiver provision, but elected instead to expand California's flexibility to adopt a complete program of motor vehicle emission controls. The report explains that the amendment is intended to ratify and strengthen the preexisting California waiver provision and to affirm the underlying intent of that provision, that is, to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.[20]

D. EPA's Administrative Process in Consideration of California's Request

On August 9, 2016, EPA published a notice of opportunity for public hearing and comment on California's waiver request. In that notice, EPA requested comments on CARB's request for a waiver for the California Phase 1 GHG Regulation under the following three criteria: Whether (a) California's determination that its motor vehicle emissions standards are, in the aggregate, at least as protective of public health and welfare as applicable federal standards is arbitrary and capricious, (b) California needs such State standards to meet compelling and extraordinary conditions, and (c) California's standards and accompanying enforcement procedures are consistent with section 202(a) of the Clean Air Act.

EPA received no comments and no requests for a public hearing. Consequently, EPA did not hold a public hearing.

III. Discussion

A. Whether California's Protectiveness Determination Was Arbitrary and Capricious

As stated in the background, section 209(b)(1)(A) of the Act sets forth the first of the three criteria governing a new waiver request—whether California was arbitrary and capricious in its determination that its motor vehicle emissions standards will be, in the aggregate, at least as protective of public health and welfare as applicable federal standards. Section 209(b)(1)(A) of the CAA requires EPA to deny a waiver if the Administrator finds that California's protectiveness determination was arbitrary and capricious. However, a finding that California's determination was arbitrary and capricious must be based upon clear and convincing evidence that California's finding was unreasonable.[21]

CARB did make a protectiveness determination in adopting the California Phase 1 GHG Regulation, and found that the California Phase 1 GHG Regulation would not cause California motor vehicle emissions standards, in the aggregate, to be less protective of the public health and welfare than applicable federal standards.[22] CARB notes that its rulemaking action established California GHG emission standards for medium- and heavy-duty vehicles that are identical to the corresponding GHG emission standards for heavy-duty engines and vehicles in EPA's Phase 1 GHG regulation, and the regulation further contains ''deemed to comply'' provisions that allow manufacturers to demonstrate 2014 through 2022 model year medium- and heavy-duty engines and vehicles comply with California GHG emission standards by providing CARB the same emissions data and related information required to certify the engine or vehicle to EPA's Phase 1 GHG regulations' requirements.[23] In addition, CARB notes that minor differences remain between the EPA and CARB programs that provide further assurances that California's program is, in the aggregate, at least as protective as the federal program as applied to the categories of affected medium- and heavy-duty engines and vehicles.[24] EPA received no comments and EPA is not otherwise aware of evidence suggesting that CARB's protectiveness determination was unreasonable.

As it is clear that California's standards are at least as protective of public health and welfare as applicable federal standards, and that CARB's deemed to comply provision together with the unique aspects of the California Phase 1 GHG Regulation make California's standards even more protective, EPA finds that California's protectiveness determination is not arbitrary and capricious.

B. Whether the Standards Are Necessary To Meet Compelling and Extraordinary Conditions

Section 209(b)(1)(B) instructs that EPA cannot grant a waiver if the Agency finds that California ''does not need such State standards to meet compelling and extraordinary conditions.'' EPA's inquiry under this second criterion has traditionally been to determine whether California needs its own motor vehicle emission control program (*i.e.* set of standards) to meet compelling and extraordinary conditions, and not whether the specific standards (the California Phase 1 GHG Regulation) that are the subject of the waiver request are necessary to meet such conditions.[25] In recent waiver actions, EPA again examined the language of section 209(b)(1)(B) and reiterated this longstanding traditional interpretation as the appropriate approach for analyzing the need for ''such State standards'' to meet ''compelling and extraordinary conditions.''[26]

In conjunction with the California Phase 1 GHG Regulation, CARB determined in Resolution 13–50 that California continues to need its own motor vehicle program to meet serious

[20] *MEMA I,* 627 F.2d at 1110 (*citing* H.R. Rep. No. 294, 95th Cong., 1st Sess. 301–02 (1977)).

[21] *MEMA I,* 627 F.2d at 1122, 1124 (''Once California has come forward with a finding that the procedures it seeks to adopt will not undermine the protectiveness of its standards, parties opposing the waiver request must show that this finding is unreasonable.''); *see also* 78 FR 2112, at 2121 (Jan. 9, 2013).

[22] California Waiver Request Support Document at 30–31, and Attachment 11 (CARB Resolution 13–50, dated December 12, 2013, at EPA–HQ–OAR–2016–0179–0012). The CARB Board expressly declared in Resolution 13–50 that ''BE IT FURTHER RESOLVED that the Board hereby determines that the regulations adopted herein will not cause California motor vehicle emission standards, in the aggregate, to be less protective of the public health and welfare than applicable federal standards.

[23] *Id.* ''Phase 1 Certified Tractor'' means a tractor that has been certified in accordance with either the Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles, as adopted by the US EPA (76 FR 57106 (September 15, 2011)); or the Greenhouse Gas Emission Requirements for New 2014 and Subsequent Model Heavy-Duty Vehicles, as adopted by the California Air Resources Board, sections 95660 to 95664, Subarticle 12, title 17, California Code of Regulations 95302.

[24] *Id.* For example, CARB explains that California's Phase 1 GHG Regulation does not fully incorporate the federal definition of ''urban bus'' in order to preserve California's existing requirement that urban buses be powered by heavy heavy-duty diesel engines (HHD) for which an EPA waiver has already been granted (78 FR 44112 (July 23, 2013), and that the useful life period for HHD diesel engines exceeds the federal useful life period for light heavy-duty and medium heavy-duty diesel engines.

[25] *See* California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles,'' 74 FR 32744 (July 8, 2009), at 32761; *see also* ''California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption Notice of Decision,'' 49 FR 18887 (May 3, 1984), at 18889–18890.

[26] *See* 78 FR 2112, at 2125–26 (Jan. 9, 2013) (''EPA does not look at whether the specific standards at issue are needed to meet compelling and extraordinary conditions related to that air pollutant.''; *see also* EPA's July 9, 2009 GHG Waiver Decision wherein EPA rejected the suggested interpretation of section 209(b)(1)(B) as requiring a review of the specific need for California's new motor vehicle greenhouse gas emission standards as opposed to the traditional interpretation (need for the motor vehicle emission program as a whole) applied to local or regional air pollution problems. *See also* 79 FR 46256, 46261 (August 7, 2014).

ongoing air pollution problems.[27] CARB asserted that ''The geographical and climatic conditions and the tremendous growth in vehicle population and use that moved Congress to authorize California to establish vehicle standards in 1967 still exist today. EPA has long confirmed CARB's judgment, on behalf of the State of California, on this matter.'' [28] In enacting the California Global Warming Solutions Act of 2006, the Legislature found and declared that:

Global warming poses a serious threat to the economic well-being, public health, natural resources, and the environment of California. The potential adverse impacts of global warming include the exacerbation of air quality problems, a reduction in the quality and supply of water to the state from the Sierra snowpack, a rise in sea levels resulting in the displacement of thousands of coastal businesses and residences, damage to the marine ecosystems and the natural environment, and an increase in the incidences of infectious diseases, asthma, and other health-related problems.[29]

There has been no evidence submitted to indicate that California's compelling and extraordinary conditions do not continue to exist. California, particularly in the South Coast and San Joaquin Valley air basins, continues to experience some of the worst air quality in the nation, and many areas in California continue to be in non-attainment with national ambient air quality standards for fine particulate matter and ozone.[30] As California has previously stated, ''nothing in [California's unique geographic and climatic] conditions has changed to warrant a change in this determination.'' [31] EPA agrees that the fundamental conditions that cause California's serious air pollution problems continue to exist.[32] Therefore, EPA affirms California's need for its new motor vehicle emissions program as a whole, to meet compelling and extraordinary conditions. In addition, EPA notes the continued adverse impacts of California's changing climate (*e.g.* the increase in wildfires, increased threats to coastal developments and ecosystems, etc.).[33]

Based on the record before us, including EPA's prior waiver decisions, EPA is unable to identify any change in circumstances or evidence to suggest that the conditions that Congress identified as giving rise to serious air quality problems in California no longer exist. Therefore, EPA cannot find that California does not need its state standards, including greenhouse gas emission standards, to meet compelling and extraordinary conditions in California.

C. Consistency With Section 202(a)

For the third and final criterion, EPA evaluates the program for consistency with section 202(a) of the CAA. Under section 209(b)(1)(C) of the CAA, EPA must deny California's waiver request if EPA finds that California's standards and accompanying enforcement procedures are not consistent with section 202(a). Section 202(a) requires that regulations ''shall take effect after such period as the Administrator finds necessary to permit the development and application of the relevant technology, considering the cost of compliance within that time.''

EPA has previously stated that the determination is limited to whether those opposed to the waiver have met their burden of establishing that California's standards are technologically infeasible, or that California's test procedures impose requirements inconsistent with the federal test procedure. Infeasibility would be shown here by demonstrating that there is inadequate lead time to permit the development of technology necessary to meet the California Phase 1 GHG Regulation, giving appropriate consideration to the cost of compliance within that time.[34] California's accompanying enforcement procedures would also be inconsistent with section 202(a) if the federal and California test procedures conflicted, *i.e.,* if manufacturers would be unable to meet both the California and federal test requirements with the same test vehicle.[35]

Regarding test procedure conflict, CARB notes that it is not aware of any instances in which a manufacturer is precluded from conducting one set of tests on a heavy-duty engine or a heavy-duty vehicle to determine compliance with both California and federal GHG requirements. The regulation's ''deemed to comply'' provisions ensure that engine and vehicle manufacturers can use federal test results to demonstrate compliance with California's GHG emission standards through the 2022 model year. CARB also notes that no test procedure inconsistencies exist for those manufactures that elect not to utilize the deemed to comply provisions, or for 2023 and subsequent model year engines and vehicles because the California GHG emission standards and associated test procedures for new medium- and heavy-duty engines and new medium- and heavy-duty vehicles are identical to corresponding federal GHG emission standards and test procedures.[36] For the reasons set forth above, and because

[27] California Waiver Request Support Document, at 31, referencing Resolution 13–50, dated December 12, 2013 (*see* EPA–HQ–OAR–2016–0179–0012). Resolution 13–50 also states ''WHEREAS, heavy-duty trucks, buses, and motor homes emitted 23 percent of greenhouse gas (GHG) emissions from on-road vehicles and 8 percent of GHG emissions from all sources in California in 2010. Resolution 13–50 also states ''WHEREAS, in recognition of the devastating impacts of climate change emissions on California, Governor Schwarzenegger, in June 2005, enacted Executive Order S–3–05 which established the following GHG emission targets: By 2010, reduce GHG emissions to 2000 levels; by 2020, reduce GHG emissions to 1990 levels; and by 2050, reduce GHG emissions 80 percent below 1990 levels. In addition, the South Coast and San Joaquin Valley air basins continue to experience some of the worst air quality in the nation, and many areas in California continue to be in nonattainment for the national ambient air quality standards for particulate matter and ozone (81 FR 78149, 78153, November 7, 2016). To address this issue, for example, California's heavy-duty program also includes an optional low NO_X provision, and CARB states ''Because the proposed regulation for Optional Low NO_X emissions standards is optional, the emission benefits from that proposal will depend on the level of participation by engine manufacturers. Staff estimated NO_X emission benefits for two different scenarios based on low and high participation rates from manufacturers and estimated NO_X emission benefits of 0.6 to 1.2 tons per day (TPD) statewide in 2020, and 3.3 to 6.9 TPD in 2035.'' CARB Initial Statement of Reasons, December 12, 2013, EPA–HQ–OAR–2016–0179–0003.

[28] California Waiver Request Support Document, at 33 (referencing 70 FR 50322, 50323 (August 26, 2005); 74 FR 32744, 32762–763 (July 9, 2009); 79 FR 46256, 46262 (August 7, 2014).

[29] *Id.* at 33. The Global Warming Solutions Act also sets for the California Legislature's finding and declaration that ''Continuing to reduce greenhouse gas emissions is critical for the protection of all areas of the state, but especially for the state's most disadvantaged communities, as those communities are affected first, and, most frequently, by the adverse impacts of climate change, including an increased frequency of extreme weather events, such as drought, heat, and flooding. The state's most disadvantaged communities also are disproportionately impacted by the deleterious effects of climate change on public health.'' In addition, on April 29, 2015, California Governor Edmund Brown issued Executive Order B–30–15 which states in part ''WHEREAS climate change poses an ever-growing threat to the well-being, public health, natural resources, economy, and the environment of California, including loss of snowpack, drought, sea level rise, more frequent and intense wildfires, heat waves, more severe smog, and harm to natural and working lands, and these effects are already being felt in the state.''

[30] 74 FR 32744, 32762–63 (July 8, 2009).

[31] 74 FR 32744, 32762 (July 8, 2009); 76 FR 77515, 77518 (December 13, 2011).

[32] In addition to the variety of human health impacts associated with high air temperatures (*e.g.,* heat stroke and dehydration, and effects on people's cardiovascular, respiratory, and nervous systems), warming can also increase the formation of ground-level ozone, a component of smog that can contribute to respiratory problems. *See* ''What Climate Change Means for California,'' August 2016, EPA 430–F–16–007 at *https://www.epa.gov/sites/production/files/2016–09/documents/climate-change-ca.pdf.*

[33] *Id.*

[34] *See, e.g.,* 38 F.R 30136 (November 1, 1973) and 40 FR 30311 (July 18, 1975).

[35] *See, e.g.,* 43 FR 32182 (July 25, 1978).

[36] California Waiver Support Document at 44.

there is no evidence in the record or other information that EPA is aware of, EPA cannot find that CARB's Phase I GHG Regulation is inconsistent with section 202(a) based upon test procedure inconsistency.

In addition, EPA did not receive any comments arguing that the California Phase 1 GHG Regulation was technologically infeasible or that the cost of compliance would be excessive, such that California's standards might be inconsistent with section 202(a).[37] In EPA's review of CARB's Phase 1 GHG Regulation, we likewise cannot identify any requirements that appear technologically infeasible or excessively expensive for manufacturers to implement within the timeframes provided.[38] EPA therefore cannot find that the California Phase 1 GHG Regulation does not provide adequate lead time or is otherwise not technically feasible.

We therefore cannot find that the California Phase 1 GHG Regulation that we analyzed under the waiver criteria is inconsistent with section 202(a).

Having found that the California Phase 1 GHG Regulation satisfies each of the criteria for a waiver, and having received no evidence to contradict this finding, we cannot deny a waiver for the regulation.

IV. Decision

The Administrator has delegated the authority to grant California section 209(b) waivers to the Assistant Administrator for Air and Radiation. After evaluating CARB's California Phase 1 GHG Regulation and CARB's submissions for EPA review, EPA is hereby granting a waiver for the California Phase 1 GHG Regulation.

This decision will affect persons in California and those manufacturers and/or owners/operators nationwide who must comply with California's requirements. In addition, because other states may adopt California's standards for which a section 209(b) waiver has been granted under section 177 of the Act if certain criteria are met, this decision would also affect those states and those persons in such states. For these reasons, EPA determines and finds that this is a final action of national applicability, and also a final action of nationwide scope or effect for purposes of section 307(b)(1) of the Act. Pursuant to section 307(b)(1) of the Act, judicial review of this final action may be sought only in the United States Court of Appeals for the District of Columbia Circuit. Petitions for review must be filed by February 27, 2017. Judicial review of this final action may not be obtained in subsequent enforcement proceedings, pursuant to section 307(b)(2) of the Act.

V. Statutory and Executive Order Reviews

As with past waiver and authorization decisions, this action is not a rule as defined by Executive Order 12866. Therefore, it is exempt from review by the Office of Management and Budget as required for rules and regulations by Executive Order 12866.

In addition, this action is not a rule as defined in the Regulatory Flexibility Act, 5 U.S.C. 601(2). Therefore, EPA has not prepared a supporting regulatory flexibility analysis addressing the impact of this action on small business entities.

Further, the Congressional Review Act, 5 U.S.C. 801, *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, does not apply because this action is not a rule for purposes of 5 U.S.C. 804(3).

Dated: December 22, 2016.

Janet G. McCabe,

Acting Assistant Administrator, Office of Air and Radiation.

[FR Doc. 2016–31646 Filed 12–28–16; 8:45 am]

BILLING CODE 6560–50–P

[37] *See, e.g.,* 78 FR 2134 (Jan. 9, 2013), 47 FR 7306, 7309 (Feb. 18, 1982), 43 FR 25735 (Jun. 17, 1978), and 46 FR 26371, 26373 (May 12, 1981).

[38] California Waiver Support Document at 34–43. For example, both CARB and EPA identified a host of technologies suitable for compliance with medium- and heavy-duty diesel engine CO_2 standards, and for engines in combination tractors and vocational vehicles. In addition, CARB and EPA identified a variety of compliance strategy technologies for heavy-duty gasoline engine CO_2 standards. EPA and CARB also identified a number of commercially available technologies that will enable 2014 through 2018 MY heavy-duty pick-up truck and van (''PUV'') GHG emission standards.

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2016–0506; FRL–9957–04]

Agency Information Collection Activities; Proposed Renewal of an Existing Collection (EPA ICR No. 2472.02 and OMB Control No. 2070–0191); Comment Request

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA), this document announces that EPA is planning to submit an Information Collection Request (ICR) to the Office of Management and Budget (OMB). The ICR, entitled: ''Pesticide Spray Drift Reduction Technologies'' and identified by EPA ICR No. 2472.02 and OMB Control No. 2070–0191, represents the renewal of an existing ICR that is scheduled to expire on August 31, 2017. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection that is summarized in this document. The ICR and accompanying material are available in the docket for public review and comment.

DATES: Comments must be received on or before February 27, 2017.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2016–0506, by one of the following methods:

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

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

FOR FURTHER INFORMATION CONTACT: Ramé Cromwell, Field and External Affairs Division (7506P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number (703) 308–9068; email address: *cromwell.rame@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. What information is EPA particularly interested in?

Pursuant to PRA section 3506(c)(2)(A) (44 U.S.C. 3506(c)(2)(A)), EPA specifically solicits comments and information to enable it to:

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 estimates 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.

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. In particular, EPA is requesting comments from very small businesses (those that employ less than 25) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

II. What information collection activity or ICR does this action apply to?

Title: Pesticide Spray Drift Reduction Technologies.

ICR number: EPA ICR No. 2472.02.

OMB control number: OMB Control No. 2070–0191.

ICR status: This ICR is currently scheduled to expire on August 31, 2017. 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 in title 40 of the Code of Federal Regulations (CFR), after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers for certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: The Environmental Protection Agency (EPA or the Agency) is seeking approval for an ICR. EPA has initiated a voluntary information collection for studies to verify the effectiveness of application technologies for agricultural pesticide sprays that have the potential to significantly reduce pesticide spray drift. The focus of these studies is on technologies, such as spray nozzles, shrouds and shields, and nozzle/drift reducing adjuvant/pesticide formulation specific combinations, which are used for aerial or groundboom applications to row and field crops. Collectively these technologies are referred to as drift reduction technologies (DRTs). This voluntary program encourages the identification and use of DRTs that can substantially reduce drift of pesticide spray droplets from the target application site (*e.g.,* a corn field) downwind to non-target areas. Exposures and adverse effects to humans, wildlife, and crops and other vegetation from pesticide spray drift are well recognized. Published research suggests 1–10% or more of applied agricultural pesticide sprays drift from the target field. EPA has seen data supporting application technologies that will have the potential to significantly reduce the amount of spray drift. Studies conducted to measure spray drift reduction would verify the percent reduction achieved, and thus identify these technologies. EPA, with input from a variety of stakeholders, has developed a testing protocol appropriate to the needs of this voluntary program.

Burden statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 124 hours per response for a wind tunnel study and 495 hours per response for a field study. Burden is defined in 5 CFR 1320.3(b).

The ICR, which is available in the docket along with other related materials, provides a detailed explanation of the collection activities and the burden estimate that is only briefly summarized here:

Respondents/Affected Entities: Entities potentially affected by the voluntary collections activities under this ICR include pesticide application equipment manufacturers, chemical manufacturers, pesticide registrants (NAICS code 32532), research and development in the physical, engineering, life sciences (NAICS 541710), and college, universities, and professional schools (NAICS 611310).

Estimated total number of potential respondents: 12 companies.

Frequency of response: On occasion.

Estimated total average number of responses for each respondent: 1.

Estimated total annual burden hours: 1,361 hours.

Estimated total annual costs: $96,250.

There is no cost for capital investment or maintenance and operational costs.

III. Are there changes in the estimates from the last approval?

This represents an increase of 822 hours and $23,250 from the previous Pesticide Spray Drift Reduction Technologies ICR. The change in the burden and costs from the previous ICR are due to an additional field study expected to be submitted; updating cost information for wind tunnel studies; and changing the methodology to calculate the respondent's burden and costs, by using 35% of the total test cost as an estimate of total paperwork costs, then using the cost estimate to back-calculate the burden hour distribution for each labor category using fully loaded wage rates which were updated from the previous ICR. These changes are an adjustment.

IV. What is the next step in the process for this ICR?

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 pursuant to 5 CFR 1320.12. EPA will issue another **Federal Register** document pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Authority: 44 U.S.C. 3501 *et seq.*

Dated: December 22, 2016.

James Jones,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2016–31633 Filed 12–28–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9957–59–OW]

Notice of Open Meeting of the Environmental Financial Advisory Board (EFAB)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of open meeting.

SUMMARY: The EPA's Environmental Financial Advisory Board (EFAB) will hold a public meeting on February 21–22, 2017. EFAB is an EPA advisory committee chartered under the Federal Advisory Committee Act to provide advice and recommendations to EPA on creative approaches to funding environmental programs, projects, and activities.

The purpose of this meeting is to hear from informed speakers on environmental finance issues, proposed legislation, and EPA priorities. Additional discussion will focus on activities, progress, and preliminary recommendations with regard to current EFAB work projects and to consider request for assistance from EPA offices. Environmental finance discussions and presentations are expected on, but not limited to, the following topics: Public-private partnerships for water infrastructure projects, decentralized wastewater systems, materials conservation and recycling, and lead risk reduction. The meeting is open to

the public; however, seating is limited. All members of the public who wish to attend the meeting must register in advance, no later than Monday, February 6, 2017. Registration is required for all members of the public to ensure an expeditious security process.

DATES: The full board meeting will be held Tuesday, February 21, 2017 from 1:30 p.m.–5:00 p.m., and Wednesday, February 22, 2017 from 9:00 a.m.–5:00 p.m.

ADDRESSES: District Architecture Center, 421 7th Street NW., Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: For information on access or services for individuals with disabilities, or to request accommodations for a disability, please contact Sandra Williams at (202) 564–4999 or *williams.sandra@epa.gov,* at least 10 days prior to the meeting to allow as much time as possible to process your request.

Andrew D. Sawyers,

Director, Office of Wastewater Management, Office of Water.

[FR Doc. 2016–31448 Filed 12–28–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2009–0154; FRL–9955–08]

Final Test Guidelines; OCSPP Series 850 Group A—Ecological Effects Test Guidelines; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA is announcing the availability of final test guidelines, OCSPP Series 850 Group A—Ecological Effects, OCSPP Test Guidelines 850.1000, 850.1010, 850.1020, 850.1025, 850.1035, 850.1045, 850.1055, 850.1075, 850.1300, 850.1400, 850.1710, 850.1730, 850.1735, and 850.1740. These test guidelines are part of a series of test guidelines established by the Office of Chemical Safety and Pollution Prevention (OCSPP) for use in testing pesticides and chemical substances. The test guidelines serve as a compendium of accepted scientific methodologies and protocols that are intended to provide data to inform regulatory decisions. The test guidelines provide guidance for conducting the test, and are also used by EPA, the public, and companies that submit data to EPA.

FOR FURTHER INFORMATION CONTACT: Melissa Chun, Regulatory Coordination Staff Office of Chemical Safety and Pollution Prevention, (7101M), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (202) 564–1605; email address: *chun.melissa@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

EPA is announcing the availability of final test guidelines, OCSPP Series 850 Group A—Ecological Effects, OCSPP Test Guideline 850.1000, 850.1010, 850.1020, 850.1025, 850.1035, 850.1045, 850.1055, 850.1075, 850.1300, 850.1400, 850.1710, 850.1730, 850.1735, and 850.1740.

These test guidelines are part of a series of test guidelines established by OCSPP for use in testing pesticides and chemical substances to develop data for submission to the Agency under the Federal Food, Drug and Cosmetic Act (FFDCA) section 408 (21 U.S.C. 346a), the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) (7 U.S.C. 136 *et seq.*), and the Toxic Substances Control Act (TSCA) (15 U.S.C. 2601 *et seq.*). The test guidelines serve as a compendium of accepted scientific methodologies and protocols that are intended to provide data to inform regulatory decisions under TSCA, FIFRA, and/or FFDCA.

The test guidelines provide guidance for conducting the test, and are also used by EPA, the public, and companies that are subject to data submission requirements under TSCA, FIFRA, and/or FFDCA. As guidance documents, the test guidelines are not binding on either EPA or any outside parties, and EPA may depart from the test guidelines where circumstances warrant and without prior notice. At places in this guidance, the Agency uses the word ''should.'' In this guidance, use of ''should'' with regard to an action means that the action is recommended rather than mandatory. The procedures contained in the test guidelines are recommended for generating the data that are the subject of the test guideline, but EPA recognizes that departures may be appropriate in specific situations. You may propose alternatives to the recommendations described in the test guidelines, and the Agency will assess them for appropriateness on a case-by-case basis.

II. General Information

A. Does this action apply to me?

This action is directed to the public in general. Although this action may be of particular interest to those persons who are or may be required to conduct testing of pesticides and chemical substances for submission to EPA under TSCA, FIFRA, and/or FFDCA, the Agency has not attempted to describe all the specific entities that may be affected by this action.

B. How can I get copies of this document and other related information?

1. *Docket for this document.* The docket for this action, identified by docket identification (ID) number EPA–HQ–OPPT–2009–0154, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

2. *Electronic access to the OCSPP test guidelines.* To access OCSPP test guidelines electronically, please go to *http://www.epa.gov/test-guidelines-pesticides-and-toxics-substances.* You may also access the test guidelines in *http://www.regulations.gov,* grouped by series under docket ID numbers: EPA–HQ–OPPT–2009–0150 through EPA–HQ–OPPT–2009–0159 and EPA–HQ–OPPT–2009–0576.

III. Overview

A. What action is EPA taking?

EPA is announcing the availability of final test guidelines under Series 850, Group A—Ecological Effects, entitled ''Group A (850.1000 Series)—Aquatic and Sediment-Dwelling Fauna, Aquatic Microcosm and Field Testing'' and identified as OCSPP Test Guidelines 850.1000, 850.1010, 850.1020, 850.1025, 850.1035, 850.1045, 850.1055, 850.1075, 850.1300, 850.1400, 850.1710, 850.1730, 850.1735, and 850.1740. EPA's OCSPP has established a unified library of test guidelines for use in developing data for submission to EPA under the TSCA, FFDCA, and FIFRA. Beginning in 1991, EPA initiated an effort to harmonize the test guidelines within OCSPP, as well as to harmonize the OCSPP test guidelines with those of the Organization for Economic Cooperation and Development (OECD). The process for developing and amending these test guidelines has included public participation and the extensive

involvement of the scientific community, including peer review by the FIFRA Scientific Advisory Panel (SAP), the Science Advisory Board (SAB), and other expert scientific organizations. With this notice, EPA is announcing the availability of the final OCSPP Series 850 Group A—Ecological Effects Test Guidelines for use in testing chemical substances and developing data for submission to EPA. Guidelines in this series were made available for public comment by notice in the **Federal Register** (61 FR 8279, March 4, 1996), peer reviewed on May 29, 1996 by the SAP, and subsequently revised in response to SAP and public comments.

Based on comments from the SAP and from the public, the following changes were made in the final harmonized environmental effects test guidelines:

1. Guideline group series name change.

EPA is changing the name of the Group A Series ''Aquatic Fauna'' to ''Aquatic and Sediment-Dwelling Fauna, Aquatic Microcosm and Field Testing'' broadening the scope of this guideline series to all test guidelines evaluating effects to aquatic fauna contained in Group A.

2. Name change for the OCSPP 850 guidelines.

EPA is changing the name of the 850.1735 ''Whole Sediment Acute Toxicity Invertebrates, Freshwater'' guideline to ''Spiked Whole Sediment 10-Day Toxicity Test, Freshwater Invertebrates.'' Likewise, EPA is changing the name of the 850.1740 ''Whole Sediment Acute Toxicity Invertebrates, Marine'' guideline to ''Spiked Whole Sediment 10-Day Toxicity Test, Saltwater Invertebrates.'' The new names reflect the understanding that a 10-day exposure is not necessarily reflective of an acute exposure when considering the life-cycle duration of the organisms, as well as identify the nature of the treated test media. In addition, the use of ''saltwater'' instead of ''marine'' reflects newer terminology. The 850.1075 ''Fish Acute Toxicity Test, Freshwater and Marine'' has changed to ''Freshwater and Saltwater Fish Acute Toxicity Test'' to also reflect newer terminology. Additionally, the 850.1020 ''Gammarid Acute Toxicity Test'' has changed to ''Gammarid Amphipod Acute Toxicity Test'' to better identify the test organism.

3. Harmonization of guideline organization.

The SAP recommended that the ecological effects guidelines include the same organizational format and that the tables summarizing test conditions for appropriate guidelines contain consistent concepts across guidelines. As a result of these suggestions, information was moved within the guidelines, but the information remained the same. Tables summarizing test conditions and test validity elements were added to guidelines in which species specific or laboratory measurements were defined. In all guidelines where a calculated response measure (*e.g.,* reproductive output) was derived from direct response measures (*e.g.,* number of offspring), equations were provided.

4. Highlights of technical changes.

a. Addition of a limit test option.

Public comments indicated that a limit test could be an option to a definitive test in additional guidelines. A limit test provides an opportunity to reduce the number of animals to be tested and/or resources. Guidelines where a limit test is appropriate and a limit test option was added include the following: 850.1010 ''Aquatic Invertebrate Acute Toxicity Test, Freshwater Daphnids''; 850.1020 ''Gammarid Acute Toxicity Test''; 850.1025 ''Oyster Acute Toxicity Test (Shell Deposition)''; 850.1035 ''Mysid Acute Toxicity Test''; 850.1045 ''Penaeid Acute Toxicity Test''; 850.1055 ''Bivalve Acute Toxicity Test (Embyro-Larval)''; 850.1300 ''Daphnid Chronic Toxicity Test''; 850.1735 ''Whole Sediment Acute Toxicity Invertebrates, Freshwater''; 850.1740 ''Whole Sediment Acute Toxicity Invertebrates, Marine''.

b. Modification of limit dosage or concentration ''cut-off'' values. The limit dosage or concentration values for tests for pesticides were originally set at values seen in the literature as ''cut off'' values. It was believed that few, if any, pesticides would be applied at a label rate that would result in residues equal to or greater than these values. However, if there are cases where estimated environmental residue values are higher than limit values provided in the Public Drafts, or there are cases where actual or expected environmental exposure levels may be higher than the limit values for industrial chemicals, language was added. To address these case-by-case occurrences, language was added saying that the limit value should be adjusted upward if environmental exposure concentrations are expected to be higher than the limit value. In addition, the limit concentration for industrial chemicals was changed from ''1,000 milligrams/Liter (mg/L)'' to ''100 mg/L'' for acute toxicity tests and ''10 mg/L'' for chronic tests.

5. Public draft guidelines that were not finalized.

The draft 850.1790 ''Chironomid Sediment Toxicity Test'' and 850.1800 ''Tadpole/Sediment Subchronic Toxicity Test'' guidelines were not finalized as the 1996 FIFRA SAP report recommended dropping these guidelines for reasons such as another sediment guideline was available (*i.e.,* 850.1735).

The draft 850.1850 ''Aquatic Food Chain Transfer'', 850.1900 ''Generic Freshwater Microcosm Test, Laboratory'', 850.1925 ''Site-Specific Aquatic Microcosm Test, Laboratory'', and 850.1950 ''Field Testing for Aquatic Organisms'' guidelines were not finalized as these types of tests are generally considered higher-tiered tests that are designed to meet specific testing needs, which may vary from study to study.

The draft 850.1500 ''Fish Life Cycle Toxicity'' and 850.1350 ''Mysid Chronic Toxicity Test'' were also not finalized. The EPA acknowledges that a test guideline for the Endocrine Disruptor Screening Program (EDSP) was developed for fish (890.2200—Medaka Extended One Generation Reproduction Test (MEOGRT) (Ref. 1)). Additionally, a mysid 2-generation toxicity test was developed for the EDSP but was not finalized into a test guideline (Ref. 2). As such, the Agency intends to consider and potentially incorporate, as appropriate, test design features from both the EDSP MEOGRT and the mysid 2-generation toxicity test when updating and finalizing the existing draft 850.1500 fish life cycle and 850.1350 mysid chronic life cycle test guideline.

With regard to the 850.1085 ''Acute Fish Toxicity Mitigated by Humic Acid Test'', the EPA is re-evaluating how the outcomes of these types of tests represent natural processes in the environment, what chemicals are expected to be impacted by this type of process, and the extent to which these tests can be used to represent environments that vary in their level of total organic carbon.

B. How were the final test guidelines developed?

In 1996, draft guidelines were made available by notice in the **Federal Register** (61 FR 8279, March 4, 1996) for public comment through the EPA docket. These guidelines were also submitted by EPA for peer review by the FIFRA Scientific Advisory Panel (SAP) on May 29, 1996 (61 FR 19276, May 1, 1996). These final guidelines incorporate changes recommended by the SAP and other changes resulting from the public comment received in response to the March 4, 1996 draft guidelines. The majority of comments

and changes dealt with the organizational structure of the guideline group series, consistency of organization and format across the ecological effects guidelines, addition of tables summarizing test conditions, addition of tables summarizing test validity elements, consistency in use of terminology, and updating of references. The reporting section of each guideline now provides a list of study specific information to include in a study report based on study reporting requirements specified in 40 CFR 160.185 for FIFRA and 40 CFR 792.185 for TSCA.

IV. References

The following is a listing of the documents that are specifically referenced in this document. The docket includes these documents and other information considered by EPA, including documents that are referenced within the documents that are in the docket, even if the referenced document is not physically located in the docket. For assistance in locating these other documents, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

1. EPA. Endocrine Disruptor Screening Program Test Guidelines 890.2200: Medaka Extended One Generation Reproduction Test (MEOGRT), July 2015. EPA No. 740–C–15–002. 2015. Docket ID No. EPA–HQ–OPPT–2014–0766–0001.

2. EPA. Guidance: Endocrine Disruptor Screening Program Test Guidelines; Three Tier 2 Non-Mammalian Tests. 2015. Docket ID No. EPA–HQ–OPPT–2014–0766–0001.

Authority: 7 U.S.C. 136 *et seq.;* 15 U.S.C. 2601 *et seq.;* 21 U.S.C. 301 *et seq.*

Dated: November 30, 2016.

James Jones,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2016–31447 Filed 12–28–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9957–61–OW]

Environmental Financial Advisory Committee; Request for Nominations of Candidates to the Environmental Financial Advisory Board

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of request for nominations of candidates to the Environmental Financial Advisory Board.

SUMMARY: The United States Environmental Protection Agency (EPA) invites nominations of qualified candidates to be considered for appointments to fill vacancies on the Environmental Financial Advisory Board (the Board or EFAB). The Board seeks to maintain diverse representation across all workforce sectors and geographic locations.

Nominees should demonstrate experience in any of the following areas: Energy efficiency; regulators; commercial banking; local utility management and finance; resource conservation; brownfields; green infrastructure financing; sustainable community partnerships; water resiliency; water and wastewater utility financial management; public-public; public-private; and public-nonprofit partnerships. Nominees who live and work in the pacific-northwest, northeast, and mid-west parts of the United States are strongly encouraged to apply.

EPA values and welcomes diversity. In an effort to obtain a diverse pool of candidates, EPA encourages nominations of women and men of all racial and ethnic groups. In addition to this notice, other sources may be utilized in the solicitation of nominees. The deadline for receiving nominations is Friday, February 10, 2017. Appointments will be made by the Administrator of the Environmental Protection Agency and will be announced in May 2017. Nominee qualifications will be assessed under the mandates of the Federal Advisory Committee Act, which requires Committees to maintain diversity across a broad range of constituencies, sectors, and groups.

DATES: Nominations should be submitted in time to arrive no later than February 10, 2017.

ADDRESSES: EPA, Office of Water, 1301 Constitution Avenue NW., (4201T), Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: Submit nomination materials by postal mail or electronic mail to: Alecia F. Crichlow, Membership Coordinator, Environmental Financial Advisory Board, or email *crichlow.alecia@epa.gov.*

SUPPLEMENTARY INFORMATION: The Environmental Financial Advisory Board was chartered in 1989 under the Federal Advisory Committee Act to provide advice and recommendations to EPA on the following issues: Reducing the cost of financing environmental facilities and discouraging polluting behavior; creating incentives to increase private investment in the provision of environmental services and removing or reducing constraints on private involvement imposed by current regulations; developing new and innovative environmental financing approaches and supporting and encouraging the use of cost-effective existing approaches; identifying approaches specifically targeted to small/disadvantaged community financing; increasing the capacity of state and local governments to carry out their respective environmental programs under current Federal tax laws; analyzing how new technologies can be brought to market expeditiously; and, increasing the total investment in environmental protection of public and private environmental resources to help ease the environmental financing challenge facing our nation.

The Board meets two times each calendar year (two days per meeting) at different locations within the continental United States. Board members typically contribute approximately 1–3 hours per month to the Board's work. The Board's membership services are voluntary and the Agency is unable to provide honoraria or compensation, according to FACA guidelines. However, Board members may receive travel and per diem allowances, where appropriate, and in accordance with Federal Travel Regulations for invitational travelers.

Evaluation Criteria: The following criteria will be used to evaluate nominees: residence in the continental United States; professional knowledge of, and experience with, environmental financing activities; senior level-experience that fills a gap in Board representation, or brings a new and relevant dimension to its deliberations; demonstrate ability to work in a consensus-building process with a wide range of representatives from diverse constituencies; and willingness to serve a two-year term as an active and contributing member, with possible re-appointment to a second term.

Nominations for membership must include a resume describing the professional and educational qualifications of the nominee, as well as expertise/experience. Contact details should include full name and title, business mailing address, telephone, fax, and email address. A supporting letter of endorsement is encouraged, but not required.

Dated: December 20, 2016.

Andrew Sawyer,

Director, Office of Wastewater Management, Office of Water.

[FR Doc. 2016–31449 Filed 12–28–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2013–0677; FRL–9956–88]

Receipt of Information Under the Toxic Substances Control Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA is announcing its receipt of information submitted pursuant to a rule, order, or consent agreement issued under the Toxic Substances Control Act (TSCA). As required by TSCA, this document identifies each chemical substance and/or mixture for which information has been received; the uses or intended uses of such chemical substance and/or mixture; and describes the nature of the information received. Each chemical substance and/or mixture related to this announcement is identified in Unit I. under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: *For technical information contact:* John Schaeffer, Chemical Control Division (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (202) 564–8173; email address: *schaeffer.john@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. Chemical Substances and/or Mixtures

Information received about the following chemical substance and/or mixture is identified in Unit IV.: *2-Oxiranemethanamine, N-[4-(2-oxiranylmethoxy)phenyl]-N-(2-oxiranylmethyl)-*(*CASRN 5026–74–4*).

II. Authority

Section 4(d) of TSCA (15 U.S.C. 2603(d)) requires EPA to publish a notice in the **Federal Register** reporting the receipt of information submitted pursuant to a rule, order, or consent agreement promulgated under TSCA section 4 (15 U.S.C. 2603).

III. Docket Information

A docket, identified by the docket identification (ID) number EPA–HQ–OPPT–2013–0677, has been established for this **Federal Register** document, which announces the receipt of the information. Upon EPA's completion of its quality assurance review, the information received will be added to the docket identified in Unit IV., which represents the docket used for the TSCA section 4 rule, order, and/or consent agreement. In addition, once completed, EPA reviews of the information received will be added to the same docket. Use the docket ID number provided in Unit IV. to access the information received and any available EPA review.

EPA's dockets are available electronically at *http://www.regulations.gov* or in person at the Office of Pollution Prevention and Toxics Docket (OPPT Docket), Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton 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.*

IV. Information Received

As specified by TSCA section 4(d), this unit identifies the information received by EPA: *2-Oxiranemethanamine, N-[4-(2-oxiranylmethoxy)phenyl]-N-(2-oxiranylmethyl)-*(*CASRN 5026–74–4*).

1. *Chemical Use: 2-Oxiranemethanamine, N-[4-(2-oxiranylmethoxy)phenyl]-N-(2-oxiranylmethyl)-* is used in resin and synthetic rubber manufacturing and aerospace and parts manufacturing.

2. *Applicable Rule, Order, or Consent Agreement:* Chemical testing requirements for third group of high production volume chemicals (HPV3), 40 CFR 799.5089.

3. *Applicable docket ID number:* The information received will be added to docket ID number EPA–HQ–OPPT–2009–0112.

4. *Information Received:* EPA received the following information:

- Equivalence Data: Oral (Gavage) Pre-Natal Developmental Toxicity Study in the Rat.

Authority: 15 U.S.C. 2601 *et seq.*

Dated: December 19, 2016.

Maria J. Doa,

Director, Chemical Control Division, Office of Pollution Prevention and Toxics.

[FR Doc. 2016–31445 Filed 12–28–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[Petition IV–2015–2; FRL–9957–62-Region 4]

Clean Air Act Operating Permit Program; Petition for Objection to State Operating Permit for Piedmont Green Power (Lamar County, Georgia)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of final order on petition to object to state operating permit.

SUMMARY: The EPA Administrator signed an Order, dated December 13, 2016, granting in part and denying in part the petition to object to Clean Air Act (CAA) title V operating permit issued by the Georgia Environmental Protection Division (Georgia EPD) to the Piedmont Green Power (PGP) facility located in Barnesville, Lamar County, Georgia. This Order constitutes a final action on the petition submitted by the Partnership for Policy Integrity (Petitioner) and received by EPA on May 26, 2015.

ADDRESSES: Copies of the Order, the petition, and all pertinent information relating thereto are on file at the following location: EPA Region 4; Air, Pesticides and Toxics Management Division; 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. The Order is also available electronically at the following address: *https://www.epa.gov/title-v-operating-permits/2016-order-responding-2015-petition-object-piedmont-green-power-operating.*

FOR FURTHER INFORMATION CONTACT: Art Hofmeister, Air Permits Section, EPA Region 4, at (404) 562–9115 or *hofmeister.art@epa.gov.*

SUPPLEMENTARY INFORMATION: The CAA affords EPA a 45-day period to review and, as appropriate, the authority to object to operating permits proposed by state permitting authorities under title V of the CAA, 42 U.S.C. 7661–7661f. Section 505(b)(2) of the CAA and 40 CFR 70.8(d) authorize any person to petition the EPA Administrator to object to a title V operating permit within 60 days after the expiration of EPA's 45-day review period if EPA has not objected on its own initiative. Petitions must be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the state, unless the petitioner demonstrates that it was impracticable to raise these issues during the comment period or the grounds for the issues arose after this period. Pursuant to sections 307(b) and 505(b)(2) of the CAA, a petition for judicial review of those parts of the

Order that deny issues in the petition may be filed in the United States Court of Appeals for the appropriate circuit within 60 days from the date this notice is published in the **Federal Register**.

Petitioner submitted a petition regarding the aforementioned PGP facility, requesting that EPA object to the CAA title V operating permit (#4911–171–0014–V–02–0). Petitioner alleged that the permit was not consistent with the CAA because: (1) It lacks adequate fuel testing to assure compliance with the burning of only ''clean cellulosic biomass''; (2) it includes synthetic minor limits for hazardous air pollutants that are unenforceable; (3) it includes synthetic minor limits for oxides of nitrogen and carbon monoxide that are unenforceable; (4) it includes other specific conditions that are unenforceable; (5) it failed to include best available control technology requirements related to greenhouse gas emissions; and (6) the potential to emit calculation for the facility impermissibly excluded emissions during startup, shutdown, and malfunction.

On December 16, 2016, the Administrator issued an Order granting in part and denying in part the petition. The Order explains EPA's rationale for granting in part and denying in part the petition.

Dated: December 16, 2016.

Heather McTeer Toney,

Regional Administrator, Region 4.

[FR Doc. 2016–31639 Filed 12–28–16; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1163]

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before February 27, 2017. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1163.

Title: Regulations Applicable to Broadcast, Common Carrier, and Aeronautical Radio Licensees Under Section 310(b) of the Communications Act of 1934, as amended.

Form Number: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 81 respondents; 81 responses.

Estimated Time per Response: 2 hours–46 hours.

Frequency of Response: On-occasion reporting requirement.

Obligation To Respond: Required to obtain or retain benefits. The statutory authority for this collection is contained in 47 U.S.C. 151, 152, 154(i), 154(j), 160, 303(r), 309, 310 and 403.

Total Annual Burden: 1,830 hours.

Total Annual Cost: $524,400.

Nature and Extent of Confidentiality: In submitting the information request, respondents may need to disclose confidential information to satisfy the requirements. However, covered entities would be free to request that such materials submitted to the Commission be withheld from public inspection (see 47 CFR 0.459 of the Commission's rules).

Privacy Impact Assessment: No impacts(s).

Needs and Uses: The Commission will submit this information collection to OMB after this 60-day comment period as a revision to obtain the full three-year clearance from OMB.

On September 29, 2016, the Commission adopted final rules in *Review of Foreign Ownership Policies for Broadcast, Common Carrier and Aeronautical Radio Licensees under Section 310(b)(4) of the Communications Act of 1934, as Amended,* Report and Order, 31 FCC Rcd 11272 (2016) (2016 Foreign Ownership Report and Order). In the 2016 Foreign Ownership Order, the Commission:

- Modified its foreign ownership filing and review process for broadcast licensees by extending to such licensees the streamlined rules and procedures developed for foreign ownership reviews of common carrier and certain aeronautical licensees (collectively, ''common carrier'' licensees) under Section 310(b)(4) of the Communications Act of 1934, as amended (the Act) with certain modifications to tailor them to the broadcast context; and
- Reformed the methodology used by both common carrier and broadcast licensees that are, or are controlled by, U.S. publicly traded companies to assess their compliance with the foreign ownership limits in Sections 310(b)(3) and 310(b)(4) of the Act, respectively.

The Commission therefore requests approval of substantial changes to the above-referenced information collection in order to apply to broadcast licensees substantially the same foreign ownership rules and procedures that apply to common carrier licensees and spectrum lessees and certain aeronautical licensees (collectively, ''common carrier'' licensees) under this information collection and the rules adopted in *Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees under Section 310(b)(4) of the Communications Act of 1934, as Amended,* IB Docket No. 11–133, Second Report and Order, 28 FCC Rcd 5741(2013).

The 2016 Foreign Ownership Report and Order incorporated broadcasters into the common carrier foreign ownership rules (previously codified in

Part 1, Subpart F, Sections 1.990 through 1.994 of the Commission's rules) through various changes. Notably, the Commission added new text to certain paragraphs of the rules (see *e.g.* Note to paragraph (i)(1) of Section 1.5001(i)), and by adding new paragraphs where needed. In this regard, we have added new paragraph (e) to Section 1.5000, which sets forth the new methodology for eligible public companies—both broadcast and common carrier—and new paragraphs (f)(2)–(3) of Section 1.5004, which sets forth new compliance provisions for such companies.

The rules adopted in the 2016 Foreign Ownership Report and Order include the following broadcast-specific provisions in lieu of provisions applicable to common carrier licensees:

• Broadcast licensees filing a petition for declaratory ruling (petition) to request Commission approval of foreign ownership in excess of the 25 percent benchmark in Section 310(b)(4) will use the broadcast ''attribution'' criteria to determine those U.S. and foreign ownership interests that must be disclosed in the petition. The disclosure will ensure the Commission has sufficient information to understand the licensee's ownership structure and to verify the identity and ultimate control of the foreign investor for which the petitioner seeks specific approval.

• Broadcast licensees will use the broadcast ''insulation criteria'' set forth in the broadcast attribution rules in determining whether the broadcaster must include in its petition a request for ''specific approval'' of a particular foreign investor because the investor holds, or would hold, directly and/or indirectly, more than 5 percent (or, in the case of certain passive investors, more than 10 percent) of the total outstanding capital stock (equity) and/or voting stock (or a controlling share) of the licensee's controlling U.S.-organized parent company. The current insulation criteria for common carrier licensees will continue to apply.

The Commission does not anticipate that these broadcast-specific provisions will impact the time per response for broadcast companies filing a Section 310(b)(4) petition. Thus, we estimate the same time per response for broadcast as for common carrier petitions. The Commission also finds that adopting a standardized filing and review process for broadcast licensees' requests to exceed the 25 percent foreign ownership benchmark in Section 310(b)(4), as the Commission has done for common carrier licensees, will provide the broadcast sector with greater transparency, more predictability, and reduce regulatory burdens and costs.

In addition to these tailored changes to incorporate broadcast licensees into the existing foreign ownership rules applicable to common carrier licensees under Section 310(b)(4), the 2016 Foreign Ownership Report and Order clarifies the Commission's foreign ownership compliance procedures (to be codified in Section 1.5004(f)(3)–(4)) specifically to allow a broadcast or common carrier licensee to file a petition for declaratory ruling to remedy the licensee's inadvertent non-compliance with the statutory foreign ownership limits or the terms and conditions of the licensee's existing foreign ownership ruling with reasonable assurance that the Commission will not take enforcement action.

The Commission is also making non-substantial changes to this information collection to renumber the foreign ownership rules, which currently are codified in Part 1, Subpart F, Sections 1.990 through 1.994 of the Commission's rules. The new rules, as adopted in the 2016 Foreign Ownership Report and Order, will be codified in Part 1, Subpart T, Section 1.5000 through 1.5004 of the Commission's rules. There is for the most part a one-to-one correlation between the existing rules (1.990–1.994) and the new rules (1.5000–1.5004).

Federal Communications Commission.

Katura Jackson,

Federal Register Liaison Officer, Office of the Secretary.

[FR Doc. 2016–31420 Filed 12–28–16; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on the agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within twelve days of the date this notice appears in the **Federal Register**. Copies of the agreements are available through the Commission's Web site (*www.fmc.gov*) or by contacting the Office of Agreements at (202)–523–5793 or *tradeanalysis@fmc.gov.*

Agreement No.: 011223–056.

Title: Transpacific Stabilization Agreement.

Parties: American President Lines, Ltd. and APL Co. PTE Ltd.; (operating as a single carrier); CMA CGM S.A.; COSCO Container Lines Company Ltd; Evergreen Line Joint Service Agreement; Hapag-Lloyd AG; Hyundai Merchant Marine Co., Ltd.; Maersk Line A/S; Mediterranean Shipping Company; Orient Overseas Container Line Limited; and Yang Ming Marine Transport Corp.

Filing Party: David F. Smith, Esq.; Cozen O'Conner; 1200 Nineteenth Street, NW; Washington, DC 20036.

Synopsis: This amendment revises Appendix A of the TSA Agreement to remove Zim Integrated Shipping Services, Ltd., as a party to the Agreement.

Agreement No.: 201143–014.

Title: West Coast MTO Agreement.

Parties: APM Terminals Pacific, Ltd.; California United Terminals, Inc.; Eagle Marine Services, Ltd.; Everport Terminal Services, Inc; International Transportation Service, Inc.; LBCT LLC d/b/a Long Beach Container Terminal LLC; Trapac, Inc.; Total Terminals LLC; West Basin Container Terminal LLC; Yusen Terminals, Inc.; Pacific Maritime Services, L.L.C.; SSA Terminals, LLC; and SSA Terminal (Long Beach), LLC.

Filing Party: Wayne R. Rohde, Esq.; Cozen O'Connor; 1200 19th Street, NW; Washington, DC 20036.

Synopsis: The amendment reflects a change in the corporate name of the entity formerly known as Long Beach Container Terminal, Inc. and revises Appendix A to clarify the corporate affiliations of International Transportation Service, Inc. and Total Terminals LLC.

Agreement No.: 201179–003.

Title: Lease and Operating Agreement between PRPA and Northeast Energy Terminal, LLC.

Parties: The Philadelphia Regional Port Authority (PRPA) and Northeast Energy Terminal, LLC.

Filing Party: Denise M. Brumbaugh; Philadelphia Regional Port Authority; 3460 N. Delaware Avenue; Philadelphia, PA 19134.

Synopsis: The amendment assigns the lease to Northeast Energy Terminal, LLC and updates the terms of the lease.

By Order of the Federal Maritime Commission.

Dated: December 23, 2016.

Rachel E. Dickon,

Assistant Secretary.

[FR Doc. 2016–31615 Filed 12–28–16; 8:45 am]

BILLING CODE 6731–01–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 January 23, 2017.

A. Federal Reserve Bank of Richmond (Adam M. Drimer, Assistant Vice President) 701 East Byrd Street, Richmond, Virginia 23261–4528. Comments can also be sent electronically to *Comments.applications@rich.frb.org:*

1. *Access National Corporation,* Reston, Virginia; to acquire all of the voting securities of Middleburg Financial Corporation, and thereby indirectly acquire Middleburg Bank, both in Middleburg, Virginia.

In connection with this application, Applicant has also applied to acquire Middleburg Trust Company, Richmond, Virginia, and Middleburg Investment Group, Inc., Middleburg, Virginia, and thereby engage in trust, funds management, and investment advisory activities pursuant to sections 225.28(b)(5), (b)(6)(i) and (b)(7)(i), respectively.

Board of Governors of the Federal Reserve System, December 23, 2016.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2016–31580 Filed 12–28–16; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Proposed Collection; Comment Request

AGENCY: Federal Trade Commission (FTC or Commission).

ACTION: Notice.

SUMMARY: The information collection requirements described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act (PRA). The FTC seeks public comments on its proposal to extend, for three years, the current PRA clearance for information collection requirements contained in its Rule Governing Pre-sale Availability of Written Warranty Terms. That clearance expires on March 31, 2017.

DATES: Comments must be received on or before February 27, 2017.

ADDRESSES: Interested parties may file a comment online or on paper by following the instructions in the Request for Comments part of the **SUPPLEMENTARY INFORMATION** section below. Write ''Warranty Rules: Paperwork Comment, FTC File No. P044403'' on your comment, and file your comment online at *https://ftcpublic.commentworks.com/ftc/presaleavailabilityrulepra* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW., Suite CC–5610 (Annex J), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW., 5th Floor, Suite 5610 (Annex J), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Requests for copies of the collection of information and supporting documentation should be addressed to Christine M. Todaro, Attorney, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW., CC–8528, Washington, DC 20580, (202) 326–3711.

SUPPLEMENTARY INFORMATION:

Proposed Information Collection Activities

Under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501–3520, federal agencies must get OMB approval for each collection of information they conduct, sponsor, or require. ''Collection of information'' means agency requests or requirements to submit reports, keep records, or provide information to a third party. 44 U.S.C. 3502(3); 5 CFR 1320.3(c). As required by section 3506(c)(2)(A) of the PRA, the FTC is providing this opportunity for public comment before requesting that OMB extend the existing PRA clearance for the information collection requirements associated with the Commission's Rule Governing Pre-sale Availability of Written Warranty Terms, (the Pre-sale Availability Rule), 16 CFR part 702 (OMB Control Number 3084–0112).

The FTC invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond. All comments must be received on or before February 27, 2017.

The Pre-sale Availability Rule, 16 CFR 702, is one of three rules [1] that the FTC issued as required by the Magnuson Moss Warranty Act, 15 U.S.C. 2301 *et seq.* (Warranty Act or Act).[2] The Pre-sale Availability Rule requires sellers and warrantors to make the text of any written warranty on a consumer product costing more than $15 available to the consumer before sale. Among other things, the Rule requires sellers to make the text of the warranty readily available either by (1) displaying it in close proximity to the product or (2) furnishing it on request and posting signs in prominent locations advising consumers that the warranty is available. The Rule requires warrantors to provide materials to enable sellers to comply with the Rule's requirements and also sets out the methods by which

[1] The other two rules relate to the information that must appear in a written warranty on a consumer product costing more than $15 if a warranty is offered and minimum standards for informal dispute settlement mechanisms that are incorporated into a written warranty.

[2] 40 FR 60168 (Dec. 31, 1975).

warranty information can be made available before the sale if the product is sold through catalogs, mail order, or door to door sales. In addition, in 2016, the FTC revised the Rule to allow warrantors to post warranty terms on Internet Web sites if they also provide a non-Internet based method for consumers to obtain the warranty terms and satisfy certain other conditions. The revised Rule also allows certain sellers to display warranty terms pre-sale in an electronic format if the warrantor has used the online method of disseminating warranty terms.

Pre-Sale Availability Rule Burden Statement

Total annual hours burden: 2,823,803 hours.

In its 2013 submission to OMB, FTC staff estimated that the information collection burden of making the disclosures required by the Pre-sale Availability Rule was approximately 2,446,610 hours per year. Staff has adjusted upward its previous estimate of the number of manufacturers subject to the Rule based on recent Census data. From that, staff now estimates that there are approximately 1,028 large manufacturers and 30,299 small manufacturers subject to the Rule. In addition, recent Census data suggests that there are an estimated 7,745 large retailers and 508,575 small retailers impacted by the Rule.

In September 2016, the FTC approved amendments to the Pre-sale Availability Rule, which became effective on October 12, 2016. Under the amendments, warrantors may display warranty terms online and provide information to consumers to obtain those terms via non-Internet means. The amendments also allow sellers to provide pre-sale warranty terms electronically or conventionally if the warrantor has chosen to display its warranty terms online. 81 FR 63664 (Sept. 15, 2016). Sellers of warranted goods for which the warrantor has chosen the online method may incur a slightly increased burden because the seller will have to ensure it provides consumers a method of reviewing the warranty terms at the point of sale, prior to sale. That burden, however, should be minimal, given that the warrantor will have to make the warranty terms available on an Internet Web site, and given the provision requiring the warrantor to supply a hard copy of the warranty terms, promptly and free of charge, in response to a seller's or a consumer's request. In addition, any burden on sellers could be offset by sellers having additional flexibility to make pre-sale warranty terms available to consumers electronically.

Therefore, staff continues to estimate that large retailers spend an average of 20.8 hours per year and small retailers spend an average 4.8 hours per year to comply with the Rule. Accordingly, the total annual burden for retailers is approximately 2,602,256 hours ((7,745 large retailers × 20.8 burden hours) + (508,575 small retailers × 4.8 burden hours)). Staff also estimates that more manufacturers will provide retailers with warranty information in electronic form in fulfilling their obligations under the Rule and thus staff has adjusted the hour burden for manufacturers as it did in its previous submission to OMB. Applying a 20% reduction to its previous estimates, staff now assumes that large manufacturers spend an average of 26.88 hours per year and that small manufacturers spend an average of 6.4 hours per year to comply with the Rule. Accordingly, the total annual burden incurred by manufacturers is approximately 221,547 hours ((1,028 large manufacturers × 26.88 hours) + (30,299 small manufacturers × 6.4 hours)).

Thus, the total annual burden for all covered entities is approximately 2,823,803 hours (2,602,256 hours for retailers + 221,547 hours for manufacturers).

Total annual labor cost: $62,123,688.

The work required to comply with the Pre-sale Availability Rule entails a mix of clerical work and work performed by sales associates. Staff estimates that half of the total burden hours would likely be performed by sales associates. At the manufacturing level, this work would entail ensuring that the written warranty is available for every warranted consumer product. At the retail level, this work would entail ensuring that the written warranty is made available to the consumer prior to sale. The remaining half of the work required to comply with the Pre-sale Availability Rule is clerical in nature, *e.g.,* shipping or otherwise providing copies of manufacturer warranties to retailers and retailer maintenance of them. Applying a sales associate wage rate of $24/hour to half of the burden hours and a clerical wage rate of $20/hour to half of the burden hours, the total annual labor cost burden is approximately $62,123,688 (1,411,902 hours × $24 per hour) + (1,411,902 hours × $20 per hour).[3]

Total annual capital or other non-labor costs: De minimis.

[3] The wage rates are derived from occupational data found in the Bureau of Labor Statistics, Occupational Employment and Wages (May 2015).

The vast majority of retailers and warrantors already have developed systems to provide the information the Rule requires. Compliance by retailers typically entails keeping warranties on file, in binders or otherwise, and posting an inexpensive sign indicating warranty availability. Warrantor compliance under the 2016 amendments entails providing retailers, together with the warranted good, a copy of the warranty or the address of the warrantor's Internet Web site where the consumer can review and obtain the warranty terms, along with the contact information where the consumer may use a non-Internet based method to obtain a free copy of the warranty terms. Commission staff believes that, in light of the amendments, annual capital or other non-labor costs will remain *de minimis.*

Request for Comments

You can file a comment online or on paper. Write ''Pre-sale Availability Rule: Paperwork Comment, FTC File No. P044403'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at *http://www.ftc.gov/os/publiccomments.shtm.* As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Web site.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, like anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any ''[t]rade secret or any commercial or financial information which is . . . privileged or confidential,'' as discussed in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

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

request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c). Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest. Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, the Commission encourages you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/presaleavailabilitypra,* by following the instructions on the Web-based form. If this Notice appears at *http://www.regulations.gov,* you also may file a comment through that Web site.

If you file your comment on paper, write ''Pre-sale Availability Rule: Paperwork Comment, FTC File No. P044403'' on your comment and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex J), 600 Pennsylvania Avenue NW., Washington, DC 20580. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Web site at *http://www.ftc.gov* to read this Notice. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before February 27, 2017. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm.*

David C. Shonka,

Acting General Counsel.

[FR Doc. 2016–31401 Filed 12–28–16; 8:45 am]

BILLING CODE 6750–01–P

OFFICE OF GOVERNMENT ETHICS

Agency Information Collection Activities; Submission for OMB Review; Proposed Collection; Comment Request for a Modified OGE Form 201 Ethics in Government Act Access Form

AGENCY: Office of Government Ethics (OGE).

ACTION: Notice of request for agency and public comments.

SUMMARY: After publication of this second round notice, OGE intends to submit a modified OGE Form 201 Ethics in Government Act access form to the Office of Management and Budget (OMB) for review and approval of a three-year extension under the Paperwork Reduction Act of 1995. The OGE Form 201 is used by persons requesting access to executive branch public financial disclosure reports and other covered records.

DATES: Written comments by the public and the agencies on this proposed extension are invited and must be received on or before January 30, 2017.

ADDRESSES: You may submit comments on this paperwork notice to the Office of Management and Budget, Attn: Desk Officer for OGE, via fax at 202–395–6974 or email at *OIRA_Submission@omb.eop.gov.* (Include reference to ''OGE Form 201 paperwork comment'' in the subject line of the message.)

FOR FURTHER INFORMATION CONTACT: Brandon Steele at the U.S. Office of Government Ethics; telephone: 202–482–9209; TTY: 800–877–8339; FAX: 202–482–9237; Email: *basteele@oge.gov.* An electronic copy of the OGE Form 201 version used to manually submit access requests to OGE or other executive branch agencies by mail or FAX is available in the Forms Library section of OGE's Web site at *http://www.oge.gov.* A paper copy may also be obtained, without charge, by contacting Mr. Steele. An automated version of the OGE Form 201, also available on OGE's Web site, enables the requester to electronically fill out, submit, and receive access to financial reports and certain related records for individuals who have been nominated by the President to executive branch positions requiring Senate confirmation and individuals who have declared their candidacy for the Office of the President of the United States.

SUPPLEMENTARY INFORMATION:

Title: Request to Inspect or Receive Copies of Executive Branch Personnel Public Financial Disclosure Reports or Other Covered Records.

Agency Form Number: OGE Form 201.

OMB Control Number: 3209–0002.

Type of Information Collection: Extension with modifications of a currently approved collection.

Type of Review Request: Regular.

Respondents: Individuals requesting access to executive branch public financial disclosure reports and other covered records.

Estimated Annual Number of Respondents: 1,003.

Estimated Time per Response: 10 minutes.

Estimated Total Annual Burden: 170 hours.

Abstract: The OGE Form 201 collects information from, and provides certain information to, persons who seek access to OGE Form 278 Public Financial Disclosure Reports, including OGE Form 278–T Periodic Transaction Reports, and other covered records. The form reflects the requirements of the Ethics in Government Act, subsequent amendments pursuant to the STOCK Act, and OGE's implementing regulations that must be met by a person before access can be granted. These requirements include the address of the requester, as well as any other person on whose behalf a record is sought, and acknowledgement that the requester is aware of the prohibited uses of executive branch public disclosure financial reports. See 5 U.S.C. app. 105(b) and (c) and 402 (b)(1) and 5 CFR 2634.603(c) and (f). Executive branch departments and agencies are encouraged to utilize the OGE Form 201 for individuals seeking access to public financial disclosure reports and other covered documents. OGE permits departments and agencies to use or develop their own forms as long as the forms collect and provide all of the required information.

OGE is proposing modifications to the automated version of the OGE Form 201, available only through the OGE Web site at *www.oge.gov.* Initially launched in March 2012, the automated version of the access form originally enabled a requestor to obtain immediately upon Web site submission of the completed form, those financial disclosure reports of individuals who have been nominated by the President to executive branch positions requiring Senate confirmation. OGE recently modified the technological process used to provide the information and no longer allows requesters to immediately download reports upon submission of the automated OGE Form 201. Instead, the forms are first reviewed by an OGE employee for completeness before the information is sent to the requester either by email or mail, according to the requester's preference. Adding this step helps ensure that the requirements of section 105(b) of the Ethics in Government Act are met before public financial disclosure reports are released. Because of this change in procedure, a requester using the automated OGE Form 201 now has the option of either providing a mailing address including street, city, state, and country information (as was previously required) or providing an email address plus city, state, and country information. Depending on which

information the requester chooses to provide, the requested public financial disclosure reports will be either emailed or mailed to the requester. This change will not affect the estimated time of response to complete the form.

OGE also intends to update the maximum civil monetary penalty for improperly obtaining or using a public financial disclosure report on both the automated and nonautomated versions of the form, in accordance with 5 CFR 2634.703.

OGE published a first round notice of its intent to request paperwork clearance for a modified OGE Form 201. See 81 FR 70112 (October 11, 2016). OGE received no responses to that notice.

Request for Comments: Agency and public comment is again invited specifically on the need for and practical utility of this information collection, the accuracy of OGE's burden estimate, the enhancement of quality, utility, and clarity of the information collected, and the minimization of burden (including the use of information technology). Comments received in response to this notice will be summarized for, and may be included with, the OGE request for extension of OMB paperwork approval. The comments will also become a matter of public record.

Approved: December 22, 2016.

Walter M. Shaub, Jr.,

Director, Office of Government Ethics.

[FR Doc. 2016–31451 Filed 12–28–16; 8:45 am]

BILLING CODE 6345–02–P

OFFICE OF GOVERNMENT ETHICS

Agency Information Collection Activities; Submission for OMB Review; Proposed Collection; Comment Request for a Modified OGE Form 450 Executive Branch Confidential Financial Disclosure Report

AGENCY: Office of Government Ethics (OGE).

ACTION: Notice of request for agency and public comments.

SUMMARY: After publication of this second round notice, OGE intends to submit a modified OGE Form 450 Executive Branch Confidential Financial Disclosure Report to the Office of Management and Budget (OMB) for review and approval of a three-year extension under the Paperwork Reduction Act of 1995.

DATES: Written comments by the public and the agencies on this proposed extension are invited and must be received by January 30, 2017.

ADDRESSES: You may submit comments on this paperwork notice to the Office of Management and Budget, Attn: Desk Officer for OGE, via fax at 202–395–6974 or email at *OIRA_Submission@omb.eop.gov.* (Include reference to ''OGE Form 450 paperwork comment'' in the subject line of the message.)

FOR FURTHER INFORMATION CONTACT: Brandon Steele at the U.S. Office of Government Ethics; telephone: 202–482–9209; TTY: 800–877–8339; FAX: 202–482–9237; Email: *basteele@oge.gov.* An electronic copy of the OGE Form 450 is available in the Forms Library section of OGE's Web site at *http://www.oge.gov.* A paper copy may also be obtained, without charge, by contacting Mr. Steele.

SUPPLEMENTARY INFORMATION:

Title: Executive Branch Confidential Financial Disclosure Report.

Agency Form Number: OGE Form 450.

OMB Control Number: 3209–0006.

Type of Information Collection: Extension with modifications of a currently approved collection.

Type of Review Request: Regular.

Respondents: Private citizens who are potential (incoming) regular Federal employees whose positions are designated for confidential disclosure filing, and special Government employees whose agencies require that they file new entrant disclosure reports prior to assuming Government responsibilities.

Estimated Annual Number of Respondents: 24,640.

Estimated Time per Response: 1 hour.

Estimated Total Annual Burden: 24,640 hours.

Abstract: The OGE Form 450 collects information from covered department and agency employees as required under OGE's executive branchwide regulatory provisions in subpart I of 5 CFR part 2634. The basis for the OGE reporting regulation is section 201(d) of Executive Order 12674 of April 12, 1989 (as modified by Executive Order 12731 of October 17, 1990, 3 CFR, 1990 Comp., pp. 306–311, at p. 308) and section 107(a) of the Ethics in Government Act, 5 U.S.C. app. sec. 107(a). OGE proposes several modifications to the form. OGE proposes to clarify the instructions in two places to assist filers in completing the form. OGE also proposes to revise the Privacy Act Statement in accordance with the OGE/GOVT–2 Executive Branch Confidential Financial Disclosure Reports Privacy Act system of records.

OGE published a first round notice of its intent to request paperwork clearance for a modified OGE Form 450 Executive Branch Confidential Financial Disclosure Report. See 81 FR 70113 (October 11, 2016). OGE received no responses to that notice.

Request for Comments: Agency and public comment is again invited specifically on the need for and practical utility of this information collection, the accuracy of OGE's burden estimate, the enhancement of quality, utility, and clarity of the information collected, and the minimization of burden (including the use of information technology). Comments received in response to this notice will be summarized for, and may be included with, the OGE request for extension of OMB paperwork approval. The comments will also become a matter of public record.

Approved: December 22, 2016.

Walter M. Shaub, Jr.,

Director, Office of Government Ethics.

[FR Doc. 2016–31452 Filed 12–28–16; 8:45 am]

BILLING CODE 6345–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Toxic Substances and Disease Registry

[30Day–17–16BEH]

Agency Forms Undergoing Paperwork Reduction Act Review

The Agency for Toxic Substances and Disease Registry (ATSDR) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The notice for the proposed information collection is published to obtain comments from the public and affected agencies.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address any of the following: (a) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) Enhance the quality, utility, and clarity of the information to be collected; (d) Minimize the burden of the collection of information on those who are to respond, including through

the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses; and (e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570 or send an email to *omb@cdc.gov.* Direct written comments and/or suggestions regarding the items contained in this notice to the Attention: CDC Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

ATSDR Communication Activities Survey (ACAS)—New—Agency for Toxic Substances and Disease Registry (ATSDR).

Background and Brief Description

The Agency for Toxic Substances and Disease Registry (ATSDR) serves the public through responsive public health actions to promote healthy and safe environments and to prevent harmful exposures. The agency aims to work effectively with communities in proximity to hazardous waste sites by listening to and understanding their health concerns and seeking their guidance on where, when, and how to take public health actions.

Community members are key participants in the agency's public health assessment process and should be actively involved in decisions that impact their community. Thus, agency's goals for this new information collection request (ICR) titled the ''ATSDR Communication Activities Survey (ACAS)'' are to ascertain the effectiveness of, and to assess the differences and the consistency of, the delivery of ATSDR activities and respondent perceptions across sites and over time. ATSDR will use the ACAS to: (1) Determine how effectively it's site teams engage community members; (2) discover how well ATSDR provides effective, clear, and consistent communication and information on how to promote healthy and safe environments; (3) understand whether the agency's activities are helping the communities address environmental issues; and (4) improve ATSDR's activities to make a greater impact within the communities served.

Recruitment will occur at communities where ATSDR and state or local agencies have implemented site activities to address environmental issues. For each engaged community, the ACAS will be used to assess a set of effectiveness indicators for ATSDR site-specific activities about the respondents' involvement, knowledge, satisfaction, observations, and opinions about ATSDR's community engagement and educational outreach efforts to inform communities. The indicators will measure ATSDR effectiveness in the following respondent areas: (1) Their involvement with the site activities; (2) how they received, and prefer to receive, ATSDR information; (3) their knowledge and understanding of ATSDR site activities and how to reduce hazardous exposures; (4) their observations and opinions of ATSDR's role in community preparedness; (5) their self-evaluation on their risk of exposure to possible environmental hazards; (6) their demographic profile; (7) their environmental concerns; and (8) any additional feedback.

ATSDR is seeking a three-year Paperwork Reduction Act clearance for this new ICR. ATSDR anticipates that approximately six to seven sites will be engaged for feedback per year (or about 20 sites over the next three years). Each year, ATSDR will recruit approximately 167 individuals per year, aged 18 and older, to participate in the ACAS where ATSDR is holding public community meetings. Therefore, respondents will include approximately 24 to 28 community members and agency stakeholders per meeting (6 to 7 meetings per year). The community members may include, but are not limited to, the general public, community leaders, faith-based leaders, and business leaders. The agency stakeholders may include, but are not limited to, state and local environmental health department employees, such as environmental health assessors, toxicologists, and departmental officials. The mix of respondents will be approximately 75 percent community members (n=125 per year) and 25 percent agency stakeholders (n=42 per year).

Trained ATSDR contractors will have a table set up at the entrance of the community meeting where community meeting attendees will pick up a fact sheet which explains what ATSDR does, and the purpose of ATSDR's site activities and the survey.

At the end of ATSDR public community meetings, there will be an announcement to ask interested attendees to take the survey. All interested attendees will sign in and provide their contact information, their preferred mode for taking the survey (in-person, online or over the phone), and whether they are a community member or an agency stakeholder.

The ACAS will preferably be self-administered right after the public community meetings. If this is not a convenient time for the respondent, the ACAS may be completed online or by phone. We estimate that approximately 80 percent of respondents will choose the self-administered ACAS, 15 percent will choose the online ACAS, and 5 percent will choose the telephone ACAS.

There are no costs to the respondents other than their time. The total annual time burden requested is 94 hours per year.

Estimated Annualized Burden Hours

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Avg. burden per response (in hrs.)
Community Members	Sign In Sheet	125	1	3/60
	Hardcopy ACAS	100	1	30/60
	Online ACAS	19	1	30/60
	Telephone ACAS	6	1	30/60
Agency Stakeholders	Sign In Sheet	42	1	3/60
	Hardcopy ACAS	34	1	30/60
	Online ACAS	6	1	30/60
	Telephone ACAS	2	1	30/60

Leroy A. Richardson,

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2016–31554 Filed 12–28–16; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–17–17HO; Docket No. CDC–2016–0118]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing efforts to reduce public burden and maximize the utility of government information, 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. This notice invites comment on a proposed information collection entitled ''Test Predictability of Falls Screening Tools.'' CDC will use the information collected to evaluate current screening tools and potentially design a new screening tool for health care practitioners to identify community-dwelling adults 65 and older at risk for falls.

DATES: Written comments must be received on or before February 27, 2017.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2016–0118 by any of the following methods:

- *Federal eRulemaking Portal: Regulations.gov*. Follow the instructions for submitting comments.
- *Mail:* Leroy A. Richardson, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. All relevant comments received will be posted without change to *Regulations.gov*, including any personal information provided. For access to the docket to read background documents or comments received, go to *Regulations.gov*.

Please note: All public comment should be submitted through the Federal eRulemaking portal (*Regulations.gov*) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact the Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30329; phone: 404–639–7570; Email: *omb@cdc.gov.*

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. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed 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. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information.

Proposed Project

Test Predictability of Falls Screening Tools—New—National Center for Injury Prevention and Control (NCIPC), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

NCIPC seeks to request a two-year OMB approval for the ''Test Predictability of Falls Screening Tools'' information collection project. Falls are the leading cause of fatal and nonfatal injuries among older adults in the U.S. and represent a significant burden to the healthcare system. Research demonstrates that clinical interventions can reduce fall risk, and the American and British Geriatrics Societies (AGS/BGS) have developed a clinical practice guideline to manage fall risk among their older adult patients. Based on these guidelines, the CDC developed a falls prevention initiative called STEADI (Stopping Elderly Accidents, Deaths, and Injuries). STEADI includes a suite of materials (available at *www.cdc.gov/STEADI*) that help health care practitioners implement these clinical guidelines.

The first step in clinical falls prevention is for health care practitioners to administer a fall risk screening. The screening identifies whether adults 65 and older are at ''increased risk'' for a fall. The initial screening step is critical because it identifies who will receive the assessments and follow-up care, which has the potential to place a large burden on health care practitioners and the healthcare system. While medical organizations such as the American Geriatrics Society recommend that adults 65 and older be screened annually for fall risk, and although there are a number of tools used to screen older adults for fall risk, there is currently no standard for fall risk screening across care settings.

The CDC proposes to conduct a new data collection in order to develop a set of brief screening questions that are clinically-useful for quickly sorting patients into risk levels for falls. The goals of this study are to: (1) Test the ability of existing falls screening tools to predict falls in the subsequent year; (2) design an effective and parsimonious screening tool for health care practitioners to identify community-dwelling adults 65 and older at risk for falls; and (3) assess how responses to questions change over time and how

well questions predict falls for specific groups (*e.g.,* gender, race, disability status).

The intended use of the resulting data is to evaluate current screening tools and potentially design a new screening tool for health care practitioners to identify community-dwelling adults 65 and older at risk for falls. The analysis will consider individual questions and groupings of questions that predict fall risk for multiple subgroups (*e.g.,* gender, race, disability status) of adults 65 and older.

The only cost to respondents will be time spent responding to the survey/screener.

ESTIMATED ANNUALIZED BURDEN HOURS

Respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (Hours)	Total burden (hours)
Contacted Panelists	Initial Call	1,463	1	2/60	49
Participating Panelists	Baseline Survey/Final Survey (month 12) Web Mode.	380	1	20/60	127
	Baseline Survey/Final Survey (month 12) Phone Mode.	570	1	30/60	285
	Monthly Update Survey (months 1–11) Web Mode.	380	11	10/60	697
	Monthly Update Survey (months 1–11) Phone Mode.	570	11	15/60	1,568
	Falls Diary	276	1	5/60	23
Proxy Respondents	Proxy Survey Web Mode	38	1	3/60	2
	Proxy Survey Phone Mode	57	1	5/60	5
Total Hours					2,756

Leroy A. Richardson,

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2016–31604 Filed 12–28–16; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Meeting of the Community Preventive Services Task Force (Task Force)

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of meeting.

SUMMARY: The Centers for Disease Control and Prevention (CDC) announces the next meeting of the Community Preventive Services Task Force (Task Force). The Task Force is an independent, nonpartisan, nonfederal, and unpaid panel. Its members represent a broad range of research, practice, and policy expertise in prevention, wellness, health promotion, and public health, and are appointed by the CDC Director. The Task Force was convened in 1996 by the Department of Health and Human Services (HHS) to identify community preventive programs, services, and policies that increase healthy longevity, save lives and dollars, and improve Americans' quality of life. CDC is mandated to provide ongoing administrative, research, and technical support for the operations of the Task Force. During its meetings, the Task Force considers the findings of systematic reviews on existing research and practice-based evidence and issues recommendations. Task Force recommendations are not mandates for compliance or spending. Instead, they provide information about evidence-based options that decision makers and stakeholders can consider when they are determining what best meets the specific needs, preferences, available resources, and constraints of their jurisdictions and constituents. The Task Force's recommendations, along with the systematic reviews of the evidence on which they are based, are compiled in the *Guide to Community Preventive Services (The Community Guide).*

DATES: The meeting will be held on Wednesday, February 15, 2017 from 8:30 a.m. to 6:00 p.m. EST and Thursday, February 16, 2017 from 8:30 a.m. to 1:00 p.m. EST.

ADDRESSES: The Task Force Meeting will be held at the CDC Edward R. Roybal Campus, Centers for Disease Control and Prevention Headquarters (Building 19), 1600 Clifton Road NE., Atlanta, GA 30329. You should be aware that the meeting location is in a Federal government building; therefore, Federal security measures are applicable. For additional information, please see Roybal Campus Security Guidelines under **SUPPLEMENTARY INFORMATION**. Information regarding meeting logistics will be available on the Community Guide Web site (*www.thecommunityguide.org*) closer to the date of the meeting.

Meeting Accessibility: This meeting is open to the public, limited only by space availability. All meeting attendees must RSVP to ensure the required security procedures are completed to gain access to the CDC's Global Communications Center.

Public Comment: The opportunity for public comment will be available during the meeting. A public comment period limited to 3 minutes per person will follow the Task Force's discussion of each systematic review. Individuals wishing to make public comments must indicate their desire to do so in advance by providing their name, organizational affiliation, and the topic to be addressed with their RSVP. Public comments will become part of the meeting summary. Public comment is not possible via Webcast.

U.S. citizens must RSVP by 02/13/2017. Non U.S. citizens must RSVP by 01/30/2017 due to additional security steps that must be completed. Failure to RSVP by the dates identified could result in the inability to attend the Task Force meeting due to the strict security regulations on federal facilities.

Meeting Accessibility: This meeting is available to the public via Webcast. The Webcast URL will be sent to registrants upon receipt of their RSVP. All meeting attendees must RSVP to receive the webcast information which will be

emailed to them from the *CPSTF@cdc.gov* mailbox.

FOR FURTHER INFORMATION AND TO RSVP CONTACT: Onslow Smith, The Community Guide Branch; Division of Public Health Information Dissemination; Center for Surveillance, Epidemiology and Laboratory Services; Office of Public Health Scientific Services; Centers for Disease Control and Prevention, 1600 Clifton Road, MS–E–69, Atlanta, GA 30333, phone: (404)498–6778, email: *CPSTF@cdc.gov.*

SUPPLEMENTARY INFORMATION:

Purpose: The purpose of the meeting is for the Task Force to consider systematic reviews and issue findings and recommendations based on the reviews. Task Force recommendations provide information about evidence-based options that decision makers and stakeholders can consider when they are determining what best meets the specific needs, preferences, available resources, and constraints of their jurisdictions and constituents.

Matters proposed to be discussed: * Cardiovascular disease prevention and control (effectiveness of digital interventions for blood pressure control, mobile phone text messaging for medication adherence), diabetes prevention and control (effectiveness and economic reviews of community health workers for diabetes management, low health literacy sensitive self-management programs for diabetes), health equity promotion (de-tracking, modified school time), and older adult health (self-management support programs for activities of daily living of older adults).

*Pending final approval of review preparations.

Roybal Campus Security Guidelines: The Edward R. Roybal Campus is the headquarters of the U.S. Centers for Disease Control and Prevention and is located at 1600 Clifton Road NE., Atlanta, Georgia. The meeting is being held in a Federal government building; therefore, Federal security measures are applicable.

All meeting attendees must RSVP by the dates outlined under *Meeting Accessibility.* In planning your arrival time, please take into account the need to park and clear security. All visitors must enter the Edward R. Roybal Campus through the front entrance on Clifton Road. Vehicles may be searched, and the guard force will then direct visitors to the designated parking area. Upon arrival at the facility, visitors must present government-issued photo identification (*e.g.,* a valid federal identification badge, state driver's license, state non-driver's identification card, or passport). Non-United States citizens must complete the required security paperwork prior to the meeting date and must present a valid passport, visa, Permanent Resident Card, or other type of work authorization document upon arrival at the facility. All persons entering the building must pass through a metal detector. Visitors will be issued a visitor's ID badge at the entrance to Building 19 and may be escorted to the meeting room. All items brought to HHS/CDC are subject to inspection.

Dated: December 22, 2016.

Lauren Hoffmann,

Acting Executive Secretary, Centers for Disease Control and Prevention.

[FR Doc. 2016–31468 Filed 12–28–16; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Community Living

Agency Information Collection Activities: Submission for OMB Review; Comment Request; Alzheimer's and Dementia Program Data Reporting Tool (ADP–DRT) (Previously Entitled: Alzheimer's Disease Supportive Services Program Data Reporting Tool (ADSSP–DRT) and Alzheimer's disease Initiative—Specialized Supportive Services (ADI–SSS) project))

AGENCY: Administration for Community Living, HHS.

ACTION: Notice.

SUMMARY: In compliance with 44 U.S.C. 3507, the Administration on Aging (AoA), Administration for Community Living (ACL), is announcing that the proposed collection of information listed above has been submitted to the Office of Management and Budget (OMB) for review and clearance as required under the Paperwork Reduction Act of 1995. This notice collects comments on the information collection requirements relating to the continuation of an existing data collection for the Alzheimer's and Dementia Program Data Reporting Tool (ADP–PDR) and expansion of this collection to incorporate ACL grantees of the Alzheimer's Disease Initiative—Specialized Supportive Services (ADI–SSS) project.

DATES: Submit written comments on the collection of information by January 30, 2017.

ADDRESSES: Submit written comments on the collection of information by fax to (202) 395–5806 or by email to *OIRA_submission@omb.eop.gov,* Attn: OMB Desk Officer for ACL.

FOR FURTHER INFORMATION CONTACT: Erin Long, (202) 795–7389; *Erin.Long@acl.hhs.gov.*

SUPPLEMENTARY INFORMATION: The Alzheimer's Disease Supportive Services Program (ADSSP) is authorized through Sections 398, 399 and 399A of the Public Health Service (PHS) Act, as amended by Public Law 101–557, the Home Health Care and Alzheimer's disease Amendments of 1990. The ADSSP helps state efforts to expand the availability of community-level supportive services for persons with Alzheimer's disease and their caregivers, including underserved populations. ADI–SSS projects are financed solely by Prevention and Public Health Funds. Similar in scope to ADSSP, ADI–SSS projects are designed to fill gaps in dementia-capable home and community based services (HCBS) for persons living with or those at high risk of developing Alzheimer's disease and related dementias (ADRD) and their caregivers by providing quality, person-centered services that help them remain independent and safe in their communities. In compliance with the PHS Act, ACL revised the ADSSP Data Reporting Tool (ADSSP–DRT) in 2013 to add demographic data, information on the individuals trained, and service and expenditure data. The 2016 revised Alzheimer's and Dementia Program Data Reporting Tool (ADP–DRT) retains these changes and has been expanded to collect information about the delivery of direct services by both ADSSP and ADI–SSS grantees, as well as basic demographic information about service recipients.

Comments in Response to the 60-Day ***Federal Register*** *Notice:*

A 60-day **Federal Register** Notice was published in the **Federal Register** on August 23, 2016, Vol. 18, No. 136; pp. 57591. There was one public comment received pertaining to the categories for living arrangements. The comment suggested that the categories needed to have a clear definition. ACL accepted the comment, and the tool was revised by condensing the categories and providing an update to its definition of categories for living arrangements. The proposed ADP–DRT can be found on AoA's Web site at: *https://nadrc.acl.gov/sites/default/files/uploads/docs/Proposed%20ADP–DRT%20Update%2011_30_2016.xlsx.*

Annual Burden Estimates: The estimated hourly burden for this revised ADP–DRT is based on the number of persons served in the most recent ADSSP and ADI grantee data

submission. In addition, the burden hours per response were determined based on reports from a sample of ADSSP and ADI grants.

Instrument	Type of respondent	Number of respondents	Responses per respondent	Burden hours per response	Total burden hours (annual)
ADP–DRT	Local Program Site	76	2	4.67	709.84
ADP–DRT	Grantee	38	2	3.6	273.6.

Estimated Total Annual Burden Hours: 983.44.

Dated: December 22, 2016.

Edwin L. Walker,

Acting Administrator and Assistant Secretary for Aging.

[FR Doc. 2016–31528 Filed 12–28–16; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–D–0524]

Listing of Ingredients in Tobacco Products; Revised Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or we) is announcing the availability of a revised guidance for industry entitled ''Listing of Ingredients in Tobacco Products.'' The revised guidance document is intended to assist persons making tobacco product ingredient submissions to FDA as required by the Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act). We received several comments to the draft guidance, and those comments were considered as the guidance was finalized.

DATES: Submit either electronic or written comments on Agency guidances at any time.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2009–D–0524 for ''Listing of Ingredients in Tobacco Products.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Submit written requests for single copies of the revised draft guidance to the Center for Tobacco Products, Food and Drug Administration, Document Control Center, 10903 New Hampshire Ave., Bldg. 71, Rm. G335, Silver Spring, MD 20993–2000. Send one self-addressed adhesive label to assist that office in processing your request or include a fax number to which the guidance document may be sent. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Katherine Collins, Center for Tobacco Products, Food and Drug Administration, Document Control Center, 10903 New Hampshire Ave., Bldg. 71, Rm. G335, Silver Spring, MD 20993–2000, 1–877–287–1373, email: *AskCTP@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

We are announcing the availability of a revised guidance for industry entitled ''Listing of Ingredients in Tobacco Products.'' We are issuing this guidance consistent with our good guidance practices regulation (21 CFR 10.115).

The revised guidance document is intended to assist persons making tobacco product ingredient submissions to FDA as required by the Tobacco Control Act.

The Tobacco Control Act (Pub. L. 111–31), enacted on June 22, 2009, amends the Federal Food, Drug, and Cosmetic Act (the FD&C Act) and provides FDA with the authority to regulate the manufacture, marketing, and distribution of tobacco products to protect the public health. Among its many provisions, the Tobacco Control Act added section 904 to the FD&C Act (21 U.S.C. 387d), establishing requirements for tobacco product ingredient submissions.

The revised guidance discusses tobacco products that are newly deemed subject to chapter IX of the FD&C Act. Cigarettes, cigarette tobacco, roll-your-own tobacco (RYO), and smokeless tobacco were immediately covered by FDA's tobacco product authorities in chapter IX of the FD&C Act, including section 904, when the Tobacco Control Act went into effect. As for other types of tobacco products, section 901(b) of the FD&C Act (21 U.S.C. 387a) grants FDA authority to deem those products subject to chapter IX of the FD&C Act. Under that authority, FDA issued a rule deeming all other products that meet the statutory definition of ''tobacco product'', set forth in section 201(rr) of the FD&C Act (21 U.S.C. 321(rr)), except for accessories of those products, as subject to chapter IX of the FD&C Act (81 FR 28974). FDA published the final rule on May 10, 2016 and it became effective on August 8, 2016. As a result, manufacturers or importers (or their agents) of tobacco products subject to the deeming rule are now required to comply with chapter IX of the FD&C Act, including the ingredient listing requirements in section 904(a)(1).

Section 904(a)(1) of the FD&C Act requires each tobacco product manufacturer or importer, or agent thereof, to submit a listing of all ingredients, including tobacco, substances, compounds, and additives that are added by the manufacturer to the tobacco, paper, filter, or other part of each tobacco product by brand and by quantity in each brand and subbrand. For cigarettes, cigarette tobacco, RYO, and smokeless tobacco products on the market as of June 22, 2009, the list of ingredients had to be submitted by December 22, 2009. For cigarettes, cigarette tobacco, RYO, and smokeless tobacco products not on the market as of June 22, 2009, section 904(c)(1) requires that the list of ingredients be submitted at least 90 days prior to delivery for introduction into interstate commerce. Section 904(c) of the FD&C Act also requires submission of information whenever any additive, or the quantity of any additive, is changed.

As described in the preamble to the final deeming rule, for products other than cigarettes, cigarette tobacco, RYO, and smokeless tobacco that are on the market as of August 8, 2016, FDA does not intend to enforce the section 904(a)(1) ingredient listing submission requirement until 6 months from the effective date of the rule or 12 months from the effective date for small-scale tobacco product manufacturers. However, in the revised guidance, FDA is announcing an additional 6-month compliance policy for newly deemed tobacco products on the market as of August 8, 2016. Under this policy, FDA will not enforce the ingredient listing submission requirement until August 8, 2017, for businesses that are not considered small-scale tobacco product manufactures, and February 8, 2018, for small-scale tobacco product manufacturers. Manufacturers of tobacco products introduced into interstate commerce after August 8, 2016, must submit the ingredient information required by section 904(a)(1) at least 90 days before the product is delivered for introduction into interstate commerce, as with cigarettes, cigarette tobacco, RYO, and smokeless tobacco first marketed after June 22, 2009 (section 904(c)(1) of the FD&C Act).

II. Significance of Guidance

FDA is issuing this revised guidance consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on ingredient listing. It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

III. Paperwork Reduction Act of 1995

This revised guidance also refers to previously approved collections of information found in FDA regulations. The revised draft guidance includes information and recommendations for how to provide ingredient listing submissions. The collections of information in section 904(a)(1) of the FD&C Act have been approved under OMB control number 0910–0650.

IV. Electronic Access

Persons with access to the Internet may obtain an electronic version of the revised guidance at either *https://www.regulations.gov* or *http://www.fda.gov/TobaccoProducts/Labeling/RulesRegulationsGuidance/default.htm.*

Dated: December 23, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–31587 Filed 12–28–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2016–N–0002]

Abbott Laboratories, et al.; Withdrawal of Approval of Four New Drug Applications and Two Abbreviated New Drug Applications

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is withdrawing approval of four new drug applications (NDAs) and two abbreviated new drug applications (ANDAs) from multiple applicants. The holders of the applications notified the Agency in writing that the drug products were no longer marketed and requested that the approval of the applications be withdrawn.

DATES: *Effective Date:* January 30, 2017.

FOR FURTHER INFORMATION CONTACT: Florine P. Purdie, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6248, Silver Spring, MD 20993–0002, 301–796–3601.

SUPPLEMENTARY INFORMATION: The holders of the applications listed in the table have informed FDA that these drug products are no longer marketed and have requested that FDA withdraw approval of the applications pursuant to the process in § 314.150(c) (21 CFR 314.150(c)). The applicants have also, by their requests, waived their opportunity for a hearing. Withdrawal of approval of an application or abbreviated application under § 314.150(c) is without prejudice to refiling.

Application No.	Drug	Applicant
NDA 019080	ProSom (estazolam) Tablets, 1 milligram (mg) and 2 mg.	Abbott Laboratories, 200 Abbott Park Rd., Abbott Park, IL 60064.
NDA 020195	Fentanyl Oralet (fentanyl citrate) Troche/Lozenge, Equivalent to (EQ) 0.1 mg base, EQ 0.2 mg base, EQ 0.3 mg base, and EQ 0.4 mg base.	Cephalon, Inc., 41 Moores Rd., Frazer, PA 19355.
NDA 021726	Niravam (alprazolam) Orally Disintegrating Tablets, 0.25 mg, 0.5 mg, 1 mg, and 2 mg.	UCB, Inc., 1950 Lake Park Dr., Building 2100, Smyrna, GA 30080.
ANDA 084287	Methyltestosterone Tablets USP, 10 mg	Impax Laboratories, Inc., 31047 Genstar Rd., Hayward, CA 94544.
ANDA 084310	Methyltestosterone Tablets USP, 25 mg	Do.
NDA 205208	Desvenlafaxine Fumarate Extended-Release Tablets, EQ 50 mg base and EQ 100 mg base.	Teva Pharmaceuticals USA, Inc., 425 Privet Rd., Horsham, PA 19044.

Therefore, under section 505(e) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 355(e)) and under authority delegated to the Director, Center for Drug Evaluation and Research, by the Commissioner, approval of the applications listed in the table, and all amendments and supplements thereto, is hereby withdrawn, effective January 30, 2017. Introduction or delivery for introduction into interstate commerce of products without approved new drug applications violates section 301(a) and (d) of the FD&C Act (21 U.S.C. 331(a) and (d)). Drug products that are listed in the table that are in inventory on the date that this notice becomes effective (see the **DATES** section) may continue to be dispensed until the inventories have been depleted or the drug products have reached their expiration dates or otherwise become violative, whichever occurs first.

Dated: December 23, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–31625 Filed 12–28–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2016–D–4317]

Compounding and Repackaging of Radiopharmaceuticals by Outsourcing Facilities; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for industry entitled ''Compounding and Repackaging of Radiopharmaceuticals by Outsourcing Facilities.'' Specifically, this guidance sets forth FDA's policy regarding compounding and repackaging of radiopharmaceuticals for human use by entities that are registered with FDA as outsourcing facilities. This guidance describes how FDA intends to apply section 503B of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) to radiopharmaceuticals compounded by outsourcing facilities, and it describes the conditions under which FDA does not intend to take action for violations of certain provisions of the FD&C Act when an outsourcing facility repackages radiopharmaceuticals.

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit either electronic or written comments on the draft guidance by February 27, 2017. Submit either electronic or written comments concerning the collection of information proposed in the draft guidance by February 27, 2017.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2016–D–4317 for ''Compounding and Repackaging of Radiopharmaceuticals by Outsourcing Facilities.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *http://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information

redacted/blacked out, will be available for public viewing and posted on *http://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Sara Rothman, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 5197, Silver Spring, MD 20993, 301–796–3110.

SUPPLEMENTARY INFORMATION:

I. Background

In 2013, the Drug Quality and Security Act created a new section 503B of the FD&C Act (21 U.S.C. 353b), which describes a new category of compounders called *outsourcing facilities.* Section 503B of the FD&C Act describes the conditions that must be satisfied for human drug products compounded by or under the direct supervision of a licensed pharmacist in an outsourcing facility to qualify for exemptions from the following three sections of the FD&C Act:

- Section 502(f)(1) (21 U.S.C. 352(f)(1)) (concerning labeling with adequate directions for use);
- section 505 (21 U.S.C. 355) (concerning drug approval requirements); and
- section 582 (21 U.S.C. 360eee–1 (concerning drug supply chain security requirements).

In contrast to section 503A (21 U.S.C. 353a), section 503B of the FD&C Act does not exclude radiopharmaceuticals. In general, FDA's policies regarding section 503B of the FD&C Act apply to the compounding of radiopharmaceutical drug products. However, the Agency has developed specific policies, applicable only to the compounding of radiopharmaceuticals by outsourcing facilities, with respect to bulk drug substances for use in compounding radiopharmaceuticals and compounding radiopharmaceuticals that are essentially copies of approved drugs when such compounding is limited to *minor deviations,* as that term is defined in the guidance.

In addition, because outsourcing facilities may sometimes repackage radiopharmaceuticals for patients, but repackaged radiopharmaceuticals are not eligible for the exemptions in section 503B of the FD&C Act, the draft guidance describes the conditions under which the Agency does not intend to take action for violations of sections 505 and 502(f)(1) of the FD&C Act when an outsourcing facility repackages radiopharmaceuticals for human use.

Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of a separate draft guidance document concerning compounding and repackaging of radiopharmaceuticals by State-licensed nuclear pharmacies and Federal facilities that are not registered as outsourcing facilities entitled ''Compounding and Repackaging of Radiopharmaceuticals by State-Licensed Nuclear Pharmacies and Federal Facilities.''

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on ''Compounding and Repackaging of Radiopharmaceuticals by Outsourcing Facilities.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

This draft guidance contains information collection provisions that are subject to review by the Office of Management and Budget under the Paperwork Reduction Act of 1995 (the PRA) (44 U.S.C. 3501–3520). The title, description, and respondent description of the information collection are given under this section with an estimate of the annual reporting and recordkeeping burdens. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

We invite comments on the following topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

The draft guidance includes the following collections of information under the PRA:

One condition in the draft guidance is that if a radiopharmaceutical is repackaged by an outsourcing facility, the label on the immediate container (primary packaging, *e.g.,* the syringe) of the repackaged product includes the following information:

- The statement ''This radiopharmaceutical was repackaged by [name of outsourcing facility].'';
- the address and phone number of the outsourcing facility that repackaged the radiopharmaceutical;
- the established name of the original, approved radiopharmaceutical that was repackaged;
- the lot or batch number of the repackaged radiopharmaceutical;
- the dosage form and radioactive dose of the repackaged radiopharmaceutical;
- a statement of either the quantity or volume of the repackaged radiopharmaceutical, whichever is appropriate;
- the date the radiopharmaceutical was repackaged;
- the beyond-use-date of the repackaged radiopharmaceutical;
- storage and handling instructions for the repackaged radiopharmaceutical;
- the National Drug Code (NDC) number of the repackaged radiopharmaceutical, if available [1];

[1] The NDC number of the original approved drug product should not be placed on the repackaged drug product.

• the statement ''Not for resale,'' and, if the repackaged radiopharmaceutical is distributed by an outsourcing facility other than pursuant to a prescription for an individual identified patient, the statement ''Office Use Only''; and

• a list of the active and inactive ingredients, unless such information is included on the label for the container from which the individual units are removed, as described in this document.

Another condition in the draft guidance is that the label on the container from which the individual units are removed for administration (secondary packaging, *e.g.,* the bag, box, or other package in which the repackaged products are distributed) includes the active and inactive ingredients, if the immediate product label is too small to include this information, and directions for use, including, as appropriate, dosage and administration, and the following information to facilitate adverse event reporting: *http://www.fda.gov/medwatch* and 1–800–FDA–1088.

We estimate that annually a total of approximately 2 outsourcing facilities (''No. of Respondents'' in table 1, row 1) will each design, test, and produce approximately 5 different labels (''No. of Disclosures per Respondent'' in table 1, row 1) for a total of 10 labels that include the information described previously (including directions for use) (''Total Annual Disclosures'' in table 1, row 1). We also estimate that designing, testing, and producing each label will take approximately 0.5 hours for each repackaged radiopharmaceutical (''Average Burden Hours per Disclosure'' in table 1, row 1). The provision to add the statement *http://www.fda.gov/medwatch* and 1–800–FDA–1088 is not included in this burden estimate because it is not considered a collection of information under the PRA because the information is ''originally supplied by the Federal Government to the recipient for the purpose of disclosure to the public'' (5 CFR 1320.3(c)(2)).

The draft guidance also references registration, adverse event reporting, product reporting, and current good manufacturing practices (CGMP) requirements for outsourcing facilities. The collection of information for outsourcing facility registration has been approved by the Office of Management and Budget (OMB) under OMB control number 0910–0777 (79 FR 69859, November 24, 2014). The collection of information for adverse event reporting by outsourcing facilities has been approved by OMB under OMB control number 0910–0800 (80 FR 60917, October 8, 2015). In the **Federal Register** of August 1, 2016 (81 FR 50523), FDA estimated the burden resulting from outsourcing facility electronic drug product reporting. In the **Federal Register** of July 2, 2014 (79 FR 37743), FDA estimated the burden resulting from outsourcing facility compliance with CGMP requirements.

The total estimated third-party disclosure burden resulting from the draft guidance is as follows:

TABLE 1—ESTIMATED ANNUAL THIRD-PARTY DISCLOSURE BURDEN

Repackaging by outsourcing facilities	Number of respondents	Number of disclosures per respondent	Total annual disclosures	Average burden per disclosure	Total hours
Designing, testing, and producing each label on immediate containers, packages and/or outer containers.	2	5	10	.5 (30 minutes)	5

There are no capital costs or operating and maintenance costs associated with this collection of information.

III. Electronic Access

Persons with access to the Internet may obtain the draft guidance at either *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm* or *https://www.regulations.gov.*

Dated: December 22, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–31512 Filed 12–28–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2016–N–0001]

Identification and Characterization of the Infectious Disease Risks of Human Cells, Tissues, and Cellular and Tissue-Based Products; Public Workshop

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public workshop.

SUMMARY: The Food and Drug Administration (FDA) is announcing a public workshop entitled ''Identification and Characterization of the Infectious Disease Risks of Human Cells, Tissues, and Cellular and Tissue-based Products.'' The purpose of the public workshop is to have a scientific discussion of the current methods available for identifying and characterizing infectious disease risks associated with human cells, tissues, and cellular and tissue-based products (HCT/Ps).

DATES: The public workshop will be held on February 8, 2017, from 8:30 a.m. to 4:30 p.m., and February 9, 2017, from 8:30 a.m. to 12:30 p.m. See the **SUPPLEMENTARY INFORMATION** section for registration date and information.

ADDRESSES: The public workshop will be held at the Wiley Auditorium located in the Harvey H. Wiley Federal Building, 5100 Campus Dr., College Park, MD 20740.

FOR FURTHER INFORMATION CONTACT: Monica Kapoor, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3111C, Silver Spring, MD 20993, *CBERPublicEvents@fda.hhs.gov;* or Stacey Rivette, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Avenue, Bldg. 71, Rm. 3109B, Silver Spring, MD 20993, *CBERPublicEvents@fda.hhs.gov* with the subject line titled ''HCT/P Workshop.''

SUPPLEMENTARY INFORMATION:

I. Background

Transplantation of HCT/Ps represents an area of medicine important for saving and/or enhancing the lives of millions of individuals every year. In order to assure the safety of patients receiving HCT/P transplants, FDA issued regulations to prevent the introduction, transmission, or spread of communicable diseases by HCT/Ps under part 1271 (21 CFR part 1271) (May 25, 2004; 69 FR 29786). These regulations became effective on May 25, 2005. The regulations under part 1271, subpart C, contain the requirements for

tissue establishments for determining HCT/P donor eligibility. These requirements include the need to screen and test potential donors of HCT/Ps for relevant communicable disease agents and diseases (RCDADs).

The regulations under part 1271, subpart C, list the following RCDADs for all cells and tissues: Human immunodeficiency virus, types 1 and 2; hepatitis B virus; hepatitis C virus; human transmissible spongiform encephalopathy; and *Treponema pallidum.* These regulations also list human T-lymphotropic virus type I and type II as RCDADs for viable, leukocyte-rich cells and tissues. For reproductive cells or tissues, a disease agent or disease of the genitourinary tract includes *Chlamydia trachomatis* and *Neisseria gonorrhea.* In addition, the regulations under part 1271, subpart C, recognize that over time as new infectious diseases emerge there would be the need to designate additional RCDADs. The regulations describe the criteria for identifying new RCDADs. These criteria include that the disease or disease agent is potentially transmissible by a HCT/P: Either it has sufficient incidence and/or prevalence to affect the donor population; or if it were released in a manner to place potential donors at risk that it could be fatal or life-threatening, and that there were appropriate screening and legally marketed screening tests available for it. However, the regulations under part 1271, subpart C, do not specify the deliberative and scientific processes necessary to apply the criteria.

This workshop will describe currently available scientific methods to characterize both epidemiologic and biological features of emerging diseases and disease agents, and discuss their potential use in evaluating HCT/P infectious diseases risks for the purpose of identifying new RCDADs for the purposes of the HCT/P regulatory framework. Assessing the overall risk of a particular disease agent or disease to recipients of HCT/Ps requires consideration of multiple factors, including the presence of the disease agent or disease in the HCT/P donor population, potential for transmission by an HCT/P, and the potential morbidity or mortality in the recipient. In many cases, information for one or more of these factors may be limited or incomplete.

II. Topics for Discussion at the Public Workshop

The workshop is intended as a scientific discussion regarding the current methods available to identify and characterize infectious disease risks related to HCT/Ps. Topics discussed will include: (1) Estimating disease incidence and/or prevalence in the potential HCT/P donor population, (2) assessing the potential transmissibility of a disease by HCT/Ps, and (3) understanding the capabilities of current screening and testing methodologies. The workshop will also include discussion on how available information can be used to characterize the overall infectious disease risks posed by HCT/Ps.

III. Participating in the Public Workshop

Registration: To register for the public workshop, please visit the following Web site at *https://www.eventbrite.com/e/identification-and-characterization-of-hctp-infectious-disease-risks-public-workshop-registration-24465329459.* Please provide complete contact information for each attendee, including name, title, affiliation, address, email, and telephone.

Registration is free and based on space availability, with priority given to early registrants. Persons interested in attending this public workshop must register by February 6, 2017. Early registration is recommended because seating is limited; therefore, FDA may limit the number of participants from each organization. Registrants will receive confirmation once they have been accepted. Attendance for this workshop is in-person only. FDA will post the agenda approximately 5 days before the workshop at *http://www.fda.gov/BiologicsBloodVaccines/NewsEvents/WorkshopsMeetingsConferences/ucm490175.htm.*

If you need special accommodations because of disability, please contact Monica Kapoor or Stacey Rivette no later than 7 days in advance of the meeting by email at *CBERPublicEvents@fda.hhs.gov* with the subject line titled ''HCT/P Workshop.''

Transcripts: Please be advised that as soon as a transcript of the public workshop is available, it will be accessible at *https://www.regulations.gov.* It may be viewed at the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852. A link to the transcript will also be available on the Internet at *http://www.fda.gov/BiologicsBloodVaccines/NewsEvents/WorkshopsMeetingsConferences/ucm525001.html.*

Dated: December 23, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–31628 Filed 12–28–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2016–D–0269]

Prescription Requirement Under Section 503A of the Federal Food, Drug, and Cosmetic Act; Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or the Agency) is announcing the availability of a final guidance for industry entitled ''Prescription Requirement Under Section 503A of the Federal Food, Drug, and Cosmetic Act.'' This guidance sets forth FDA's policy concerning certain prescription requirements for compounding human drug products for identified individual patients under section 503A of the Federal Food, Drug, and Cosmetic Act (the FD&C Act). It addresses compounding after the receipt of a prescription for an identified individual patient, compounding before the receipt of a prescription for an identified individual patient (anticipatory compounding), and compounding for office use.

DATES: Submit electronic or written comments on Agency guidances at any time.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that

identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2016–D–0269 for ''Prescription Requirement Under Section 503A of the Federal Food, Drug, and Cosmetic Act.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Submit written requests for single copies of the guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Sara Rothman, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 5197, Silver Spring, MD, 301–796–3110.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a final guidance for industry entitled ''Prescription Requirement Under Section 503A of the Federal Food, Drug, and Cosmetic Act.'' Section 503A 21 U.S.C. 353a), added to the FD&C Act by the Food and Drug Administration Modernization Act in 1997, describes the conditions that must be satisfied for human drug products compounded by a licensed pharmacist in a State-licensed pharmacy or Federal facility, or by a licensed physician, to be exempt from the following three sections of the FD&C Act:

• Section 501(a)(2)(B) (21 U.S.C. 351(a)(2)(B)) (concerning current good manufacturing practice requirements);

• section 502(f)(1) (21 U.S.C. 352(f)(1)) (concerning the labeling of drugs with adequate directions for use); and

• section 505 (21 U.S.C. 355) (concerning the approval of drugs under new drug applications (NDAs) or abbreviated new drug applications (ANDAs)).

A compounded drug product may be eligible for the exemptions under section 503A of the FD&C Act only if it is, among other things, compounded for an identified individual patient based on the receipt of a valid prescription order or a notation, approved by the prescribing practitioner, on the prescription order that a compounded product is necessary for the identified patient. Among other conditions, to qualify for the exemptions under section 503A, the drug product must be compounded by a licensed pharmacist in a State-licensed pharmacy or a Federal facility, or by a licensed physician (section 503A(a) of the FD&C Act).

This guidance sets forth FDA's policy concerning certain prescription requirements for compounding human drug products for identified individual patients under section 503A of the FD&C Act. It addresses compounding after the receipt of a prescription for an identified individual patient, compounding before the receipt of a prescription for an identified individual patient (anticipatory compounding), and compounding for office use.

In the **Federal Register** of April 18, 2016 (81 FR 22617), FDA issued a notice announcing the availability of the draft version of this guidance. The comment period on the draft guidance ended on July 18, 2016. FDA received 111 comments on the draft guidance. In response to received comments, FDA made certain changes to the guidance to clarify particular points. FDA also removed provisions concerning notations on prescriptions and recordkeeping. The Agency intends to address these matters in future policy documents.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on the prescription requirement under section 503A of the FD&C Act. It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Electronic Access

Persons with access to the Internet may obtain the guidance at either *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm* or *https://www.regulations.gov.*

Dated: December 23, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–31607 Filed 12–28–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–D–0234]

Clinical Pharmacology Data To Support a Demonstration of Biosimilarity to a Reference Product; Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a guidance for industry entitled ''Clinical Pharmacology Data to Support a Demonstration of Biosimilarity to a Reference Product.'' This guidance is to assist the pharmaceutical industry and other investigators engaged in biosimilar product development in determining the clinical pharmacology data necessary for evaluation of a proposed biosimilar product. This guidance finalizes the draft guidance with the same name issued in May 2014. This guidance is one in a series of guidances that FDA is developing to implement the Biologics Price Competition and Innovation Act of 2009 (BPCI Act).

DATES: Submit either electronic or written comments on Agency guidances at any time.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *http://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *http://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2014–D–0234 for ''Clinical Pharmacology Data To Support a Demonstration of Biosimilarity to a Reference Product; Guidance for Industry; Availability.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *http://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *http://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Submit written requests for single copies of this guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002; or to the Office of Communication, Outreach and Development, Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Sandra Benton, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6340, Silver Spring, MD 20993–0002, 301–796–2500; or Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a guidance for industry entitled ''Clinical Pharmacology Data to Support a Demonstration of Biosimilarity to a Reference Product.'' This guidance is intended to assist the pharmaceutical industry and other investigators engaged in biosimilar product development with the design and use of clinical pharmacology data necessary for evaluation of a proposed biosimilar product. This guidance provides recommendations on how clinical pharmacology studies that assess the presence or absence of clinically meaningful differences between the proposed biosimilar product and the U.S.-licensed reference product should be conducted and analyzed to address questions arising during biosimilar product development.

Clinical pharmacology studies are part of a stepwise approach for developing the data and information needed to support a demonstration of biosimilarity. These studies can reduce the residual uncertainty in assessing the biosimilarity between a proposed biosimilar product and reference product and inform the design of subsequent clinical trials to assess clinically meaningful differences. This guidance is intended to assist sponsors in designing such studies in support of applications submitted under section 351(k) of the Public Health Service Act (42 U.S.C. 262(k)), as added by the BPCI Act.[1] In particular, this guidance discusses certain critical considerations for using clinical pharmacology testing to support biosimilarity, approaches for developing the appropriate clinical pharmacology database to support a demonstration of biosimilarity, and the utility of modeling and simulation for designing and analyzing clinical trials. Scientific principles described in the guidance may also be informative for the development of certain biological products under section 505(b)(2) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(b)(2)).

On May 14, 2014, FDA issued a notice announcing the availability of a draft guidance with the same name as the current guidance to solicit comments from the public (79 FR 27622). After carefully reviewing received comments and in light of increased regulatory experience and the evolution of the science in biosimilar product development and evaluation, FDA has finalized that guidance with certain changes. These changes are for clarity, however, and are not substantive.

This guidance is one in a series that FDA is developing to implement the BPCI Act and is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on conducting clinical pharmacology studies in support of proposed biosimilar products. It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. The Paperwork Reduction Act of 1995

The guidance refers to previously approved collections of information that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collection of information submitted under section 351(k) applications for biosimilars is approved under OMB control number 0910–0719. The collection of information submitted under 21 CFR part 312 is approved under OMB control number 0910–0014.

III. Electronic Access

Persons with access to the Internet may obtain the guidance at either *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm, http://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/default.htm,* or *http://www.regulations.gov.*

Dated: December 22, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–31511 Filed 12–28–16; 8:45 am]

BILLING CODE 4164–01–P

[1] The BPCI Act was enacted as part of the Patient Protection and Affordable Care Act (Pub. L. 111–148) on March 23, 2010.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2016–D–4318]

Compounding and Repackaging of Radiopharmaceuticals by State-Licensed Nuclear Pharmacies and Federal Facilities; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for industry entitled ''Compounding and Repackaging of Radiopharmaceuticals by State-Licensed Nuclear Pharmacies and Federal Facilities.'' This guidance sets forth FDA's policy regarding compounding and repackaging of radiopharmaceuticals for human use by State-licensed nuclear pharmacies and Federal facilities that are not registered as outsourcing facilities. Because such radiopharmaceuticals are not eligible for exemptions from provisions of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) related to the production of drugs, FDA is issuing this guidance to describe the conditions under which it does not intend to take action for violations of certain provisions of the FD&C Act when a State-licensed nuclear pharmacy or Federal facility compounds or repackages radiopharmaceuticals.

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit either electronic or written comments on the draft guidance by February 27, 2017. Submit either electronic or written comments concerning the collection of information proposed in the draft guidance by February 27, 2017.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2016–D–4318 for ''Compounding and Repackaging of Radiopharmaceuticals by State-Licensed Nuclear Pharmacies and Federal Facilities.'' Received

comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

• *Confidential Submissions*—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Edisa Gozun, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 5197, Silver Spring, MD 20993, 301–796–3110.

SUPPLEMENTARY INFORMATION:

I. Background

Under current law, radiopharmaceuticals that are compounded by entities that are not registered with FDA as outsourcing facilities, and radiopharmaceuticals that are repackaged, are subject to all applicable provisions of the FD&C Act related to the production of drugs. Because Congress explicitly excluded radiopharmaceuticals from section 503A of the FD&C Act (21 U.S.C. 353a) (see section 503A(d)(2)),[1] compounded radiopharmaceuticals are not eligible for the exemptions under section 503A from section 505 of the FD&C Act (21 U.S.C. 355) (concerning new drug approval requirements), section 502(f)(1) of the FD&C Act (21 U.S.C. 352(f)(1)) (concerning labeling with adequate directions for use), and section 501(a)(2)(B) of the FD&C Act (21 U.S.C. 351(a)(2)B)) (concerning current good manufacturing practice (CGMP) requirements). In addition, Congress did not exempt repackaged radiopharmaceuticals from any provisions of the FD&C Act.

Because State-licensed nuclear pharmacies and Federal facilities sometimes compound or repackage radiopharmaceuticals for patients, but radiopharmaceuticals are not eligible for the exemptions in section 503A of the FD&C Act, FDA is issuing this guidance to describe the conditions under which the Agency does not intend to take action for violations of sections 505, 502(f)(1), and 501(a)(2)(B) of the FD&C Act when a State-licensed nuclear pharmacy or a Federal facility that is not an outsourcing facility compounds or repackages radiopharmaceuticals for human use.

Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of a separate draft guidance document concerning compounding and repackaging of radiopharmaceuticals by outsourcing facilities entitled ''Compounding and Repackaging of Radiopharmaceuticals by Outsourcing Facilities.''

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on ''Compounding and Repackaging of Radiopharmaceuticals by State-Licensed Nuclear Pharmacies and Federal Facilities.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995 (the PRA) (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information that they conduct or sponsor. Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the collection of information associated with this document, FDA invites comments on the following topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

One of the conditions of the draft guidance is that the compounded radiopharmaceutical is not essentially a copy of an approved radiopharmaceutical. If a compounder intends to rely on a determination from a prescriber that there is a change between the compounded radiopharmaceutical and the

[1] Section 503A of the FD&C Act describes the conditions that must be met for drug products compounded by a licensed pharmacist in a State-licensed pharmacy or Federal facility, or by a licensed physician, to qualify for exemptions from sections 505, 502(f)(1), and 501(a)(2)(B) of the FD&C Act. Section 503A(d)(2) of the FD&C Act states that ''this section shall not apply to . . . radiopharmaceuticals.''

comparable approved radiopharmaceutical that produces for an identified individual patient a clinical difference, the determination is documented on the prescription or order in writing by either (1) the prescribing practitioner, or (2) the compounder, reflecting a conversation with the prescribing practitioner. The compounder maintains records of the prescription or order documenting this determination.

We estimate that annually a total of approximately 10 compounders (''No. of Respondents'' in table 1, line 1) will consult a prescriber to determine whether he or she has made a determination that the compounded radiopharmaceutical has a change that produces a clinical difference for an identified individual patient as compared to the comparable approved radiopharmaceutical. We estimate that compounders will document this determination on approximately 250 prescriptions or orders for compounded radiopharmaceuticals ''Total Annual Disclosures'' in table 1, line 1). We estimate that the consultation between the compounder and the prescriber and noting this determination on each prescription or order that does not already document this determination will take approximately 3 minutes per prescription or order.

A compounder also maintains records of prescriptions or orders noting the determination that a prescriber has determined that the compounded radiopharmaceutical has a change that produces a clinical difference for an identified individual patient. We estimate that the compounder will take approximately 2.1 hours to maintain the records of 250 prescriptions or orders documenting the prescriber's determination of clinical difference (''Total Hours'' in table 2). We estimate that maintaining such records will take approximately 30 seconds per prescription or order.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL THIRD-PARTY DISCLOSURE BURDEN [1]

Type of reporting	Number of respondents	Number of disclosures per respondent	Total annual disclosures	Average burden per disclosure	Total hours
Consultation between the compounder and prescriber or health care facility, and the notation on the prescription or order documenting the prescriber's determination of clinical difference.	10	25	250	3 minutes	12.5

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

Type of reporting	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per record-keeping	Total hours
Maintenance of records of prescriptions or orders documenting the prescriber's determination of clinical difference.	10	25	250	30 seconds ..	2.1

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

III. Electronic Access

Persons with access to the Internet may obtain the draft guidance at either *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm* or *https://www.regulations.gov.*

Dated: December 22, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–31513 Filed 12–28–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–D–1953]

Providing Regulatory Submissions in Electronic Format—Submission of Manufacturing Establishment Information; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for industry entitled ''Providing Regulatory Submissions in Electronic Format—Submission of Manufacturing Establishment Information.'' This guidance discusses the requirements for a valid electronic submission of manufacturing establishment information (MEI) under the Federal Food, Drug, and Cosmetic Act (the FD&C Act). This action will streamline the review of all manufacturing establishments involved in the preparation of a drug or biological product by consolidating information in one location and eliminating the inclusion of erroneous and/or outdated information from other Agency files.

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit either electronic or written comments on the draft guidance by February 27, 2017.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

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Written/Paper Submissions

Submit written/paper submissions as follows:

• Mail/Hand delivery/Courier (for written/paper submissions): Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2014–D–1953 for ''Providing Regulatory Submissions in Electronic Format—Submission of Manufacturing Establishment Information.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002; or to the Office of Communication, Outreach and Development, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT:

Regarding drug products: Karen Takahashi, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 4244, Silver Spring, MD 20993–0002, 301–796–3191.

Regarding biological products: Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993, 240–402–7911.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled ''Providing Regulatory Submissions in Electronic Format—Submission of Manufacturing Establishment Information.''

This draft guidance discusses the requirements and implementation of section 745A(a) of the FD&C Act (21 U.S.C. 379k–1) regarding valid electronic submissions of MEI. Twenty-four months after this draft has been finalized, MEI contained in new drug applications (NDAs), abbreviated new drug applications (ANDAs), biologics license applications (BLAs), and amendments, supplements, or resubmissions of these application types must be submitted electronically in the format specified in this guidance. This draft guidance also applies to drug master files that are submitted for incorporation by reference into an NDA, ANDA, or BLA.

Under current regulations at 21 CFR 314.50(d) and 21 CFR 601.2(a), applicants and holders of approved applications are required to submit contact information for each manufacturing establishment involved in the manufacture of the drug or biological product, as well as other information relating to the manufacture of the product. This information is part of the existing application form (FDA Form 356h, ''Application to Market a New Drug, Biologic, or an Antibiotic Drug for Human Use''). We have found that the MEI is sometimes incomplete, and scattered throughout electronic submissions. This can lead to delays in application processing.

The Agency is requiring that applicants submit a single, consolidated list of information about each manufacturing establishment mentioned in any application. This information must include the name and address of each manufacturing establishment involved in the manufacture of the drug or biological product, specific information regarding the physical location of the establishment, facility identifiers assigned to the establishment by FDA, contact information for the person responsible for scheduling inspections at the establishment, and

the specific manufacturing operations conducted at the establishment.

We believe the required electronic MEI can be consolidated to appear in a single location to facilitate the complete, timely, and accurate review of all manufacturing establishments involved in the preparation of a drug or biological product. This will help to eliminate the inclusion and/or maintenance of potentially outdated and erroneous information that could be retrieved from other Agency files and will enable proper identification and timely evaluation of manufacturing establishments for conformance with requirements, including current good manufacturing practices.

II. Paperwork Reduction Act of 1995

The guidance refers to previously approved collections of information that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The draft guidance discusses the electronic submission of MEI contained in an NDA, ANDA, or BLA to the Center for Drug Evaluation and Research and the Center for Biologics Evaluation and Research by specifying the format for the electronic submission of such submissions. The information collection discussed in the guidance is contained in our NDA and ANDA regulations (part 314) and approved under OMB control number 0910–0001, and our BLA regulations (part 601) and approved under OMB control number 0910–0338. Currently, MEI is submitted as part of the existing application form, Form FDA 356h, and is approved by OMB under control number 0910–0338.

III. Electronic Access

Persons with access to the Internet may obtain the document at *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm, http://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/default.htm,* or *https://www.regulations.gov.*

Dated: December 23, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–31626 Filed 12–28–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–0879]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Procedures for the Safe and Sanitary Processing and Importing of Fish and Fishery Products

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by January 30, 2017.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–7285, or emailed to *oira_submission@omb.eop.gov.* All comments should be identified with the OMB control number 0910–0354. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: FDA PRA Staff, Office of Operations, Food and Drug Administration, Three White Flint North, 10A63, 11601 Landsdown St., North Bethesda, MD 20852, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Procedures for the Safe and Sanitary Processing and Importing of Fish and Fishery Products—21 CFR part 123

OMB Control Number 0910–0354—Extension

FDA regulations in part 123 (21 CFR part 123) mandate the application of hazard analysis and critical control point (HACCP) principles to the processing of seafood. HACCP is a preventive system of hazard control designed to help ensure the safety of foods. The regulations were issued under FDA's statutory authority to regulate food safety, including section 402(a)(1) and (4) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 342(a)(1) and (4)).

Certain provisions in part 123 require that processors and importers of seafood collect and record information. The HACCP records compiled and maintained by a seafood processor primarily consist of the periodic observations recorded at selected monitoring points during processing and packaging operations, as called for in a processor's HACCP plan (*e.g.,* the values for processing times, temperatures, acidity, etc., as observed at critical control points). The primary purpose of HACCP records is to permit a processor to verify that products have been produced within carefully established processing parameters (critical limits) that ensure that hazards have been avoided.

HACCP records are normally reviewed by appropriately trained employees at the end of a production lot or at the end of a day or week of production to verify that control limits have been maintained, or that appropriate corrective actions were taken if the critical limits were not maintained. Such verification activities are essential to ensure that the HACCP system is working as planned. A review of these records during the conduct of periodic plant inspections also permits FDA to determine whether the products have been consistently processed in conformance with appropriate HACCP food safety controls.

Section 123.12 requires that importers of seafood products take affirmative steps and maintain records that verify that the fish and fishery products they offer for import into the United States were processed in accordance with the HACCP and sanitation provisions set forth in part 123. These records are also to be made available for review by FDA as provided in § 123.12(c).

The time and costs of these recordkeeping activities will vary considerably among processors and importers of fish and fishery products, depending on the type and number of products involved, and on the nature of the equipment or instruments required to monitor critical control points. The burden estimate in table 1 includes only those collections of information under the seafood HACCP regulations that are not already required under other statutes and regulations. The estimate also does not include collections of information that are a usual and customary part of businesses' normal activities. For example, the tagging and labeling of molluscan shellfish (21 CFR 1240.60) is a customary and usual practice among seafood processors. Consequently, the estimates in table 1

account only for information collection and recording requirements attributable to part 123.

Description of respondents: Respondents to this collection of information include processors and importers of seafood.

In the **Federal Register** of July 26, 2016 (81 FR 48816), FDA published a 60-day notice requesting public comment on the proposed collection of information. No comments were received.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

21 CFR Section [2]	Number of recordkeepers	Number of records per recordkeeper [3]	Total annual records	Average burden per recordkeeping [4]	Total hours
123.6(a), (b), and (c); Prepare hazard analysis and HACCP plan.	50	1	50	16	800
123.6(c)(5); Undertake and prepare records of corrective actions.	15,000	4	60,000	.30 (18 minutes)	18,000
123.8(a)(1) and (c); Reassess hazard analysis and HACCP plan.	15,000	1	15,000	4	60,000
123.12(a)(2)(ii); Verify compliance of imports and prepare records of verification activities.	4,100	80	328,000	.20 (12 minutes)	65,600
123.6(c)(7); Document monitoring of critical control points.	15,000	280	4,200,000	.30 (18 minutes)	1,260,000
123.7(d); Undertake and prepare records of corrective actions due to a deviation from a critical limit.	6,000	4	24,000	.10 (6 minutes)	2,400
123.8(d); Maintain records of the calibration of process-monitoring instruments and the performing of any periodic end-product and in-process testing.	15,000	47	705,000	.10 (6 minutes)	70,500
123.11(c); Maintain sanitation control records	15,000	280	4,200,000	.10 (6 minutes)	420,000
123.12(c); Maintain records that verify that the fish and fishery products they offer for import into the United States were processed in accordance with the HACCP and sanitation provisions set forth in part 123.	4,100	80	328,000	.10 (6 minutes)	32,800
123.12(a)(2); Prepare new written verification procedures to verify compliance of imports.	41	1	41	4	164
Total					1,930,264

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] These estimates include the information collection requirements in the following sections:
§ 123.16—Smoked Fish—process controls (see § 123.6(b));
§ 123.28(a)—Source Controls—molluscan shellfish (see § 123.6(b));
§ 123.28(c) and (d)—Records—molluscan shellfish (see § 123.6(c)(7)).
[3] Based on an estimated 280 working days per year.
[4] Estimated average time per 8-hour work day unless one-time response.

We base this hour burden estimate on our experience with the application of HACCP principles in food processing. Further, the burdens have been estimated using typical small seafood processing firms as a model because these firms represent a significant proportion of the industry. The hour burden of HACCP recordkeeping activities will vary considerably among processors and importers of fish and fishery products, depending on the size of the facility and complexity of the HACCP control scheme (*i.e.,* the number of products and the number of hazards controlled); the daily frequency that control points are monitored and values recorded; and also on the extent that data recording time and cost are minimized by the use of automated data logging technology. The burden estimate does not include burden hours for activities that are a usual and customary part of businesses' normal activities. For example, the tagging and labeling of molluscan shellfish (§ 1240.60) is a customary and usual practice among seafood processors.

Based on our records, we estimate that there are 15,000 processors and 4,100 importers. We estimate that 50 processors will undertake the initial preparation of a hazard analysis and HAACP plan (§ 123.6(a), (b), and (c)). We estimate the burden for the initial preparation of a hazard analysis and HAACP plan to be 16 hours per processor for a total burden of 800 hours.

We estimate that all processors (15,000 processors) will undertake and keep records of four corrective action plans (§ 123.6(c)(5)) for a total of 60,000 records. We estimate the burden for the preparation of each record to be .30 hours for a total burden of 18,000 hours. We estimate that all processors (15,000 processors) will annually reassess their hazard analysis and HACCP plan (§ 123.8(a)(1) and (c)). We estimate the burden for the reassessment of the hazard analysis and HAACP plan to be 4 hours per processor for a total burden of 60,000 hours.

We estimate that all importers (4,100 importers) will take affirmative steps to verify compliance of imports and prepare 80 records of their verification activities (§ 123.12(a)(2)(ii)) for a total of 328,000 records. We estimate the burden for the preparation of each record to be .20 hours for a total burden of 65,600 hours.

We estimate that all processors (15,000 processors) will document the monitoring of critical control points (§ 123.6(c)(7)) at 280 records per processor for a total of 4,200,000 records. We estimate the burden for the preparation of each record to be .30 hours for a total burden of 1,260,000 hours.

We estimate that 40 percent of all processors (6,000 processors) will maintain records of any corrective actions taken due to a deviation from a critical limit (§ 123.7(d)) at 4 records per

processor for a total of 24,000 records. We estimate the burden for the preparation of each record to be .10 hours for a total burden of 2,400 hours.

We estimate that all processors (15,000 processors) will maintain records of the calibration of process-monitoring instruments and the performing of any periodic end-product and in-process testing (§ 123.8(d)) at 47 records per processor for a total of 705,000 records. We estimate the burden for the preparation of each record to be .10 hours for a total burden of 70,500 hours.

We estimate that all processors (15,000 processors) will maintain sanitation control records (§ 123.11(c)) at 280 records per processor for a total of 4,200,000 records. We estimate the burden for the preparation of each record to be .10 hours for a total burden of 420,000 hours.

We estimate that all importers (4,100 importers) will maintain records that verify that the fish and fishery products they offer for import into the United States were processed in accordance with the HACCP and sanitation provisions set forth in part 123 (§ 123.12(c)). We estimate that 80 records will be prepared per importer for a total of 328,000 records. We estimate the burden for the preparation of each record to be .10 hours for a total burden of 32,800 hours.

We estimate that 1 percent of all importers (41 importers) will require new written verification procedures to verify compliance of imports (§ 123.12(a)(2)). We estimate the burden for preparing the new procedures to be 4 hours per importer for a total burden of 164 hours.

Dated: December 21, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–31424 Filed 12–28–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2016–D–2495]

Submission of Warning Plans for Cigars; Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a guidance for industry entitled ''Submission of Warning Plans for Cigars.'' The guidance will help those involved in the manufacture, distribution, and sale of cigars in the United States understand the new cigar warning plan requirements under FDA's final rule deeming these products to be subject to the tobacco product authorities in the Federal Food, Drug, and Cosmetic Act (the FD&C Act). The guidance reiterates the health warning statements and display and distribution requirements that should be provided in cigar warning plans and will help persons determine who should submit a warning plan, when a plan must be submitted, and what information should be included when submitting a plan.

DATES: Submit either electronic or written comments on Agency guidances at any time.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2016–D–2495 for ''Submission of Warning Plans for Cigars; Guidance for Industry.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Submit written requests for single copies of this guidance to the Center for Tobacco Products, Food and Drug Administration, Document Control Center, Bldg. 71, Rm. G335, 10903 New

Hampshire Ave., Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request or include a fax number to which the guidance document may be sent. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

FOR FURTHER INFORMATION CONTACT: Deirdre Jurand, Center for Tobacco Products, Food and Drug Administration, 10903 New Hampshire Ave., Document Control Center, Bldg. 71, Rm. G335, 10903 New Hampshire Ave., Silver Spring, MD 20993–0002, 1–877–287–1373, *AskCTP@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a guidance for industry entitled ''Submission of Warning Plans for Cigars.'' On June 22, 2009, the President signed the Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act) (Pub. L. 111–31) into law. The Tobacco Control Act granted FDA important new authority to regulate the manufacture, marketing, and distribution of cigarettes, cigarette tobacco, roll-your-own tobacco, and smokeless tobacco products to protect the public health and to reduce tobacco use by minors.

The Tobacco Control Act also gave FDA the authority to issue a regulation deeming all other products that meet the statutory definition of a tobacco product as subject to FDA regulatory authority under section 901(b) of the FD&C Act (21 U.S.C. 387a(b)). On May 10, 2016, FDA issued that rule, extending FDA's tobacco product authority to cigars, among other products (81 FR 28973). Among the requirements that now apply to cigars are health warning statements prescribed under section 906(d) of the FD&C Act (21 U.S.C. 387f(d)), which permits restrictions on the sale and distribution of tobacco products that are ''appropriate for the protection of public health.'' The regulation specifies the health warning statements to be displayed and also requires the submission of warning plans that provide for the random, equal display and random distribution of the statements on cigar packaging and advertising.

The guidance discusses the regulatory requirements to submit warning plans, who submits a warning plan, the scope of a warning plan, when to submit a warning plan, what information should be submitted in a warning plan, where to submit a warning plan, and what approval of a warning plan means.

II. Significance of Guidance

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on submission of warning plans for cigars. It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

III. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 1143 have been approved under OMB control number 0910–0768.

IV. Electronic Access

Persons with access to the Internet may obtain an electronic version of the guidance at either *https://www.regulations.gov* or *http://www.fda.gov/TobaccoProducts/Labeling/RulesRegulationsGuidance/default.htm.*

Dated: December 23, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–31586 Filed 12–28–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2000–D–0103]

Botanical Drug Development; Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a guidance for industry entitled ''Botanical Drug Development.'' This guidance describes FDA's current thinking on appropriate development plans for botanical drugs to be submitted in new drug applications (NDAs) and specific recommendations for submitting investigational new drug applications (INDs) to support future NDA submissions for botanical drugs. In addition, this guidance provides general information on the over-the-counter (OTC) drug monograph system for botanical drugs. Although this guidance does not intend to provide recommendations specific to botanical drugs to be marketed under biologics license applications (BLAs), many scientific principles described in this guidance may also apply to these products. This guidance replaces the guidance for industry entitled ''Botanical Drug Products'' issued in June 2004 and finalizes the August 2015 draft guidance entitled ''Botanical Drug Development.''

DATES: Submit either electronic or written comments on Agency guidances at any time.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2000–D–0103 for ''Botanical Drug Development.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Submit written requests for single copies of this guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Sau L. Lee, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 2128, Silver Spring, MD 20993–0002, 301–796–2905.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a guidance for industry entitled ''Botanical Drug Development.'' This guidance describes the current thinking of the Center for Drug Evaluation and Research (CDER) on appropriate development plans for botanical drugs to be submitted in NDAs and specific recommendations on submitting INDs in support of future NDA submissions for botanical drugs. In addition, this guidance provides general information on the OTC drug monograph system for botanical drugs. Although this guidance does not intend to provide recommendations specific to botanical drugs to be marketed under BLAs, many scientific principles described in this guidance may also apply to these products.

This guidance specifically discusses several areas in which, due to the unique nature of botanical drugs, the Agency finds it appropriate to apply regulatory policies that differ from those applied to nonbotanical drugs, such as synthetic, semi-synthetic, or otherwise highly purified or chemically modified drugs, including antibiotics derived from microorganisms. Because this guidance focuses on considerations unique to botanical drugs, policies and recommendations applicable to both botanical and nonbotanical drugs are generally not covered in this document.

In the **Federal Register** of August 17, 2015 (80 FR 49240), FDA issued and sought comment on a draft guidance that revised the final guidance for industry ''Botanical Drug Products'' issued in June 2004. This guidance finalizes the August 2015 draft guidance ''Botanical Drug Development'' and replaces the June 2004 final guidance. The June 2004 final guidance, August 2015 draft guidance, and related public comments are publicly available in Docket No. FDA–2000–D–0103. The general approach to botanical drug development has remained unchanged since 2004; however, based on improved understanding of botanical drugs and experience acquired in the reviews of NDAs and INDs for these drugs, specific recommendations have been modified and new sections have been added to this guidance to better address late-phase development and NDA submission for botanical drugs. This guidance also addresses the minor comments received from stakeholders on the 2015 draft guidance and provides clarity on the application of the fixed-dose drug combination rule to botanicals.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on botanical drug development. It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. The Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The guidance explains the circumstances under which FDA regulations require approval of an NDA for marketing a botanical drug product and when such a product may be marketed under an OTC drug monograph. The regulations governing the preparation and submission of an NDA are in part 314 (21 CFR part 314), and the guidance does not contain any recommendations that exceed the requirements of these regulations. FDA has estimated the information collection requirements resulting from the preparation and submission of an NDA, and OMB has approved the burden under OMB control number 0910–0001. FDA anticipates that any NDAs submitted for botanical drug products would be included under the burden estimates approved by OMB for part 314.

The regulations on the procedures for classifying OTC drugs as generally recognized as safe and effective and not misbranded, and for establishing OTC drug monographs, are set forth in § 330.10 (21 CFR 330.10). FDA believes that any botanical drug products that may be eligible for inclusion in an OTC drug monograph under current § 330.10 have already been or are presently being considered for such inclusion.

The guidance also provides scientific and regulatory guidance to sponsors on conducting clinical investigations of botanical drugs. The regulations governing the preparation and submission of INDs are in part 312 (21 CFR part 312). The guidance does not

contain any recommendations that exceed the requirements in those regulations. FDA has estimated the information collection requirements resulting from the preparation and submission of an IND under part 312, and OMB has approved the reporting and recordkeeping burden under OMB control number 0910–0014.

III. Electronic Access

Persons with access to the Internet may obtain the guidance at either *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm* or *https://www.regulations.gov.*

Dated: December 23, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–31627 Filed 12–28–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; 60-Day Comment Request; Continuation of Use of the Early Career Reviewer Program Online Application and Vetting System—Center for Scientific Review (CSR)

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995 to provide opportunity for public comment on proposed data collection projects, Center for Scientific Review, the National Institutes of Health (NIH) will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

DATES: Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication.

FOR FURTHER INFORMATION CONTACT: To obtain a copy of the data collection plans and instruments, submit comments in writing, or request more information on the proposed project, contact: Dr. Monica Basco, Early Career Reviewer Program Coordinator, Center for Scientific Review, 6701 Rockledge Drive, Room 3030, Bethesda, Maryland 20892 or call non-toll-free number (301)–300–3839 or Email your request, including your address to: *CSRearlyCareerReviewer@mail.nih.gov.* Formal requests for additional plans and instruments must be requested in writing.

SUPPLEMENTARY INFORMATION: Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires: Written comments and/or suggestions from the public and affected agencies are invited to address one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Proposed Collection Title: Early Career Reviewer Program Online Application and Vetting System—Center for Scientific Review (CSR), 0925—Extension of Information Collection Request, Center for Scientific Review (CSR), National Institutes of Health (NIH) (OMB Control Number: 0925–0695; Expiration: 04/30/2017).

Need and Use of Information Collection: The Center for Scientific Review (CSR) is the portal for NIH grant applications and their review for scientific merit. Our mission is to see that NIH grant applications receive fair, independent, expert, and timely reviews—free from inappropriate influences—so NIH can fund the most promising research. To accomplish this goal, Scientific Review Officers (SRO) form study sections consisting of scientists who have the technical and scientific expertise to evaluate the merit of grant applications. Study section members are generally scientists who have established independent programs of research as demonstrated by their publications and their grant award experiences.

The CSR Early Career Reviewer program was developed to identify and train qualified scientists who are early in their scientific careers and who have not had prior CSR review experience. The goals of the program are to expose these early career scientists to the peer review experience so that they become more competitive as applicants as well as to enrich the existing pool of NIH reviewers. Currently, online application software, the Early Career Reviewer Application and Vetting System, is accessed online by applicants to the Early Career Reviewer Program who provide their names, contact information, a description of their areas of expertise, their study section preferences, professional Curriculum Vitae and links to their professional Web site. This Information Collection Request (ICR) is to continue to use the Early Career Reviewer Application and Vetting System to process applications for the Early Career Reviewer program.

OMB approval is requested for 3 years. There are no costs to respondents other than their time. The total estimated annualized burden hours are 450.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Number of respondents	Number of responses per respondent	Average time per response (in hours)	Total annual burden hour
Applicants	1,080	1	25/60	450
Total	1,080	1,080		450

Dated: December 21, 2016.

Joanna Bare,

Executive Officer, Division of Management Services, Center for Scientific Review, NIH.

[FR Doc. 2016–31543 Filed 12–28–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Meeting of the National Vaccine Advisory Committee

AGENCY: National Vaccine Program Office, Office of the Assistant Secretary for Health, Office of the Secretary, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: As stipulated by the Federal Advisory Committee Act, the Department of Health and Human Services (HHS) is hereby giving notice that a meeting is scheduled to be held for the National Vaccine Advisory Committee (NVAC). The meeting will be open to the public; public comment sessions will be held during the meeting.

DATES: The meeting will be held on February 7 and 8, 2017. The meeting times and agenda will be posted on the NVAC Web site at *http://www.hhs.gov/nvpo/nvac/meetings/index.html* as soon as they become available.

ADDRESSES: Pre-registration is required for members of the public who wish to attend the meeting and who wish to participate in the public comment session. Individuals who wish to attend the meeting and/or participate in the public comment session should register at *http://www.hhs.gov/nvpo/nvac/meetings/index.html.* Participants may also register by emailing *nvpo@hhs.gov* or by calling (202) 690–5566 and providing their name, organization, and email address.

U.S. Department of Health and Human Services, Hubert H. Humphrey Building, Great Hall, 200 Independence Avenue SW., Washington, DC 20201.

The meeting can also be accessed through a live webcast on both days of the meeting. For more information, visit *http://www.hhs.gov/nvpo/nvac/meetings/index.html.*

FOR FURTHER INFORMATION CONTACT: National Vaccine Program Office, U.S. Department of Health and Human Services, Room 715H, Hubert H. Humphrey Building, 200 Independence Avenue SW., Washington, DC 20201. Phone: (202) 690–5566; email: *nvpo@hhs.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to Section 2101 of the Public Health Service Act (42 U.S.C. 300aa–1), the Secretary of Health and Human Services was mandated to establish the National Vaccine Program to achieve optimal prevention of human infectious diseases through immunization and to achieve optimal prevention against adverse reactions to vaccines. The NVAC was established to provide advice and make recommendations to the Director of the National Vaccine Program on matters related to the Program's responsibilities. The Assistant Secretary for Health serves as Director of the National Vaccine Program.

During the February 2017 NVAC meeting, there will be a discussion of the 21st Century Cures Act and vaccines; an update on the recent mumps outbreaks in the US; presentations on Zika virus disease and the status of Zika vaccine development; presentations on vaccine adverse events and insights from personalized medicine; and the NVAC's Mid-course Review Working Group will present its findings and draft recommendations for deliberation and vote by the Committee. Please note that agenda items are subject to change as priorities dictate. Information on the final meeting agenda will be posted prior to the meeting on the NVAC Web site: *http://www.hhs.gov/nvpo/nvac/index.html.*

Public attendance at the meeting is limited to the available space. Individuals who plan to attend in person and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the National Vaccine Program Office at the address/phone listed above at least one week prior to the meeting. For those unable to attend in person, a live webcast will be available. More information on registration and accessing the webcast can be found at *http://www.hhs.gov/nvpo/nvac/meetings/index.html.*

Members of the public will have the opportunity to provide comments at the NVAC meeting during the public comment periods designated on the agenda. Public comments made during the meeting will be limited to three minutes per person to ensure time is allotted for all those wishing to speak. Individuals are also welcome to submit their written comments. Written comments should not exceed three pages in length. Individuals submitting written comments should email their comments to the National Vaccine Program Office (*nvpo@hhs.gov*) at least five business days prior to the meeting.

Dated: December 21, 2016.

Bruce Gellin,

Designated Federal Officer, National Vaccine Advisory Committee, Deputy Assistant Secretary for Health.

[FR Doc. 2016–31530 Filed 12–28–16; 8:45 am]

BILLING CODE 4150–44–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Director; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App), notice is hereby given of a meeting of the NIH Clinical Center Research Hospital Board.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The portions of the meeting devoted to the Anonymous Safety Hotline and the laboratories or units and staff involved in the individual reports to the Hotline, staff, as well as discussions regarding non-executive employees holding specific positions in the Clinical Center will be closed to the public in accordance with the provisions set forth in section 552b(c)(9)(B) and 552b(c)(6), Title 5 U.S.C., as amended. Premature disclosure of the laboratories or units and staff involved in the individual reports could significantly limit the Hotline's purpose by compromising anonymity. Discussion of specific non-executive employees would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: NIH Clinical Center Research Hospital Board.

Date: January 13, 2017.

Open: 8:30 a.m. to 12:30 p.m.

Agenda: Board Chair's Overview, Remarks from the NIH Director and the New CEO, Clinical Center Focus Groups, Improving the Clinical Center's Census, Clinical Center Patient and Worker Safety Metrics.

Open: 1:30 p.m. to 3:30 p.m.

Agenda: IT Infrastructure and Security, Audits of Delayed Reporting—Self-Audit Results and Formal Audit Planning, Facilities Update.

Closed: 3:45 p.m. to Adjournment.

Agenda: Anonymous Safety Hotline, Clinical Center Employees.

Place: Conference Room 6C6, Building 31, National Institutes of Health, Bethesda, MD 20892.

Contact Person: Gretchen Wood, Staff Assistant, National Institutes of Health, Office of the Director, One Center Drive, Building 1 Room 126, Bethesda, MD 20892, 301–496–4272, *woodgs@od.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Dated: December 23, 2016.

Anna Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–31611 Filed 12–28–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 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: Microbiology, Infectious Diseases and AIDS Initial Review Group Microbiology and Infectious Diseases Research Committee.

Date: January 26–27, 2017.

Time: 11:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 5601 Fishers Lane, Rockville, MD 20892 (Telephone Conference Call).

Contact Person: Frank S. De Silva, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, Room #3E72A, National Institutes of Health/NIAID, 5601 Fishers Lane, MSC 9834, Bethesda, MD 20892934, (240) 669–5023, *fdesilva@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: December 23, 2016.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–31568 Filed 12–28–16; 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 Initial Review Group; Neuroscience of Aging Review Committee.

Date: February 2–3, 2017.

Time: 3:00 p.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Jeannette L. Johnson, Ph.D., Deputy Review Branch Chief, National Institutes of Health, National Institute on Aging, Gateway Building, Bethesda, MD 20892, 301–402–7705, *johnsonj9@nia.nih.gov.*

Name of Committee: National Institute on Aging Initial Review Group; Behavior and Social Science of Aging Review Committee.

Date: February 2–3, 2017.

Time: 3:00 p.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Kimberly Firth, Ph.D., National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, 301–402–7702, *kimberly.firth@nih.gov.*

Name of Committee: National Institute on Aging Initial Review Group; Biological Aging Review Committee.

Date: February 2–3, 2017.

Time: 4:00 p.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

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 Initial Review Group; Clinical Aging Review Committee.

Date: February 2–3, 2017.

Time: 4:00 p.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Alicja L. Markowska, Ph.D., D.Sc., National Institute on Aging, National Institutes of Health, Gateway Building 2C212, 7201 Wisconsin Avenue, 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: December 22, 2016.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–31433 Filed 12–28–16; 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; P30 and P50 Revisions for AD Centers.

Date: February 13, 2017.
Time: 12:01 p.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institute on Aging, Gateway Building, Suite 2W200, 7201 Wisconsin Ave., Bethesda, MD 20892.
Contact Person: Maurizio Grimaldi, MD, Ph.D., Scientific Review Officer, National Institute on Aging, National Institutes of Health, 7201 Wisconsin Avenue, Room 2C218, Bethesda, MD 20892, 301–496–9374, *grimaldim2@mail.nih.gov.*

Name of Committee: National Institute on Aging Special Emphasis Panel; 2017 Beeson Review.
Date: February 24, 2017.
Time: 11:00 a.m. to 3:30 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institute on Aging, Gateway Building, Suite 2W200, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Telephone Conference Call).
Contact Person: Alexander Parsadanian, Ph.D., Scientific Review Officer, National Institute on Aging, Gateway Building 2C/212, 7201 Wisconsin Avenue, Bethesda, MD 20892, 301–496–9666, *Parsadaniana@nia.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 23, 2016.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–31566 Filed 12–28–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Prospective Grant of Exclusive Patent License: Development and Commercialization of Nitrite Salts for the Treatment, Amelioration, and Prevention by Any Route of Administration of Pulmonary Hypertension, Including All WHO Classifications of Pulmonary Hypertension, e.g., Groups 1–5

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The National Heart, Lung, and Blood Institute (''NHLBI''), an institute of the National Institutes of Health; an agency within the Department of Health and Human Services, is contemplating the grant of an exclusive patent license to commercialize the invention(s) embodied in the intellectual property estate stated in the Summary Information section of this notice to United Therapeutics Corporation (''United'') located in Silver Spring, MD and incorporated under the laws of Delaware.

DATES: Only written comments and/or applications for a license which are received by the NHLBI Office of Technology Transfer and Development on or before January 13, 2017 will be considered.

ADDRESSES: Requests for copies of the patent application, inquiries, and comments relating to the contemplated exclusive license should be directed to: Cristina Thalhammer-Reyero, Ph.D., MBA, Senior Licensing and Patenting Manager, NHLBI Office of Technology Transfer and Development, 31 Center Drive Room 4A29, MSC2479, Bethesda, MD 20892–2479; Telephone: +1–301–435–4507; Fax: +1–301–594–3080; Email: *thalhamc@mail.nih.gov.*

SUPPLEMENTARY INFORMATION: The following represents the intellectual property to be licensed under the prospective agreement:

PCT Application Number: PCT/US2004/21985, filed 9 July 2004, and corresponding US, EP, CA, AU and JP filings; and PCT Patent Application PCT/US2004/22232 filed 9 July 2004, and corresponding issued patents in EP, CA, AU and JP, as well as US 8,927,030 issued 01/06/2015; US 9,387,224 issued 07/12/2016, and two pending US patent applications; Titled ''Use of Nitrite Salts for the treatment of Cardiovascular Conditions'' (NIH Reference No. E–254–2003/0,1,2,3)

With respect to persons who have an obligation to assign their right, title and interest to the Government of the United States of America, the patent rights in these inventions have been assigned to the Government of the United States of America.

The prospective exclusive license territory may be worldwide and the field of use may be limited to: ''Use of the Licensed Patent Rights for the treatment, amelioration, and prevention of any kind or nature and by any route of administration of Pulmonary Hypertension, including all WHO classifications of pulmonary hypertension, *e.g.,* Groups 1–5''.

The invention pertains to the unexpected finding that low, physiological and non-toxic concentrations of sodium nitrite are able to increase blood flow and produce vasodilation by infused and nebulized routes of administration.

This notice is made in accordance with 35 U.S.C. 209 and 37 CFR part 404. The prospective Exclusive Patent License will be royalty bearing and may be granted unless within fifteen (15) days from the date of this published notice, the NHLBI Office of Technology Transfer and Development receives written evidence and argument that establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR part 404.

Complete applications for a license in the prospective field of use that are timely filed in response to this notice will be treated as objections to the grant of the contemplated Exclusive Patent License. Comments and objections to this notice submitted will not be made available for public inspection and, to the extent permitted by law, will not be released under the *Freedom of Information Act,* 5 U.S.C. 552.

Dated: December 21, 2016.

Cristina Thalhammer-Reyero,

Senior Licensing and Patenting Manager, Office of Technology Transfer and Development, National Heart, Lung, and Blood Institute.

[FR Doc. 2016–31437 Filed 12–28–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Complementary and Integrative Health; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Advisory Council for Complementary and Integrative Health.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Council for Complementary and Integrative Health.
Date: February 3, 2017.
Closed: 8:30 a.m. to 9:15 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Building 31, Conference Room 10, 31 Center Drive, Bethesda, MD 20892.

Open: 9:30 a.m. to 3:15 p.m.

Agenda: A report from the Institute Director and other staff.

Place: National Institutes of Health, Building 31, Conference Room 10, 31 Center Drive, Bethesda, MD 20892.

Contact Person: Martin H. Goldrosen, Ph.D., Director, Division of Extramural Activities, National Center for Complementary and Integrative Health, NIH, 6707 Democracy Blvd., Ste. 401, Bethesda, MD 20892–5475, (301) 594–2014, *goldrosm@mail.nih.gov*.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *https://nccih.nih.gov/about/naccih/*, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.213, Research and Training in Complementary and Integrative Health, National Institutes of Health, HHS)

Dated: December 22, 2016.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–31430 Filed 12–28–16; 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; NIAID Peer Review Meeting.

Date: January 11–12, 2017.

Time: 7:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: Hilton Garden Inn Savannah Historic District, Telfair Conference Room, 321 West Bay Street, Savannah, GA 31401.

Contact Person: Ellen S. Buczko, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, Room #3F30A, National Institutes of Health/NIAID, 5601 Fishers Lane, MSC 9823, Bethesda, MD 20892 –9823, (240) 669–5028, *ebuczko1@niaid.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIAID Investigator Initiated Program Project Applications (P01).

Date: January 25–26, 2017.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Room 3G53, 5601 Fishers Lane, Rockville, MD 20892 (Telephone Conference Call).

Contact Person: Julio Aliberti, Scientific Review Officer, Scientific Review Program, DEA/NIAID/NIH/DHHS, 5601 Fishers Lane, MSC–9823, Rockville, MD 20852, 301–761–7322, *alibertijc@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: December 23, 2016.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–31610 Filed 12–28–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Using Informatics To Improve Data Analysis of Chemical Screening Assays Conducted in Zebrafish; Notice of Webinars; Registration Information

SUMMARY: The National Toxicology Program (NTP) at the National Institute of Environmental Health Sciences announces the webinar series, ''Using Informatics to Improve Data Analysis of Chemical Screening Assays Conducted in Zebrafish.'' The webinars will provide an overview of current issues that need to be addressed to facilitate the broader use of zebrafish for chemical safety screening studies and how data science can be applied to address some of those issues.

DATES: *First Webinar:* February 2, 2017, from 11:30 a.m. to 1:00 p.m. Eastern Standard Time (EST).

Subsequent Webinars: February 16, 2017; March 2, 2017; both webinars will be presented from 11:30 a.m. to 12:30 p.m. EST.

Registration for Webinars: Registration will be open continuously; registration for any webinar will automatically register the participant for all subsequent webinars.

ADDRESSES: *Web page:* The preliminary agenda, registration, and other meeting materials are at *http://ntp.niehs.nih.gov/go/zfweb-2017.*

FOR FURTHER INFORMATION CONTACT: Dr. Elizabeth Maull, NTP Interagency Center for the Evaluation of Alternative Toxicological Methods (NICEATM), at telephone: (919) 316–4668 or email: *maull@niehs.nih.gov.*

SUPPLEMENTARY INFORMATION:

Background: The small size and rapid development of the zebrafish make it a useful vertebrate model for assessing potential effects of chemicals on development in a medium to high-throughput manner. However, a lack of harmonization in several key protocol components hinders the broader adoption of the zebrafish model for toxicological screening. In an effort to address this issue, NTP launched the Systematic Evaluation of the Application of Zebrafish in Toxicology (SEAZIT) program.

SEAZIT is addressing the issues of variability among laboratories in the endpoints measured, as well as the nomenclature used for each endpoint. NICEATM is organizing a webinar series in support of the SEAZIT program that will consider how these issues might be addressed by implementation of standardized nomenclature systems, also known as ontologies.

Webinars in this series will (1) summarize some of the barriers to routine use of zebrafish in toxicological evaluations, (2) review the concept of ontologies, and (3) consider how ontologies could be applied to harmonize procedures used for zebrafish screening studies.

Webinar Topics and Other Information: A link to registration and additional information about the webinar series, including topics and speakers for all webinars, are available at *http://ntp.niehs.nih.gov/go/zfweb-2017.* The webinar steering committee is

comprised of representatives from academia, industry, and government.

Webinar and Registration: The webinars are open to the public, free of charge, with attendance limited only by available webcasting capacity. Individuals who plan to attend the first webinar should register at *http://ntp.niehs.nih.gov/go/zfweb-2017* by February 2, 2017. Subsequent webinars will be presented on February 16 and March 2; registration for any webinar will automatically register the participant for all subsequent webinars. Interested individuals are encouraged to visit *http://ntp.niehs.nih.gov/go/zfweb-2017* to stay abreast of the most current information about the webinar series.

Individuals with disabilities who need accommodation to participate in this event should contact Dr. Elizabeth Maull at telephone: (919) 316–4668 or email: *maull@niehs.nih.gov.* TTY users should contact the Federal TTY Relay Service at (800) 877–8339. Requests should be made at least five business days in advance of the event.

Background Information on NICEATM: NICEATM conducts data analyses, workshops, independent validation studies, and other activities to assess new, revised, and alternative test methods and strategies. NICEATM also provides support for the Interagency Coordinating Committee on the Validation of Alternative Methods (ICCVAM). The ICCVAM Authorization Act of 2000 (42 U.S.C. 285*l*–3) provides authority for ICCVAM and NICEATM in the development of alternative test methods. Information about NICEATM and ICCVAM is found at *http://ntp.niehs.nih.gov/go/niceatm* and *http://ntp.niehs.nih.gov/go/iccvam,* respectively.

Dated: December 20, 2016.

John R. Bucher,

Associate Director, National Toxicology Program.

[FR Doc. 2016–31438 Filed 12–28–16; 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 contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, 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 of Allergy and Infectious Diseases Special Emphasis Panel; NIAID Peer Review Meeting.

Date: January 25, 2017.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 5601 Fishers Lane, Rockville, MD 20892, (Telephone Conference Call).

Contact Person: Susana Mendez, DVM, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, Room 3G53B, National Institutes of Health, NIAID, 5601 Fishers Lane Dr., MSC 9823, Bethesda, MD, 20892–9823, (240) 669–5077, *mendezs@niaid.nih.gov.*

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIAID Peer Review Meeting.

Date: January 26–27, 2017.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 5601 Fishers Lane, Rockville, MD 20892 (Telephone Conference Call)

Contact Person: Susana Mendez, DVM, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, Room 3G53B, National Institutes of Health, NIAID, 5601 Fishers Lane Dr. MSC 9823, Bethesda, MD 20892–9823, (240) 669–5077, *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: December 23, 2016.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–31569 Filed 12–28–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel, Aging in Cellular Models of Alzheimer's Disease.

Date: February 2, 2017.

Time: 12:01 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, Suite 2W200, 7201 Wisconsin Ave., Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Maurizio Grimaldi, MD, Ph.D., Scientific Review Officer, National Institute on Aging, National Institutes of Health, 7201 Wisconsin Avenue, Room 2C218, Bethesda, MD 20892, 301–496–9374, *grimaldim2@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 23, 2016.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–31567 Filed 12–28–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Interagency Coordinating Committee on the Validation of Alternative Methods Communities of Practice Webinar on Incorporating Chemical Information: Resources, Limitations, and Characterizing the Domain of Applicability for 21st Century Toxicity Testing; Notice of Public Webinar; Registration Information

SUMMARY: The Interagency Coordinating Committee on the Validation of Alternative Methods (ICCVAM) announces a public webinar ''Incorporating Chemical Information: Resources, Limitations, and Characterizing the Domain of Applicability for 21st Century Toxicity Testing.'' The webinar is organized on behalf of ICCVAM by the National Toxicology Program Interagency Center for the Evaluation of Alternative Toxicological Methods (NICEATM), National Institute of Environmental Health Sciences, and hosted by the U.S. Environmental Protection Agency's National Center for Computational

Toxicology. Interested persons may participate via Adobe Connect. Time will be allotted for questions from the audience.

DATES: *Webinar:* January 24, 2017, 1:00 p.m. to approximately 2:30 p.m. Eastern Standard Time (EST).

Registration for Webinar: Registration is open through 2:30 p.m. on January 24, 2017.

ADDRESSES: *Webinar Web page: http://ntp.niehs.nih.gov/go/commprac-2017.*

FOR FURTHER INFORMATION CONTACT: Dr. Warren Casey, Director, NICEATM; email: *warren.casey@nih.gov;* telephone: (919) 316–4729.

SUPPLEMENTARY INFORMATION:

Background: ICCVAM promotes the development and validation of toxicity testing methods that protect human health and the environment while replacing, reducing, or refining animal use. ICCVAM also provides guidance to test method developers and facilitates collaborations that promote the development of new test methods. To address these goals, ICCVAM will hold a Communities of Practice webinar on ''Incorporating Chemical Information: Resources, Limitations, and Characterizing the Domain of Applicability for 21st Century Toxicity Testing.''

This webinar will emphasize the importance of understanding the structural and functional diversity of chemicals used in developing and validating alternative approaches to traditional *in vivo* toxicology test methods. It will also feature next generation chemoinformatics techniques, which are being used to fully characterize chemical lists, and highlight case studies where such techniques have been successfully applied.

The ICCVAM webinar will feature presentations by two experts on characterizing the domain of applicability for validation of high throughput test methods and strategies. The preliminary agenda and additional information about presentations will be posted at *http://ntp.niehs.nih.gov/go/commprac-2017* as available.

Webinar and Registration: This webinar is open to the public with time scheduled for questions by participants following each presentation. Registration for the webinar is required and is open through 2:30 p.m. on January 24, 2017. Registration is available at *http://ntp.niehs.nih.gov/go/commprac-2017.* Registrants will receive instructions on how to access and participate in the webinar in the email confirming their registration. Interested individuals are encouraged to visit this Web page to stay abreast of the most current webinar information.

Individuals with disabilities who need accommodation to participate in this event should contact Cameron Clark at phone: (919) 541–4086 or email: *clark.cameron@epa.gov.* TTY users should contact the Federal TTY Relay Service at (800) 877–8339. Requests should be made at least five business days in advance of the event.

Background Information on ICCVAM and NICEATM: ICCVAM is an interagency committee composed of representatives from 15 federal regulatory and research agencies that require, use, generate, or disseminate toxicological and safety testing information. ICCVAM conducts technical evaluations of new, revised, and alternative safety testing methods and integrated testing strategies with regulatory applicability and promotes the scientific validation and regulatory acceptance of testing methods that more accurately assess the safety and hazards of chemicals and products and replace, reduce, or refine (enhance animal well-being and lessen or avoid pain and distress) animal use. The ICCVAM Authorization Act of 2000 (42 U.S.C. 285*l*–3) establishes ICCVAM as a permanent interagency committee of the National Institute of Environmental Health Sciences and provides the authority for ICCVAM involvement in activities relevant to the development of alternative test methods. ICCVAM acts to ensure that new and revised test methods are validated to meet the needs of federal agencies, increase the efficiency and effectiveness of federal agency test method review, and optimize utilization of scientific expertise outside the federal government. Additional information about ICCVAM can be found at *http://ntp.niehs.nih.gov/go/iccvam.*

NICEATM administers ICCVAM, provides scientific and operational support for ICCVAM-related activities, and conducts and publishes analyses and evaluations of data from new, revised, and alternative testing approaches. NICEATM and ICCVAM work collaboratively to evaluate new and improved testing approaches applicable to the needs of U.S. federal agencies. NICEATM and ICCVAM welcome the public nomination of new, revised, and alternative test methods and strategies for validation studies and technical evaluations. Additional information about NICEATM can be found at *http://ntp.niehs.nih.gov/go/niceatm.*

Dated: December 19, 2016.

John R. Bucher,

Associate Director, National Toxicology Program.

[FR Doc. 2016–31439 Filed 12–28–16; 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; NIH Big Data to Knowledge (BD2K) Enhancing Diversity in Biomedical Data.

Date: January 23, 2017.

Time: 12:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Delia Olufokunbi Sam, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3158, MSC 7770, Bethesda, MD 20892, 301–435–0684, *olufokunbisamd@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR Panel: Mammalian Models for Translational Research.

Date: January 24, 2017.

Time: 2:30 p.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Sharon K Gubanich, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6195D, MSC 7804, Bethesda, MD 20892, (301) 408–9512, *gubanics@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR Panel: High Throughput Screening.

Date: January 26, 2017.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: David Filpula, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6181, MSC 7892, Bethesda, MD 20892, 301–435–2902, *filpuladr@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR 16–116: Bioengineering Research Partnerships (BRP).

Date: January 27, 2017.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892.

Contact Person: Songtao Liu, MD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5108, Bethesda, MD 20817, 301–435–3578, *songtao.liu@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: December 23, 2016.

Anna Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–31565 Filed 12–28–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel, Developing Infrastructure for Interdisciplinary Aging Research.

Date: January 19, 2017.

Time: 3:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, Suite 2W200, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Anita H. Undale, Ph.D., MD, Scientific Review Officer, Scientific Review Branch, National Institute on Aging, Gateway Building, Suite 2W200, 7201 Wisconsin Avenue, Bethesda, MD 20892, 240–747–7825, *anita.undale@nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 23, 2016.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–31608 Filed 12–28–16; 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 NIAID Clinical Trial Implementation Cooperative Agreement (U01).

Date: January 23, 2017.

Time: 1:30 p.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 5601 Fishers Lane, Rockville, MD 20892, (Telephone Conference Call).

Contact Person: Paul A. Amstad, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, Room 3G41, NIAID/NIH/DHHS, 5601 Fishers Lane, Bethesda, MD 20892–7616, 240–669–5067, *pamstad@niaid.nih.gov.*

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel NIAID Clinical Trial Planning Grants (R34)

Date: January 24, 2017.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6120 Executive Blvd., Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Paul A. Amstad, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, Room 3G41, NIAID/NIH/DHHS, 5601 Fishers Lane, Bethesda, MD 20892–7616, 240–669–5067, *pamstad@niaid.nih.gov.*

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel NIAID Clinical Trial Implementation Cooperative Agreement (U01).

Date: January 26, 2017.

Time: 11:30 a.m. to 1:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 5601 Fishers Lane, Rockville, MD 20892, (Telephone Conference Call).

Contact Person: Paul A. Amstad, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, Room 3G41, NIAID/NIH/DHHS, 5601 Fishers Lane, Bethesda, MD 20892–7616, 240–669–5067, *pamstad@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: December 23, 2016.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–31570 Filed 12–28–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental 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: National Institute of Mental Health Special Emphasis Panel, Applied Research Toward Zero Suicide Healthcare Systems.

Date: January 31, 2017.

Time: 8:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD 20814.

Contact Person: David I. Sommers, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, National Institutes of Health, 6001 Executive Blvd., Room 6154, MSC 9606, Bethesda, MD 20892–9606, 301–443–7861, *dsommers@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program No. 93.242, Mental Health Research Grants, National Institutes of Health, HHS)

Dated: December 23, 2016.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–31571 Filed 12–28–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Nursing Research; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Nursing Research Special Emphasis Panel Multicenter Clinical Grants.

Date: January 25, 2017.

Time: 11:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, One Democracy Plaza, 6701 Democracy Boulevard, Suite 703, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Tamizchelvi Thyagarajan, Ph.D., Scientific Review Officer, Office of Review, Division of Extramural Activities, National Institute of Nursing Research, National Institutes of Health, One Democracy Plaza, 6701 Democracy Boulevard, Suite 703, Bethesda, MD 20892, (301) 402–5807, *tamizchelvi.thyagarajan@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.361, Nursing Research, National Institutes of Health, HHS)

Dated: December 23, 2016.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–31578 Filed 12–28–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meetings

Pursuant to section 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 material, 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 Heart, Lung, and Blood Institute Special Emphasis Panel; Technologies for the CART Demonstration Project for Collaborative Aging Research.

Date: January 24, 2017.

Time: 2:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6701 Rockledge Drive, Room 7182, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Susan Wohler Sunnarborg, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National, Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7182, Bethesda, MD 20892, *sunnarborgsw@nhlbi.nih.gov*.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; SBIR Topic 100 MRI Myocardial Needle Chemoablation Catheter.

Date: January 25, 2017.

Time: 1:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6701 Rockledge Drive, Room 7178, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: William J Johnson, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7178, Bethesda, MD 20892–7924, 301–435–0725, *johnsonwj@nhlbi.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: December 22, 2016.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–31432 Filed 12–28–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meetings

Pursuant to section 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 Cancer Institute Special Emphasis Panel; Fundamental Mechanisms of Affective and Decisional Processes in Cancer Control.

Date: January 17, 2017.

Time: 10:45 a.m. to 1:00 p.m.

Agenda: To review and evaluate cooperative agreement applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W530, Rockville, MD 20850, (Telephone Conference Call).

Contact Person: Shamala K. Srinivas, Ph.D., Associate Director, Office of Referral, Review, and Program Coordination, Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W530, Rockville, MD 20892–9750, 240–276–6442, *ss537t@nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI Program Project I (P01).

Date: January 31–February 1, 2017.

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.

Contact Person: Majed M. Hamawy, Ph.D., Scientific Review Officer, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W120, Rockville, MD 20892–9750, 240–276–6457, *mh101v@nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI SPORE III Review.
Date: February 9–10, 2017.
Time: 8:00 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Bethesda North Marriott Hotel & Conference Center, 5701 Marinelli Road, Bethesda, MD 20852.
Contact Person: Klaus B. Piontek, Ph.D., Scientific Review Officer, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W612, Rockville, MD 20892–9750, 240–276–5413, *klaus.piontek@nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI R03/R21 SEP–7.
Date: February 14, 2017.
Time: 9:00 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W110, Rockville, MD 20850, (Telephone Conference Call).
Contact Person: Robert E. Bird, Ph.D., Scientific Review Officer, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W110, Rockville, MD 20892–9750, 240–276–6344, *birdr@mail.nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; Cancer Target Discovery and Development Network (U01).
Date: February 15, 2017.
Time: 10:00 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W108, Rockville, MD 20850, (Telephone Conference Call).
Contact Person: Clifford W. Schweinfest, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W108, Rockville, MD 20892–9750, 240–276–6343 *schweinfestcw@mail.nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI R03/R21 SEP–2.
Date: February 16–17, 2017.
Time: 8:00 a.m. to 12:00 p.m.
Agenda: To review and evaluate grant applications.
Place: The Ritz-Carlton, Tysons Corner, 1700 Tysons Boulevard, McLean, VA 22102.
Contact Person: Eun Ah Cho, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W104, Rockville, MD 20892–9750, 240–276–6342, *choe@mail.nih.gov*.

Name of Committee: National Cancer Institute Initial Review Group; Subcommittee I—Transition to Independence.
Date: February 16–17, 2017.
Time: 8:00 a.m. to 5:30 p.m.
Agenda: To review and evaluate grant applications.
Place: Doubletree Hotel Bethesda, 8120 Wisconsin Avenue, Bethesda, MD 20814.
Contact Person: Delia Tang, MD, Scientific Review Officer, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W602, Rockville, MD 20892–9750, 240–276–6456, *tangd@mail.nih.gov*.

Name of Committee: National Cancer Institute Initial Review Group; Subcommittee F—Institutional Training and Education.
Date: February 27–28, 2017.
Time: 7:30 p.m. to 4:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Bethesda Marriott Suites, 6711 Democracy Boulevard, Bethesda, MD 20817.
Contact Person: Timothy C. Meeker, MD, Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W606, Rockville, MD 20892–9750, 240–276–6464, *meekert@mail.nih.gov.*

Name of Committee: National Cancer Institute Initial Review Group; Subcommittee J—Career Development.
Date: March 1–2, 2017.
Time: 8:00 a.m. to 4:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Bethesda Marriott Suites, 6711 Democracy Boulevard, Bethesda, MD 20817.
Contact Person: Tushar Deb, Ph.D., Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W624, Rockville, MD 20892–9750, 240–276–9684, *tushar.deb@nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI P01/P50 Supplements.
Date: March 7, 2017.
Time: 12:00 p.m. to 4:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W110, Rockville, MD 20850, (Telephone Conference Call).
Contact Person: Robert E. Bird, Ph.D., Scientific Review Officer, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W110, Rockville, MD 20892–9750, 240–276–6344, *birdr@mail.nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI R01 Meeting.
Date: March 8, 2017.
Time: 12:00 p.m. to 4:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W110, Rockville, MD 20850, (Telephone Conference Call).
Contact Person: Robert E. Bird, Ph.D., Scientific Review Officer, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W110, Rockville, MD 20892–9750, 240–276–6344, *birdr@mail.nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI R21 and R03 SEP–8.
Date: April 11, 2017.
Time: 10:00 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Rockville, MD 20850, (Telephone Conference Call).
Contact Person: Nadeem Khan, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W260, Rockville, MD 20892–9750, 240–276–7684, *nadeem.khan@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: December 22, 2016.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–31431 Filed 12–28–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0067]

Agency Information Collection Activities: Application for Asylum and for Withholding of Removal, Form I–589; Revision of a Currently Approved Collection

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

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 information collection notice was previously published in the **Federal Register** on September 19, 2016, at 84 FR 64190, allowing for a 60-day public comment period. USCIS did receive

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 January 30, 2017. 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.* Comments may also be submitted via fax at (202) 395–5806. (This is not a toll-free number.) All submissions received must include the agency name and the OMB Control Number 1615–0067.

You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make. For additional information please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, 20 Massachusetts Avenue NW., Washington, DC 20529–2140, Telephone number (202) 272–8377 (This is not a toll-free number; comments are not accepted via telephone message.). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS Web site at *http://www.uscis.gov,* or call the USCIS National Customer Service Center at (800) 375–5283; TTY (800) 767–1833.

SUPPLEMENTARY INFORMATION:

Comments

You may access the information collection instrument with instructions, or additional information by visiting the Federal eRulemaking Portal site at: *http://www.regulations.gov* and enter USCIS–2007–0034 in the search box. 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 Asylum and for Withholding of Removal.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–589; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. Form I–589 is necessary to determine whether an alien applying for asylum and/or withholding of removal in the United States is classified as refugee, and is eligible to remain in the United States.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–589 is approximately 157,372 and the estimated hour burden per response is 12 hours per response; and the estimated number of respondents providing biometrics is 97,152 and the estimated hour burden per response is 1.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 2,002,132 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $61,689,824.

Dated: December 22, 2016.

Samantha Deshommes,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2016–31429 Filed 12–28–16; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–ES–2016–N220; FXES11130100000–178–FF01E00000]

Endangered Species; Recovery Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of permit applications; request for comment.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on applications for recovery permits to conduct activities with the purpose of enhancing the survival of endangered species. With some exceptions, the Endangered Species Act of 1973, as amended (Act), prohibits certain activities with endangered species unless a Federal permit allows such activity. The Act also requires that we invite public comment before issuing these permits.

DATES: To ensure consideration, please send your written comments by January 30, 2017.

ADDRESSES: Program Manager, Restoration and Endangered Species Classification, Ecological Services, U.S. Fish and Wildlife Service, Pacific Regional Office, 911 NE 11th Avenue, Portland, OR 97232–4181. Please refer to the permit number for the application when submitting comments.

FOR FURTHER INFORMATION CONTACT: Colleen Henson, Fish and Wildlife Biologist, at the above address, or by telephone (503–231–6131) or fax (503–231–6243).

SUPPLEMENTARY INFORMATION:

Background

The Act (16 U.S.C. 1531 *et seq.*) prohibits certain activities with respect to endangered and threatened species unless a Federal permit allows such activity. Along with our implementing regulations in the Code of Federal Regulations (CFR) at 50 CFR 17, the Act provides for certain permits, and requires that we invite public comment before issuing these permits for endangered species.

A permit granted by us under section 10(a)(1)(A) of the Act authorizes the permittee to conduct activities (including take or interstate commerce) with respect to U.S. endangered or threatened species for scientific purposes or enhancement of propagation or survival. Our regulations implementing section 10(a)(1)(A) of the Act for these permits are found at 50 CFR 17.22 for endangered wildlife

species, 50 CFR 17.32 for threatened wildlife species, 50 CFR 17.62 for endangered plant species, and 50 CFR 17.72 for threatened plant species.

Applications Available for Review and Comment

We invite local, State, and Federal agencies and the public to comment on the following applications. Please refer to the permit number for the application when submitting comments.

Documents and other information submitted with these applications are available for review by request from the Program Manager for Restoration and Endangered Species Classification at the address listed in the **ADDRESSES** section of this notice, subject to the requirements of the Privacy Act (5 U.S.C. 552a) and the Freedom of Information Act (5 U.S.C. 552).

Permit Number: TE–80538A

Applicant: H.T. Harvey and Associates, Los Gatos, California.

The applicant requests a permit renewal with changes to take (capture, handle, measure, band, collect bio-samples, attach radio-transmitters and light emitting diodes, release, and recapture) the Hawaiian hoary bat (*Lasiurus cinereus semotus*) in conjunction with research, monitoring, and population studies in Hawai'i for the purpose of enhancing the species' survival.

Permit Number: TE–05083C

Applicant: Nathan Schwab, Missoula, Montana.

The applicant requests a new permit to take (capture, handle, measure, band, collect bio-samples, attach radio-transmitters, release, and recapture) Hawaiian hoary bat (*Lasiurus cinereus semotus*) in conjunction with research, survey, and population monitoring activities in Hawai'i, for the purpose of enhancing the species' survival.

Public Availability of Comments

All comments and materials we receive in response to this request will be available for public inspection, by appointment, during normal business hours at the address listed in the **ADDRESSES** section.

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: We provide this notice under section 10 of the Act (16 U.S.C. 1531 *et seq.*).

Dated: December 22, 2016.

Jason D. Holm

Acting, Regional Director, Pacific Region, U.S. Fish and Wildlife Service.

[FR Doc. 2016–31647 Filed 12–28–16; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–HQ–LE–2016–N211; FF09L00200–FX–LE18110900000]

Information Collection Request Sent to the Office of Management and Budget (OMB) for Approval; Federal Fish and Wildlife Permit Applications and Reports—Law Enforcement

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (U.S. Fish and Wildlife Service) have sent an Information Collection Request (ICR) to OMB for review and approval. We summarize the ICR below and describe the nature of the collection and the estimated burden and cost. This information collection is scheduled to expire on December 31, 2016. We may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. However, under OMB regulations, we may continue to conduct or sponsor this information collection while it is pending at OMB.

DATES: You must submit comments on or before January 30, 2017.

ADDRESSES: Send your comments and suggestions on this information collection to the Desk Officer for the Department of the Interior at OMB–OIRA at (202) 395–5806 (fax) or *OIRA_Submission@omb.eop.gov* (email). Please provide a copy of your comments to the Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service, MS BPHC, 5275 Leesburg Pike, Falls Church, VA 22041–3803 (mail), or *tina_campbell@fws.gov* (email). Please include ''1018–0092'' in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Tina Campbell at *tina_campbell@fws.gov* (email) or 703–358–2676 (telephone). You may review the ICR online at *http://www.reginfo.gov.* Follow the instructions to review Department of the Interior collections under review by OMB.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 1018–0092.

Title: Federal Fish and Wildlife Permit Applications and Reports—Law Enforcement, 50 CFR parts 13 and 14.

Service Form Numbers: 3–200–2, 3–200–3a, and 3–200–3b.

Type of Request: Extension of a currently approved collection.

Description of Respondents: Individuals, businesses, scientific institutions, and State, local, or tribal governments.

Respondent's Obligation: Required to obtain or retain a benefit.

Activity	Total annual responses	Completion time per response (hours)	Total annual burden hours	Hourly rate including benefits	$ Value of annual burden hours *
3–200–2—Designated Port Exception Permit (application and recordkeeping):					
Private Sector	755	1.25	944	$25.18	$23,770
Individuals	629	1.25	786	34.69	27,266
Government	14	1.25	18	45.14	813
3–200–2 Subtotal	1,398	.....	1748	.....	51,849
Designated Port Exception Permit Report (private sector)	5	1	5	25.18	126
3–200–3a—Import/Export License—U.S. Entities (application and recordkeeping (private sector))	9,225	1.25	11,531	25.18	290,350
3–200–3b—Import/Export License—Foreign Entities (application and recordkeeping (private sector))	126	1.25	158	25.18	3,979
Import/Export License Report (priv. sector)	10	1	10	25.18	252

Activity	Total annual responses	Completion time per response (hours)	Total annual burden hours	Hourly rate including benefits	$ Value of annual burden hours *
Totals	10,764		13,452		346,556

Estimated Annual Nonhour Burden Cost: $1,073,500.

Abstract: The Endangered Species Act (16 U.S.C. 1531 *et seq.;* ESA) makes it unlawful to import or export wildlife or wildlife products for commercial purposes without first obtaining an import/export license (see 16 U.S.C. 1538(d)). The ESA also requires that fish or wildlife be imported into or exported from the United States only at a designated port or at a nondesignated port under certain limited circumstances (see 16 U.S.C. 1538(f)). This information collection includes the following permit/license application forms:

(1) FWS Form 3–200–2 (Designated Port Exception Permit). Under 50 CFR 14.11, it is unlawful to import or export wildlife or wildlife products at ports other than those designated in 50 CFR 14.12 unless you qualify for an exception. The following exceptions allow qualified individuals, businesses, or scientific organizations to import or export wildlife or wildlife products at a nondesignated port:

(a) To export the wildlife or wildlife products for scientific purposes;

(b) To minimize deterioration or loss; or

(c) To relieve economic hardship.

To request authorization to import or export of wildlife or wildlife products at nondesignated ports, applicants must complete FWS Form 3–200–2. Designated port exception permits can be valid for up to 2 years. We may require a permittee to file a report on activities conducted under authority of the permit.

(2) FWS Form 3–200–3a and 3–3b (Import/Export License). It is unlawful to import or export wildlife or wildlife products for commercial purposes without first obtaining an import/export license (50 CFR 14.91). Applicants located in the United States must complete FWS Form 3–200–3a to request this license. Foreign applicants that reside or are located outside the United States must complete FWS Form 3–200–3b to request this license. We use the information that we collect on the application as an enforcement tool and management aid to (a) monitor the international wildlife market and (b) detect trends and changes in the commercial trade of wildlife and wildlife products. Import/export licenses are valid for up to 1 year. We may require a licensee to file a report on activities conducted under authority of the import/export license.

Permittees and licensees must maintain records that accurately describe each importation or exportation of wildlife or wildlife products made under the license, and any additional sale or transfer of the wildlife or wildlife products. In addition, licensees must make these records and the corresponding inventory of wildlife or wildlife products available for our inspection at reasonable times, subject to applicable limitations of law. We believe the burden associated with these recordkeeping requirements is minimal because the records already exist. Importers and exporters must complete FWS Form 3–177 (Declaration for Importation or Exportation of Fish or Wildlife) for all imports or exports of wildlife or wildlife products. This form provides an accurate description of the imports and exports. OMB has approved the information collection for FWS Form 3–177 and assigned OMB Control Number 1018–0012. Normal business practices should produce records (*e.g.,* invoices or bills of sale) needed to document subsequent sales or transfers of the wildlife or wildlife products.

Comments: On September 6, 2016, we published in the **Federal Register** (81 FR 61239) a notice of our intent to request that OMB renew approval for this information collection. In that notice, we solicited comments for 60 days, ending on November 7, 2016. We received no comments in response to this notice.

We again invite comments concerning this information collection on:

- Whether or not the collection of information is necessary, including whether or not the information will have practical utility;
- The accuracy of our estimate of the burden for this collection of information;
- Ways to enhance the quality, utility, and clarity of the information to be collected; and
- Ways to minimize the burden of the collection of information on respondents.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask OMB in your comment to withhold your personal identifying information from public review, we cannot guarantee that it will be done.

Dated: December 23, 2016.

Tina A. Campbell,

Chief, Division of Policy and Directives Management, U.S. Fish and Wildlife Service.

[FR Doc. 2016–31584 Filed 12–28–16; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

[Docket No. ONRR–2012–0003; DS63602000 DR2000000.PX8000 178D0102R2]

U.S. Extractive Industries Transparency Initiative Multi-Stakeholder Group (USEITI MSG) Advisory Committee Meeting Notice

AGENCY: Office of the Secretary, Office of Natural Resources Revenue, Interior.

ACTION: Meetings.

SUMMARY: This notice announces the next three meetings of the United States Extractive Industries Transparency Initiative (USEITI) Multi-Stakeholder Group (MSG) Advisory Committee.

DATES AND TIMES: The three meetings in 2017 will occur on February 1–2, June 7–8, and November 15–16, in Washington, DC, from 9:00 a.m. to 5:00 p.m. Eastern Time, unless we indicate otherwise at *www.doi.gov/eiti/faca,* where we will post agendas, meeting logistics, and meeting materials prior to the meeting.

ADDRESSES: The first two meetings will be held in the South Penthouse of the Stewart Lee Udall Department of the Interior Building located at 1849 C Street NW., Washington, DC 20240, and the third meeting will be held in Room 5160 at the same location. Members of the public may attend in person or view documents and presentations under discussion via WebEx at *http://bit.ly/1cR9W6t* and listen to the proceedings at telephone number 1–888–455–2910 and International Toll number 210–839–8953 (passcode: 7741096).

FOR FURTHER INFORMATION CONTACT: Judith Wilson, USEITI Secretariat, 1849 C Street NW., MS 4211, Washington, DC 20240. You may also contact the USEITI Secretariat via email to *useiti@ios.doi.gov,* by phone at 202–208–0272, or by fax at 202–513–0682.

SUPPLEMENTARY INFORMATION: The U.S. Department of the Interior established the USEITI Advisory Committee (Committee) on July 26, 2012, to serve as the USEITI multi-stakeholder group. More information about the Committee, including its charter, is available at *www.doi.gov/eiti/faca.*

Meeting Agendas: At the February 1–2, 2017, meeting the MSG will discuss and decide scope, approaches to the Independent Administrator's (IA) recommendations regarding Reporting and Reconciliation, and the first phase of additions and updates to the USEITI Data Portal for the 2017 USEITI Report. The June 7–8, 2017, meeting agenda will include the MSG discussion of the IA draft Executive Summary and the second phase of additions and updates to the USEITI Data Portal for the 2017 USEITI Report. At the November 15–16, 2017, meeting the MSG will discuss and approve the final 2017 USEITI Report and the 2018 Annual Workplan. The USEITI Secretariat, which is the administrator for USEITI, will post the final agendas and materials for all meetings on the USEITI MSG Web site at *www.doi.gov/eiti/faca.* All Committee meetings are open to the public.

Whenever possible, we encourage those participating by telephone to gather in conference rooms in order to share teleconference lines. Please plan to dial into the meeting and/or log into WebEx at least 10–15 minutes prior to the scheduled start time in order to avoid possible technical difficulties. We will accommodate individuals with special needs whenever possible. If you require special assistance (such as an interpreter for the hearing impaired), please notify Department of the Interior staff in advance of the meeting at 202–208–0272 or via email to *useiti@ios.doi.gov.*

We will post the minutes from these proceedings on the USEITI MSG Web site at *www.doi.gov/eiti/faca* and they will also be available for public inspection and copying at our office at the Stewart Lee Udall Department of the Interior Building in Washington, DC by contacting Department of the Interior staff via email to *useiti@ios.doi.gov* or by telephone at 202–208–0272. For more information on USEITI, visit *www.doi.gov/eiti.*

Dated: December 13, 2016.

Gregory J. Gould,

Director, Office of Natural Resources Revenue.

[FR Doc. 2016–31620 Filed 12–28–16; 8:45 am]

BILLING CODE 4335–30–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLORB00000.L17110000.PH0000. LXSSH1060000.17XL1109AF; HAG 17–0053]

Notice of Public Meeting for the Steens Mountain 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, and the U.S. Department of the Interior, Bureau of Land Management (BLM), the Steens Mountain Advisory Council (SMAC) will meet as indicated below:

DATES: Thursday, January 19, 2017 from 10 a.m. to 5 p.m., and Friday, January 20, 2017, from 8:30 a.m. to 2 p.m., at the Hilton Garden Inn, 425 SW Bluff Drive, Bend, Oregon. Daily sessions may end early if all business items are accomplished ahead of schedule, or go longer if discussions warrant more time.

FOR FURTHER INFORMATION CONTACT: Tara Thissell, Public Affairs Specialist, BLM Burns District Office, 28910 Highway 20 West, Hines, Oregon 97738, (541) 573–4519, or email *tthissell@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 1(800) 877–8339 to contact the above individual during normal business hours. The service is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The SMAC was initiated August 14, 2001, pursuant to the Steens Mountain Cooperative Management and Protection Act of 2000 (Pub. L. 106–399). The SMAC provides representative counsel and advice to the BLM regarding new and unique approaches to management of the land within the bounds of the Steens Mountain Cooperative Management and Protection Area (CMPA), recommends cooperative programs and incentives for landscape management that meet human needs, and advises the BLM on maintenance and improvement of the ecological and economic integrity of the area. Agenda items for January 19–20, 2017 session include, but are not limited to: An update from the Designated Federal Official; information sharing on the implementation of projects for the Steens Mountain Comprehensive Recreation Plan; discussion of access to inholdings in the CMPA; a subcommittee report and discussion on public access at Pike Creek Canyon; and regular business items such as approving the previous meeting's minutes, member round-table, and planning the next meeting's agenda. Any other matters that may reasonably come before the SMAC may also be included, such as program status updates and previous meetings' follow-up items. A public comment period is available both days. Unless otherwise approved by the SMAC Chair, the public comment period will last no longer than 30 minutes, and each speaker may address the SMAC for a maximum of five minutes.

Jeff Rose,

Burns District Manager.

[FR Doc. 2016–31648 Filed 12–28–16; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWY930000.L10100000.PH0000]

Notice of Availability of the BLM Draft Presumed To Conform List of Actions Under General Conformity—Upper Green River Basin, Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Clean Air Act, Clean Air Act Amendments of 1990, and U.S. Environmental Protection Agency's (EPA) regulations, the Bureau of Land Management (BLM) has developed a Draft Presumed to Conform List of Actions under General Conformity for the Upper Green River Basin (UGRB) ozone nonattainment area and by this notice is announcing the opening of the comment period.

DATES: To ensure comments will be considered, the BLM must receive comments on the Draft Presumed to Conform List on or before February 13, 2017. The BLM will announce future meetings or hearings and any other public involvement activities at least 15 days in advance through media releases.

ADDRESSES: Comments may be submitted by any of the following methods:

- *Web site: http://bit.ly/WYPtCList.*
- *Email: BLM_WY_PTCList_comments@blm.gov.*

Copies of the Draft Presumed to Conform List are available at the BLM Wyoming State Office, 5353 Yellowstone Road, Cheyenne, WY 82009 and online at the above Web site.

FOR FURTHER INFORMATION CONTACT: Charis Tuers, Air Resource Specialist; Telephone: 307–775–6099; address: BLM Wyoming State Office, 5353 Yellowstone Road, Cheyenne, WY 82009, or P.O. Box 1828, Cheyenne, WY 82003; or email: *BLM_WY_PTCList_comments@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 1–800–877–8339 to contact the above individual during normal business hours. The Service 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 Clean Air Act section 176(c), 42 U.S.C. 7506(c) and Clean Air Act Amendments of 1990 [1] require that all Federal actions conform to an applicable State Implementation Plan (SIP) for the criteria pollutants and precursors identified in 40 CFR 93.153(b)(1) and (b)(2) and in the National Ambient Air Quality Standards (NAAQS) under 40 CFR 50.4–50.12.[2] The criteria pollutants for which there are established NAAQS include: ozone (O_3), carbon monoxide (CO), nitrogen dioxide (NO_2), lead (Pb), sulfur dioxide (SO_2),[3] particulate matter consisting of particles with a diameter less than or equal to 2.5 micrometers ($PM_{2.5}$), and particulate matter consisting of particles with a diameter greater than 2.5 but less than or equal to 10 micrometers (PM_{10}).[4] A SIP is the written plan submitted to the EPA detailing a state's strategy to control air emissions to meet and maintain the NAAQS for these pollutants, and thus to comply with the Clean Air Act.[5]

The U.S. Environmental Protection Agency (EPA) has established criteria and procedures for Federal agencies to use in demonstrating conformity with an applicable SIP. The criteria and procedures can be found at 40 CFR 93.150 *et seq.* (General Conformity Rule).

The General Conformity Rule allows Federal agencies to develop a list of actions that are presumed to conform to a SIP with respect to the criteria pollutants and their precursors that are identified in 40 CFR 93.153(b)(1) and (b)(2). Addressing the need for efficiency and streamlining, the EPA states that the provisions allowing Federal agencies to establish categories of actions that are presumed to conform are ''intended to assure that these Rules are not overly burdensome and Federal agencies would not spend undue time assessing actions that have little or no impact on air quality.'' [6] Furthermore, the EPA states that ''Federal actions which are de minimis should not be required by this Rule to make an applicability analysis.'' [7] To achieve this end, the General Conformity Rule allows individual Federal agencies to present categories of activities that have been documented to have de minimis emissions, and therefore could be presumed to conform under 40 CFR 93.153(f).

To identify actions that are presumed to conform, Federal agencies must meet the following criteria from the General Conformity regulations:

(1) Clearly demonstrate that the total of direct and indirect emissions of the criteria pollutants or precursor pollutants from the type of activities that would be presumed to conform would not:

(i) Cause or contribute to any new violation of any standard in any area;

(ii) Interfere with provisions in the applicable SIP for maintaining any standard;

(iii) Increase the frequency or severity of any existing violation of any standard in any area; or

(iv) Delay timely attainment of any standard or any required interim emission reductions or other milestones in any area including emission levels specified in the applicable SIP; [8] or

(2) Provide documentation that emissions from the types of actions that would be presumed to conform are below the applicable thresholds established in 40 CFR 93.153(b)(1) and (b)(2).[9] This documentation may be based on similar actions that the agency has taken over recent years.[10]

Besides documenting the basis for presuming that the activities would conform, Federal agencies must fulfill procedural requirements under the General Conformity Rule by publishing the list of activities that are presumed to conform in the **Federal Register**; notifying Federal, State, and local agencies that the list is available; providing opportunity for public comment; and making available the agency's responses to any public comments.[11]

The BLM has developed a draft list of activities that are Presumed to Conform to Wyoming's SIP for the Upper Green River Basin (UGRB) ozone nonattainment area. Wyoming's UGRB was designated by EPA as an ozone nonattainment area with a marginal classification on April 30, 2012. A nonattainment area is any area that does not meet the national primary or secondary ambient air quality standard for the specified pollutant. Ozone nonattainment designations are classified based on the severity of the nonattainment. A marginal designation is the lowest, or least severe, classification. As a result of the nonattainment designation, the BLM must comply with the General Conformity regulations in 40 CFR 93 Subpart B (which have subsequently been incorporated by the State of Wyoming in Chapter 8, Section 3 of the Wyoming Air Quality Standards and Regulations (WAQSR)) before authorizing or approving any Federal action undertaken within the designated nonattainment area.

As noted, the BLM must demonstrate conformity by completing a conformity analysis, and cannot approve any action that would cause or contribute to a new violation of the applicable NAAQS or increase the frequency or severity of any existing violation. With respect to ozone in the UGRB, the presumed to conform analysis is completed by ensuring that emissions of volatile organic compounds (VOCs) and nitrogen oxides (NO_X), the precursor pollutants that form ground level ozone, are below the de minimis emission thresholds specified in the regulations for marginal nonattainment areas. The de minimis emission thresholds identified in 40 CFR 93.153(b)(1) and (b)(2) for a marginal ozone nonattainment are 100 tons/year of VOCs and 100 tons/year of NO_X). Federal actions and activities that demonstrate total direct and indirect emissions below the de minimis emission thresholds can be presumed to conform to the regulations and authorized without further analysis. Actions that exceed the de minimis emission thresholds require further

[1] The Clean Air Act Title 1 Air Pollution Prevention and Control, Part D. Subpart 1, Section 176 Limitation on Certain Federal Assistance.

[2] The NAAQS established by the EPA represent maximum concentration standards for criteria pollutants to protect human health (primary standards) and to protect property and aesthetics (secondary standards).

[3] The BLM calculated SO_X is considered equal to SO_2.

[4] $PM_{2.5}$ is a subset of PM_{10} with separate standards for each.

[5] 40 CFR 93.153(f).

[6] 58 FR 63228 (Nov. 30, 1993).

[7] 58 FR 63229 (Nov. 30, 1993).

[8] 40 CFR 93.153(g)(1).

[9] 40 CFR 93.153(g)(2).

[10] Ibid.

[11] 40 CFR 93.153(h).

evaluation and a conformity determination.

In this Notice, the BLM is identifying a list of de minimis actions and activities that are presumed to conform. This Notice contains a summary of documentation and analysis that demonstrates that the actions described will not exceed the applicable emission levels for the UGRB ozone nonattainment area. The actions involve BLM approval and/or financial assistance for projects or agency activities within the UGRB in Wyoming. Adoption of the list would reduce agency costs and time associated with conducting individualized evaluations of actions that have minimal emissions. Once the list is finalized, the BLM will be able to improve its environmental review process by streamlining review of actions with minimal impacts and applying more resources to actions that have the potential to reach regulated emission levels or adversely impact air quality.

This draft list identifies two categories of actions: (1) Actions that are presumed to conform to the SIP for the UGRB area because they are projected to result in emissions lower than the established de minimis thresholds; and (2) actions that are entirely exempt from the General Conformity Rule, under 40 CFR 93.153(c)(2), because they fall within broad categories of exempt actions—as defined by EPA—that result in no emissions increase, associated increases in emissions that are already covered by the SIP, or emissions increases that are clearly de minimis.

Notification Process for the BLM UGRB Presumed To Conform List

The notification requirements in the General Conformity Rule are as follows: [12]

(1) The Federal agency must publish in the **Federal Register** its draft list of activities that are presumed to conform and the basis for the presumptions;

(2) The Federal agency must notify the appropriate EPA Regional Office(s), state and local air quality agencies and, where applicable, the agency designated under section 174 of the Clean Air Act and the relevant metropolitan planning organization, and provide at least 30 days for the public to comment on the list of proposed activities presumed to conform;

(3) The Federal agency must document its response to all the comments received and make the comments, responses, and final list of activities available to the public upon request; and

(4) The Federal agency must publish the final list of activities presumed to conform in the **Federal Register**.

The BLM is initiating its notification requirements by publishing this Draft Presumed to Conform List. The public may obtain further program information or review project documentation by contacting the office and person listed under **FOR FURTHER INFORMATION CONTACT**.

The major sections of this document follow:

I. Background
II. Existing Exemptions
III. BLM UGRB Presumed To Conform List and Technical Justifications
IV. How To Apply Presumed To Conform Actions

I. Background

General conformity refers to the process of demonstrating that a Federal action conforms to the applicable SIP. A general conformity determination is required for each pollutant identified as nonattainment or maintenance in a particular area, when the total of direct and indirect emissions caused by a Federal action equals or exceeds any of the applicable thresholds.[13] In cases where emissions equal or exceed the applicable thresholds, the Federal agency must complete additional evaluation to demonstrate how the action will conform to the SIP and meet General Conformity requirements. However, for actions where the emissions are below the applicable thresholds, an applicability analysis is used to demonstrate that the emissions are below the thresholds and are considered de minimis. No further evaluation or demonstration of conformity is required if this is the case.

The procedure for assessing conformity depends on whether the relevant action is classified as a Federal ''transportation'' action or a ''general'' Federal action. A Federal transportation action is an action related to transportation plans, programs, and projects that are developed, funded, or approved under Title 23 United States Code (U.S.C.) or the Federal Transit Act (FTA).[14] A general Federal action is defined as any Federal action that is not a transportation action and consequently not subject to the conformity requirements established for Federal highway or transit actions, referred to as ''transportation conformity.'' Since the BLM actions described in this Notice do not meet the definition of a transportation action, they are general actions by default, and thus subject to the General Conformity Rule.

The BLM and other Federal agencies subject to general conformity must make a determination, prior to taking or authorizing any Federal action, that the action conforms to the applicable SIP's purpose to meet and maintain the NAAQS. If the actions are not specifically exempt, covered under an existing SIP, or classified as presumed to conform, the BLM or other agency must complete an emissions inventory as part of the applicability analysis to determine if emissions are likely to equal or exceed the established de minimis emission thresholds allowed for the nonattainment area. Administering and enforcing conformity regulations are delegated by the EPA to the individual states through provisions in each SIP. When a nonattainment area achieves compliance with the NAAQS, it becomes a maintenance area for at least 10 years, with ongoing state responsibility to ensure continued attainment.[15]

Under the General Conformity Rule (40 CFR 93.153(g) and (h)), Federal agencies may develop a list of actions that are presumed to conform to relevant SIPs. As noted, the process of establishing presumed to conform classifications is predicated on ensuring that an activity that is presumed to conform does not cause or contribute to any new violations of the NAAQS, exacerbate existing violations, or interfere with provisions contained in the applicable SIP.

II. Existing Exemptions

To provide the proper context and baseline for identifying and proposing a list of presumed to conform Federal actions for the UGRB, the BLM must first consider whether any individual actions and activities already qualify for exemption from general conformity requirements. The EPA has defined broad categories of exempt actions under 40 CFR 93.153. Actions in these categories result in no emissions increase, emissions increases that are already covered by the SIP, or emissions increases that are clearly de minimis. These exempt actions are not subject to further analysis for applicability, conformity, or regional significance under the General Conformity Rule. Further, activities that qualify for exemptions from the conformity analysis under 40 CFR 93.153 are not subject to the same public review and notification requirements as those activities that the BLM has listed as presumed to conform. Nevertheless, in

[12] 40 CFR 93.153(h)(1–4).

[13] 40 CFR 93.153(b).

[14] 49 U.S.C. 1601 *et seq.*

[15] Clean Air Act, Section 175A, 42 U.S.C. 7505a.

this **Federal Register** Notice, the BLM is identifying those activities occurring in the UGRB ozone nonattainment area that are exempt from the conformity requirements on the basis that associated emissions are de minimis. (The complete list of activities identified by the BLM as being exempt from the conformity regulation is available at: *http://bit.ly/WYPtCList.*)

A. Continuing and Recurring Activity (40 CFR 93.153(c)(2)(ii))

The BLM regularly conducts activities in support of its management of public lands in the UGRB, including but not limited to: (1) Archaeological surveys; (2) issuing grazing permits; (3) weed control on public lands; (4) resource surveys for visual resources, wildlife, etc.; and (5) collecting transportation data. These activities may involve short-term and infrequent vehicle use by employees to travel into the field. The BLM has determined that any air emissions associated with the corresponding vehicle use are de minimis, and therefore these activities are exempt from general conformity requirements.

B. Routine Maintenance and Repair Activities (40 CFR 93.153(c)(2)(iv))

BLM activities in the UGRB also involve actions that qualify as routine operations and maintenance under the General Conformity Rule. Examples of such activities include, but are not limited to: (1) Maintaining air quality monitoring equipment operated by the BLM; (2) managing solid waste collected at public use areas such as at campgrounds, picnic grounds, etc.; (3) maintaining BLM-managed lands such as cleaning cattle-guards, and windmill/fence repair; and (4) performing routine maintenance of trails, campgrounds, and other recreational sites managed by the BLM. These activities typically involve short-term and infrequent vehicle use by employees to travel into the field, and may at times also include short-term use of heavy equipment. Due to the short-term and infrequent nature of such activities, the BLM has determined that any air emissions associated with the corresponding vehicle and/or equipment use are de minimis, and therefore these activities are exempt from general conformity requirements.

It should be noted that activities that involve extensive construction and/or earthmoving are not considered routine and do not qualify under the exemption described above. However, some construction activities associated with specific projects may qualify as presumed to conform under this Draft Presumed to Conform List, depending on the level of the associated emissions.

C. Regulatory Monitoring and Inspections (40 CFR 93.153(c)(2)(v))

The BLM inspects and monitors compliance of regulated activities under its jurisdiction within the UGRB. These inspection and monitoring activities include, but are not limited to: (1) Monitoring and assessing cultural resources; (2) identifying and monitoring solid waste and/or hazardous waste sites; (3) inspecting, monitoring and assessing range, forests and other lands; (4) conducting field inspections of oil and gas operations, sand and gravel operations, and similar activities where the BLM has issued authorizations for resource development; (5) monitoring and assessing recreational activities such as off-road vehicle use; and (6) monitoring wildlife and wild horse populations on BLM-managed lands. These activities may at times involve short-term and infrequent vehicle use by employees to travel into the field. The BLM has determined that due to the short-term and infrequent nature of such activities, any air emissions associated with the corresponding vehicle use are de minimis, and therefore these activities are exempt from general conformity requirements.

D. Administrative Actions (40 CFR 93.153(c)(2)(vi))

The BLM issues permits and conducts other administrative actions as part of its land management activities. Examples of such permits include, but are not limited to: Forest permits, recreation permits, small group tours, and meetings. The administrative actions of the BLM generally do not involve activities that would produce air emissions, but they may at times include short-term and infrequent vehicle use by employees. The BLM has determined that any air emissions associated with the corresponding short-term and infrequent vehicle use are de minimis, and therefore these permitting activities are exempt from general conformity requirements.

Note that the various activities permitted by the BLM may not be exempt in their own right; the exemption described above only applies to the administrative processing of these actions. If a particular activity subject to a BLM permit or other approval is reasonably foreseeable and has quantifiable air emissions, then the specified activity will need to undergo the appropriate conformity review before the BLM issues the required permit or approval. Some related activities may be included on the BLM UGRB Presumed to Conform List.

E. Debris Removal (40 CFR 93.153(c)(2)(ix))

Activities involving debris removal from BLM-managed lands are exempt from conformity. This includes events where individuals and/or groups pick up litter and other debris at campgrounds, trails, etc. These activities are expected to involve short-term and infrequent vehicle use; however, the BLM has determined that any air emissions associated with the corresponding vehicle use are de minimis.

F. Emissions Not Reasonably Foreseeable (40 CFR 93.153(d)(3))

In some cases, BLM activities in the UGRB that do not themselves produce significant emissions may be expected to lead to future air emissions. In many cases, however, the emissions are not reasonably foreseeable or quantifiable at the time of the action. One example is offering for lease a tract or parcel of land or holding a mineral lease sale. The sale itself is an administrative action that does not authorize development or the approval of emission generating activities. However, it is recognized that the sale could result in air emissions at the time development occurs. Since the associated emissions are largely dependent on the specifics of the development proposal, which is unknown at the time of the lease offering, the emissions are not reasonably foreseeable or quantifiable at the leasing stage. However, any resource development that is proposed following the lease sale would trigger additional National Environmental Policy Act (NEPA) analysis, and the development in question would be subject to conformity requirements at that time.

G. Clean Air Act Permitted Sources (40 CFR 93.153(d)(1))

Some activities within the UGRB are subject to multiple regulatory approvals. One example is air emission units that are subject to the State of Wyoming air quality permit program administered by the Wyoming Department of Environmental Quality (WDEQ). Any regulated emissions source that receives an air quality permit through the WDEQ's New Source Review (NSR) permitting program is exempt from inclusion in the BLM's conformity analysis per 40 CFR 93.153(d)(1) and the Wyoming Air Quality Standards and Regulations, Chapter 8, Section 3.

H. Emergency Response (40 CFR 93.153(d)(2))

The BLM may at times need to provide for emergency response when incidents occur on BLM-managed lands. Examples include responding to wildfires, spills associated with oil and gas operations, or other hazardous material incidents. While such activities may include significant air emissions associated with the event itself and/or with the response, these activities are exempt because the associated emissions are not reasonably foreseeable, nor are they quantifiable. Also, the analysis involved in assessing compliance with the general conformity requirements is not generally consistent with emergencies, which require an immediate response so as not to create and/or exacerbate a public safety or other environmental hazard.

I. Research (40 CFR 93.153(d)(3))

BLM-sponsored research is also exempt from a conformity analysis. Within the UGRB, a primary BLM research activity is installing and operating air quality monitoring equipment and water quality monitoring activities. These activities may involve short-term and infrequent vehicle use by the BLM and/or its contractors. The BLM has determined that any emissions associated with vehicle use for these activities are de minimis, and therefore these activities are exempt from general conformity requirements.

J. Prescribed Fire (40 CFR 93.153(i)(2))

The BLM's land management in the UGRB may at times include the use of prescribed fire. Prescribed fire activities are exempt from conformity to the extent that the BLM conducts them according to the WDEQ's approved Prescribed Burn Management Program. Prescribed burns require a permit from the WDEQ prior to being conducted. For the purpose of conformity, any air emissions associated with prescribed fire within the confines of an approved management plan have already been incorporated into the Wyoming SIP and are exempt from the BLM conformity analysis.

III. BLM UGRB Presumed To Conform List and Technical Justification

The BLM UGRB Presumed to Conform List addresses projects proposed in the UGRB ozone nonattainment area. Conformity requires that any such project demonstrate that emissions would be less than the threshold levels given in 40 CFR 93.153(b)(1) and Chapter 8, Section 3 of the Wyoming Air Quality Standards and Regulations (WAQSR)—that is, 100 tpy for either NO_X or VOCs, the precursor pollutants that form ozone in the atmosphere. Projects on the Presumed to Conform List would be considered to conform and would not be required to develop project-specific emission inventories to demonstrate compliance. To develop the list, the BLM quantified project emissions based on similar actions undertaken, approved, or permitted by the BLM over recent years within the UGRB. The BLM recognizes that any individual project subject to BLM authorization may include multiple component activities. For any project with multiple component activities, the emissions for each pollutant need to be summed across all project-related activities to determine conformity. The project conforms if the summed NO_X and VOC emissions are less than 100 tpy for each pollutant. General Conformity for large scale oil and gas development projects that are being evaluated through an EIS will not be determined using the Presumed to Conform List. Such projects are required to submit comprehensive, detailed emission inventories for the life of the project in order to evaluate the year of maximum emissions for General Conformity compliance.

The BLM has developed the Presumed to Conform List using emissions data from a variety of sources. For operations proposed by the oil and gas industry, data were compiled from emissions information used in current and past actions. The total emissions for development and operation were summed over the expected emission sources at the project and expressed in terms of three units: Emissions per well, per road-mile, or per pipeline-mile. The emissions data were compiled in a calculation workbook and, by using this workbook, the number of such units that could be developed in a single year without emissions exceeding the conformity thresholds was calculated. For example, if developing one well is, on average, associated with emissions of nine tons of NO_X or VOC per well, then projects with up to 11 wells in a single year would be presumed to conform, (since 9 tpy*11wells = 99 tpy, which is less than the100 tpy de minimis threshold for each pollutant). Note that this example assumes the project has no additional reasonably foreseeable or quantifiable direct or indirect emissions.

Emission sources and associated activity levels were solicited from UGRB oil and gas operators for well development and operations, including associated infrastructure such as roads and pipelines. Several datasets were received and reviewed for quality control purposes. In order to maintain confidentiality of the operators, these datasets are referred to as Scenario A, Scenario B, etc. in the calculation workbook. Emissions data from the scenarios were grouped according to typical major phases of development: Construction, drilling, completion, operations/workovers, and reclamation. Within each phase, the scenario data that showed the maximum emissions per unit of development was selected. These data were then combined to form a composite scenario that represents a maximum emissions case for the activity. The composite scenario is the basis for the presumed to conform emissions estimate. Use of this composite maximum emissions case assures that the presumed to conform criteria are set conservatively—that is, this approach ensures that the estimates of emissions associated with particular levels of development overstate the actual emissions that are expected fromthe activity, and therefore the total annual emissions from the specified activities will be less than the conformity thresholds.

The following table lists the items where BLM has determined that emissions are presumed to conform. Additional discussion of each activity that is presumed to conform is presented below the table. The supporting technical calculations and workbooks for all activities included on the BLM UGRB Presumed to Conform List can be found at: *http://bit.ly/WYPtCList.* In many cases, the table lists emissions associated with particular activities on a per-unit basis (*e.g.* per well, or per mile, or per facility). For these activities, to assess whether a larger project can be presumed to conform, the number of units in the project must be multiplied by the expected per-unit emissions to determine whether the overall emissions from the project is expected to be less than the thresholds of 100 tpy NO_X and 100 tpy VOCs. For example, in the oil and gas full development scenario in the table, the emissions are estimated at 7.0 tpy of NO_X per well, and 0.4 tpy of VOCs per well; full development of up to 14 wells in a single 12-month period could therefore be presumed to conform, because 14×7.0 is 98 tpy NO_X, under the de minimis threshold of 100 tpy.

In other cases, the table lists emissions associated with overall activities, such as emissions associated with any amount of cultural resource excavation. In these cases, the total emissions for the overall activity are so low that any amount of the activity can be presumed to conform; no per-unit analysis is necessary.

TABLE 1—PRESUMED TO CONFORM ACTIVITIES

BLM resource area	Description of activity	Emissions		Comments
		NO_X (ton/yr)	VOC (ton/yr)	
Cultural Resources	Data recovery/site excavation. Excavation usually related to well pad construction.	<0.1	<0.1	Based on one passenger vehicle traveling up to 200 miles per day for 60 days.
Activities Associated with Land Use Permits, such as Rights-of-Way (ROW).	Install powerlines/transmission lines.	0.44 tons/mile	0.032 tons/mile	Calculated per mile of transmission or distribution line, based on emissions for a 24-mile project.
	Install roads (non-oil and gas)	1.61 tons/mile	0.13 tons/mile	Calculated per mile of road.
	Install communications tower/facility.	1.5 per tower	0.2 per tower	Estimated for South Rim Communications Tower (one tower).
	Construct natural gas support facility.	0.45 tons/facility	0.1 tons/facility	Calculated for a single support facility, based on data for Facility Construction in supporting Oil and Gas Workbook. Conformity for a project would be based on the number of facilities. For example, construction of up to 222 facilities in a single 12-month period would conform.
Oil and Gas—Emissions are for a Single Well.	Full development scenario; includes drilling well, pad and facility construction (including road construction, pipeline construction, and electric line construction (oil well only)), well completion, production/workover/operations, and reclamation.	7.0 tons/well	0.4 tons/well	Oil wells—Calculated for a single well using the maximum emissions for local development areas. Conformity for a project would be based on the number of wells. For example, full development for up to 14 wells in a single 12-month period would conform.
		4.0 tons/well	0.5 tons/well	Natural gas wells—Calculated for a single well using the maximum emissions for local development areas. Conformity for a project would be based on the number of wells. For example, full development for up to 24 wells in a single 12-month period would conform.
Oil and Gas—Emissions are for a Single Well.	New well on existing pad scenario; excludes pad, facility, and pipeline construction.	5.6 tons/well	0.3 tons/well	Oil wells—Calculated for a single well using the maximum emissions for local development areas. Conformity for a project would be based on the number of wells. For example, up to 17 new wells in a single 12-month period on an existing pad would conform.
		2.6 tons/well	0.3 tons/well	Natural gas wells—Calculated for a single well using the maximum emissions for local development areas. Conformity for a project would be based on the number of wells. For example, up to 38 new wells in a single 12-month period on an existing pad would conform.
	Existing well scenario; production/workover/operations only.	<0.1 tons/well	<0.1 tons/well	Oil wells—Calculated for a single well using the maximum emissions for local development areas. Conformity for a project would be based on the number of wells. For example, redevelopment of up to 1,287 existing wells in a single 12-month period would conform.
		<0.1 tons/well	<0.1 tons/well	Natural gas wells—Calculated for a single well using the maximum emissions for local development areas. Conformity for a project would be based on the number of wells. For example, redevelopment of up to 1,207 existing wells in a single 12-month period would conform.
Oil and Gas	Install pipelines	1.24 tons/mile	0.136 tons/mile	Based on maximum development of 79 miles for natural gas pipeline, 20 to 30 inches diameter. Conformity for a project would be based on the number of miles of pipeline constructed. For example, construction of up to 80 miles of pipeline in a single 12-month period would conform.
Other Minerals	Sand and gravel operations (includes stripping, digging, crushing and hauling).	4.0	0.3	Based on 20,000 cubic yards of sand/gravel extraction over a 3–5 year contract period. Hauling based on 160,000 miles/yr (20 trips per day @ 200 miles round-trip for two 20-day operations per year).
Range	Drilling water well	0.53	0.02	Calculated for a single water well based on emissions estimates for Cabrito 3–31 Water Well.,
	Converting windmills to solar energy.	<0.1	<0.1	Calculated for a single conversion project. Infrequent—Minor construction (no heavy duty vehicles; based on single day of pickup use).
Recreation	Construct recreation facilities (*i.e.,* campgrounds).	0.7	0.1	Calculated for construction of a single facility, based on Sand Dunes recreation improvement project, Wind River Front reconstruction project, general annual maintenance, etc.
	River access sites	1.5	0.2	Calculated for construction of a single site, based on projects constructing multi-vehicle boat ramps, including pre-work design/survey, road, ramp, and parking lot construction, installation of visitor facilities (restrooms, kiosks, barricades, fencing, etc.).

TABLE 1—PRESUMED TO CONFORM ACTIVITIES—Continued

BLM resource area	Description of activity	Emissions		Comments
		NO_X (ton/yr)	VOC (ton/yr)	
	Special Use Permits, *e.g.,* commercial hunting and fishing guides.	0.1	<0.1	Calculated for a single issued permit, assuming 1 passenger vehicle traveling up to 200 miles round trip for 250 trips per year.
	Trail construction	<0.1	<0.1	Calculated for a single construction project up to 5 days in duration. Assumes primarily hand construction and one tractor or backhoe operating for 5 days.
Wild Horses	Gather wild horses	<0.1	<0.1	Calculated for a single gather, based on helicopter use (Bell 206 JetRanger) for one week period.
Wildlife	Habitat improvement projects (includes selecting and designating sites, planning, and implementation).	1.9	0.2	Calculated for a single project, based on Wyoming Range Mule Deer Habitat Project EA.
	Wildlife survey (aircraft)	0.1	<0.1	Calculated and based on a single survey with twin engine aircraft use (Beech King Air) for one week period.
Misc. Activities	Road maintenance and upkeep	9.7	0.7	Infrequent and short-term vehicle use, minor heavy duty equipment. Based on grader and diesel pickup use to maintain 40,000 miles of road annually. Not applicable to initial road construction.

For pollutant emissions presented in the above table for oil and gas industry sources, the following key assumptions are applicable and can also be further reviewed in the supporting Oil and Gas Workbook (included with the supporting emission calculations) located at: *http://bit.ly/WYPtCList:*

- EPA regulates the emissions from mobile sources by setting standards for the specific pollutants being emitted. EPA established progressively more stringent emission standards for carbon monoxide, hydrocarbons, nitrogen oxides, and particulate matter in the early 1990s for non-road engines and equipment. Emissions standards set limits on the amount of pollution a vehicle or engine can emit. A higher tier standard corresponds to lower emissions. Emissions shown on the list assume non-road equipment/engines meet either EPA Tier 2 or a mix of Tier 1 and Tier 2 emission standards. In order to determine emissions for a project using entirely Tier 1 non-road equipment/engines, the comparison panels in the supporting Oil and Gas Workbook must be used.
- For projects using Tier 3 or better non-road equipment/engines, a higher number of wells may conform, but the supporting Oil and Gas Workbook must be used to adjust the single well emission values.
- For projects using drill rigs permitted through the WDEQ, New Source Review (NSR) permitting program, a higher number of wells may conform since NSR-permitted sources are excluded from the BLM's General conformity analysis. The supporting Oil and Gas Workbook can be used to adjust the single well emission values by excluding permitted drill rig emissions.
- Emissions data for on-road vehicles correspond to calendar years 2008 to 2013, depending on the operator, and so are expected to be conservative (overestimate emissions) for 2014 and later years. Emissions data were previously generated using EPA's Motor Vehicle Emission Simulator (MOVES) modeling system which estimates emissions for mobile sources at the national, county, and project level for criteria air pollutants, greenhouse gases, and air toxics. Emissions data for off-road vehicles, such as construction equipment, were previously generated using EPA's NONROAD Model.
- The ton per year (tpy) emissions presented for a single well are rounded to one decimal place; however, the number of wells noted as conforming in the comments are based on more precise emissions that can be found in the supporting Oil and Gas Workbook.

Further explanation of the Presumed to Conform activities identified in the table is provided below in the order in which they appear in the table.

1. Cultural Resources: Data Recovery/Site Excavation

Cultural resource evaluations may occur during site excavation, whether connected to oil and gas development or to other BLM projects. These activities are expected to result in de minimis emissions associated with infrequent and short-term light-duty vehicle use for personnel to travel to the project site. Calculations were based on one passenger vehicle traveling up to 200 miles per day for 60 days. Emissions for NO_X and VOC have each been calculated to be less than 0.1 ton per year. Since the emissions for this activity are de minimis, no extrapolation of the number of cultural site excavations that could occur in a single year is provided; this activity is not a daily activity and would never approach the emissions threshold. These activities are de minimis and presumed to conform.

2. Lands: Install Power/Transmission Lines

Due to the remote location of many oil and gas development projects in the UGRB, electrical power is not available at the project site and electrical transmission or distribution lines may be installed in order to bring power to the project site. Constructing these transmission or distribution lines results in NO_X and VOC emissions associated with construction equipment activities. Based on an actual 24-mile transmission or distribution line, construction assumes standard construction equipment including light-duty and heavy-duty trucks, along with a backhoe and forklift, operating 12 hours per day. The calculated emissions are 0.44 tpy of NO_X and 0.032 tpy of VOCs per mile. By extrapolation, any transmission or distribution line construction project up to 225 miles in a 12-month period could be developed without exceeding the emissions threshold. These activities are de minimis and presumed to conform.

3. Lands: Install Roads (Non-Oil and Gas)

New road construction may be undertaken or authorized by the BLM to create access to previously inaccessible locations. Emissions would be associated with the construction equipment needed to build the access road, such as backhoes, bulldozers, tractor scrapers, and motor graders,

operating 12 hours per day. Based on 2009 Sublette County emission factors from EPA's NONROAD emissions model, the calculated emissions are 1.61 tpy of NO_X and 0.13 tpy of VOCs per mile. Accordingly, any access road construction project up to about 61 miles in a 12-month period could be developed without exceeding the emissions threshold. This activity is de minimis and presumed to conform.

4. Lands: Install Communication Tower/Facility

The BLM may authorize construction of communication towers and ancillary facilities on Federal lands within the UGRB in order to improve cellular telephone and other communications in the region. Estimated emissions are associated with the construction equipment for installing a single tower, based on construction of the South Rim Communications Tower, including light and heavy-duty trucks, backhoes, cranes and a truck drill rig, operating 10 hours per day. Off-road vehicles assumed 2008 Sublette County NONROAD emission factors and on-road vehicles assumed 2013 emission factors from EPA's MOVES model. The calculated emissions are 1.5 tpy of NO_X and 0.2 tpy of VOCs. By extrapolation, up to 66 towers could be constructed in a single 12-month period without exceeding the emissions threshold. This activity is de minimis and presumed to conform.

5. Oil and Gas: Full Development Scenario

Developing an oil and gas well involves many different activities, including well pad construction, well drilling, completion workovers and construction of on-site facilities and associated roads and pipelines. Emissions were calculated for these activities assuming full development for a single well using a maximum development scenario for the UGRB. Separate calculations were performed for oil wells and natural gas wells.

For a single oil well, the calculation assumes a drill rig and boiler with drilling activities lasting 15 days for 24 hours per day (hr/day). Construction is assumed to last 3 days at 10 hr/day and involve standard construction equipment such as dozers, backhoes, motor graders, dump trucks, and water tankers. Completion activities involve a pump engine operating for 5 days and a rig engine operating for 1 day, at 12 hr/day. Workovers are assumed to involve one rig engine operating for 5 days at 12 hr/day. Off-road equipment is assumed to meet EPA Tier 2 emissions standards. On-road vehicles would consist of light and heavy-duty trucks. Equipment and vehicle emissions are calculated for 2013.

For a single oil well, the calculated emissions are 7.0 tpy of NO_X and 0.4 tpy of VOCs. By extrapolation, up to 14 oil wells could be developed for a project in a 12-month period without exceeding the emissions threshold.

For a single natural gas well, the calculation assumes a drill rig and boiler, with a drilling duration of 10 days at 24 hours per day. Construction is assumed to last 15 days. Completion is assumed to involve a pump engine operating for 5 days and a rig engine operating for 1 day at 12 hr/day. Workovers are assumed to involve two engines operating for 2 days at 8 hr/day. Off-road equipment is assumed to meet EPA Tier 2 emissions standards. On-road vehicles would consist of light and heavy trucks. Equipment and vehicle emissions are calculated for 2008. For a single natural gas well, the calculated emissions are 4.0 tpy of NO_X and 0.5 tpy of VOCs. By extrapolation, up to 24 natural gas wells could be developed for a project in a 12-month period without exceeding the emissions threshold.

Each of these activities are de minimis and presumed to conform.

6. Oil and Gas: New Well on an Existing Pad

For a new oil or natural gas well on an existing pad, the emissions are the same as described above except that construction emissions are excluded (since the associated facilities already exist). The assumptions and data used for equipment and vehicles in this calculation are the same as for the Full Development Scenario (number 5 above).

For a single oil well drilled on an existing pad, the calculated emissions are 5.6 tpy of NO_X and 0.3 tpy of VOCs. By extrapolation, up to 17 oil wells on an existing pad could be developed in a 12-month period without exceeding the emissions threshold.

For a single natural gas well drilled on an existing pad, the calculated emissions are 2.6 tpy of NO_X and 0.3 tpy of VOCs. By extrapolation, up to 38 natural gas wells could be developed on an existing pad in a 12-month period without exceeding the emissions threshold. These activities are de minimis and presumed to conform.

7. Oil and Gas: Production/Workover/Operations Only

Once a well is drilled and producing, production-related maintenance activities such as workovers typically occur annually and generate emissions that may not be included in the well site's production permit. Workovers typically require the short-term use of diesel-fired engines associated with the workover rig itself. Also, there are typically traffic-related emissions from workers travelling to the site.

For a single oil or natural gas well, the calculation for workovers assumes a single engine operating for 5 days at 12 hr/day. Off-road equipment is assumed to meet EPA Tier 2 emissions standards. On-road vehicles would consist of light and heavy trucks. Equipment and vehicle emissions are calculated for 2013.

For a single oil well and a single natural gas well, the calculated emissions associated with production maintenance activities are less than 0.1 tpy for both NO_X and VOCs. By extrapolation, up to 1,287 oil wells and 1,207 natural gas wells could be maintained in a 12-month period without exceeding the emissions threshold. Each of these activities are de minimis and presumed to conform.

8. Oil and Gas: Install Pipelines

Once an oil or gas well is developed, pipelines are often constructed to transport the recovered oil, condensate, gas and water. Emissions result from the construction equipment used for pipeline projects. For a 79-mile pipeline (up to 30-inch diameter pipe) the calculation assumes that construction proceeds at the rate of 1 to 4 days per mile, depending on the phase of work. Up to 8 pieces of equipment are assumed to be operating simultaneously (up to 20 for welding). Equipment is assumed to operate for 12 hr/day and includes standard construction equipment such as excavators, dozers, backhoes, motor graders, sidebooms, and cranes. Additional equipment includes welders and x-ray trucks. Vehicles include light-duty trucks, heavy-duty trucks, and water tankers. Off-road equipment is assumed to consist of 50% meeting EPA Tier 1 and 50% meeting Tier 2 emissions standards. Equipment and vehicle emissions are calculated for 2008.

For a 79-mile pipeline (up to 30-inch diameter pipe), the calculated emissions are 98.3 tpy of NO_X and 10.7 tpy of VOCs. The average emissions per mile of pipeline are 1.24 tons/mile of NO_X and 0.136 tons/mile of VOCs. By extrapolation, any pipeline construction project up to about 80 miles in a 12-month period could be developed without exceeding the emissions threshold. This activity is de minimis and presumed to conform.

9. Other Minerals: Sand and Gravel Operations

The BLM issues contracts and authorizations for developing sand and gravel resources within the UGRB. Air emissions result from on-site heavy equipment (front loaders and bulldozers), operation of a crushing/screening plant (which generally run on diesel-fueled engines), employee/contractor traffic (light-duty vehicles), and use of heavy-duty trucks to transport the aggregate product to nearby markets. The emission calculations were based on 20,000 cubic yards of sand/gravel extraction over a 3–5 year contract period and a one-way hauling distance of 100 miles, which is the BLM's maximum projected development level.

Under the development scenario described above, the calculated emissions are 4.0 tpy of NO_X and 0.3 tpy of VOCs. By extrapolation, up to 24 sand and gravel operations could occur in a single year 12-month period without exceeding the emissions threshold.

Also presumed to conform under this category are activities associated with selling and removing decorative rock. Activities associated with gathering decorative stone typically create fewer emissions than sand and gravel sites since no crushing/screening equipment is necessary. Each of these activities are de minimis and presumed to conform.

10. Range: Drilling a Water Well

Water well development occurs on BLM lands within the UGRB. Emissions are associated with the drill rig and ancillary equipment although the intensity and duration of activity for drilling water wells is significantly less than that for an oil or gas well.

Water well drilling assumes a water well drill rig, with Tier 2 engines, along with supporting light and heavy-duty trucks. A round trip distance of 70 miles was assumed for the on-road vehicles. The calculated emissions for a single water well are 0.5 tpy of NO_X and 0.02 tpy of VOCs. By extrapolation, up to 186 water wells could be developed in a 12-month period without exceeding the emissions threshold. This activity is de minimis and presumed to conform.

11. Range: Converting Windmills to Solar Energy

The BLM has a program to convert existing windmills to solar energy. These activities are expected to result in de minimis emissions associated with infrequent and short-term light-duty vehicle use for personnel to travel to the project site. Emissions for NO_X and VOCs have been calculated to be less than 0.1 ton per year for each conversion. Since the emissions for this activity are de minimis, no extrapolation of the number conversions that could occur in a single year is provided; this activity is infrequent and would never approach the emissions threshold. This activity is de minimis and presumed to conform.

12. Recreation: Construct Recreation Facilities, i.e., Campgrounds

The BLM may also construct recreational facilities such as campgrounds or picnic areas to enhance visitor use of recreation areas. This activity may involve construction over a small area, generally lasting up to about 15 working days. Air emissions would result from the construction equipment and work vehicles, such as front loaders, a Bobcat, a motor grader, and light-duty and heavy-duty trucks, operating 10 hours per day. Off-road vehicles assumed 2008 Sublette County NONROAD emission factors and on-road vehicles assumed MOVES 2013 emission factors.

For recreation facility construction, the calculated emissions are 0.7 tpy of NO_X and 0.1 tpy of VOCs per facility. By extrapolation, up to 142 facilities could be developed in a 12-month period without exceeding the emissions threshold. This activity is de minimis and presumed to conform.

13. Recreation: River Access Sites

At river access sites within the UGRB, projects can include constructing multi-vehicle boat ramps, access roads, parking areas and visitor facilities such as restrooms, kiosks, barricades and fencing. Typical projects involve about 40 days of construction activities at the site, and associated air emissions result from construction equipment and work vehicles, including a front loader, excavator, and motor grader, along with light-duty and heavy-duty trucks, operating 10 hours per day. Off-road vehicles assumed 2008 Sublette County NONROAD emission factors and on-road vehicles assumed MOVES 2013 emission factors. For constructing river access sites, the calculated emissions are 1.5 tpy of NO_X and 0.2 tpy of VOCs per access site. By extrapolation, up to 66 sites could be developed in a 12-month period without exceeding the emissions threshold. This activity is de minimis and presumed to conform.

14. Recreation: Special Use Permits

Examples of Special Use Permits issued by the BLM include commercial hunting and fishing guide permits. Emissions result from light duty vehicle traffic associated with the hunting and fishing trips. Based on 250 trips per year and 200 miles (round-trip) for each guided trip, the calculated emissions are less than 0.1 tpy each for NO_X and VOCs. By extrapolation, up to 1,911 permits could be issued in a 12-month period without exceeding the emissions threshold. This activity is de minimis and presumed to conform.

15. Recreation: Trail Construction

The BLM maintains and constructs trails within the UGRB. Most trail construction involves hand equipment, but may occasionally require use of mechanized equipment such as a tractor, depending upon local site conditions. These activities are typically short-term (*i.e.,* 5 days duration, 8 hours per day). The calculated emissions are less than 0.1 tpy each for NO_X and VOCs per construction project. By extrapolation, up to 2,181 trail construction projects could occur in a 12-month period without exceeding the emissions threshold. This activity is de minimis and presumed to conform.

16. Wild Horses: Gather Wild Horses

Wild horse gathers within the UGRB typically involve the use of a helicopter, which is the primary emissions source for this activity. The calculations are based on use of a Bell 206 Jet Ranger helicopter over a five day period, with an average flight time of 6 hours each day. The calculated emissions are less than 0.1 tpy each for NO_X and VOCs per gather. This activity is de minimis and presumed to conform.

17. Wildlife: Habitat Improvement Projects

The BLM conducts and/or authorizes habitat improvement projects within the UGRB. Activities for these projects typically include the use of off-road construction equipment (such as a tractor, feller buncher, and skidder) for 10 hours per day, as well as light duty vehicle use and occasional helicopter use and heavy-duty fire engines. The calculated emissions are 1.9 tpy of NO_X and 0.2 tpy of VOCs, per project. By extrapolation, up to 52 projects could be completed in a 12-month period without exceeding the emissions threshold. This activity is de minimis and presumed to conform.

18. Wildlife: Wildlife Surveys (Aircraft)

The BLM conducts or participates in aerial wildlife surveys within the UGRB. Emissions are based on the use of a twin engine aircraft (*e.g.,* Beechcraft King Air) for a 5-day week, with an average flight time of 4 hours each day. The calculated emissions are 0.1 tpy of NO_X

and less than 0.1 tpy of VOCs per survey. By extrapolation, up to 1,833 surveys could be conducted in a 12-month period without exceeding the emissions threshold. This activity is de minimis and presumed to conform

19. Miscellaneous: Road Maintenance and Upkeep

The BLM conducts and authorizes maintenance of existing roads within the UGRB. Air emissions result from the short-term use of heavy duty construction equipment. The calculated emissions are 9.7 tpy of NO_X and 0.7 tpy of VOCs calculated for 40,000 miles per year of road maintenance activities (this is 5 times the normal amount of activity that typically occurs based on BLM–WY submitted data). This activity is de minimis and presumed to conform.

IV. How To Apply Presumed To Conform Actions

The list of qualifying project categories discussed in the preceding section is referred to as the BLM UGRB Presumed to Conform List. The analyses for BLM's presumed to conform actions are considered representative of a majority of common, recurring projects within the UGRB. However, the BLM must consider the appropriateness of applying this list to any particular project, by assessing how the proposed project compares to the presumed to conform categories of projects.[16]

As authorized under the Clean Air Act, the list provides an additional way for the BLM to improve its environmental program management while still ensuring that agency air quality goals and requirements are met. Use of the BLM UGRB Presumed to Conform List will reduce review times, eliminate unnecessary paperwork, clarify analytical requirements for all project actions, and ensure that the proper level of documentation is applied in each case. Moreover, the BLM UGRB Presumed to Conform List will provide a method that the BLM can use to demonstrate conformity with the Wyoming SIP. When applying the BLM UGRB Presumed to Conform List, the BLM will determine whether the project in question represents one or more single actions or a combined action. The BLM will also determine whether any combined action involves multiple connected presumed to conform actions. Below is a description of the different BLM actions and procedures.

Single Action. A single presumed to conform action is defined as a presumed to conform action that is not connected or dependent on other actions and that has independent utility.[17] For such actions, no general conformity evaluation or applicability analysis is required and BLM officials may simply document that the project action is presumed to conform on the basis of this Notice and the applicable project category.

Using the Presumed to Conform List and supporting calculation workbooks for this Notice meets the major intent of EPA's rationale for developing presumed to conform activities—to reduce the analysis burden for actions that have minimal or no direct or indirect emissions. By analyzing each project category in the BLM UGRB Presumed to Conform List and reporting the findings, the BLM has shown that the resulting emissions from each single presumed to conform action will typically be below the applicable emission thresholds.

Combined Action. A combined action is defined as either: (1) Multiple presumed to conform actions that are connected to each other; or (2) one or more presumed to conform actions that are connected to one or more non-presumed to conform actions being evaluated under the environmental review requirements of NEPA. The Council on Environmental Quality defines connected actions as actions that are closely related involving, for example, interdependent parts of a larger action, dependence on a larger action for justification, or dependence on other actions taken previously or simultaneously.[18]

Where there is a combined action, only one action specified on the BLM UGRB Presumed to Conform List may be excluded in calculating total direct and indirect emissions. The emissions from all the other actions that are not otherwise exempt must be calculated to determine the total emissions from the remaining actions.[19] For example, the BLM may undertake a project with several connected actions that must be analyzed under NEPA. Several of those actions may individually be listed on the BLM UGRB Presumed to Conform List because those actions taken alone would typically have emissions below the threshold levels. To determine whether such a project requires a conformity determination, the BLM would exclude one presumed to conform action and then prepare an applicability analysis for the remaining actions. For example, an oil and gas operator could propose a project to install pipelines from existing well pads to a proposed new compressor station. In this example, only one proposed activity would be excluded using the Presumed to Conform List—either the pipeline installation or the construction activities for the compressor station. Emissions from the other activity would be calculated to determine if the remaining total emissions are still below the de minimis emission thresholds.

The above procedures for combined actions allow the BLM to exclude the emissions from one presumed to conform action and to prepare an applicability analysis based upon the total direct and indirect emissions of the actions that are not otherwise exempt.[20] Thus, in a combined action, the emissions from one presumed to conform action may be excluded from the calculation of total project emissions. The process could show that either the combined action (minus the one excluded presumed to conform action) would equal or exceed the emission thresholds and thus trigger a conformity determination, or that the combined action (minus the one excluded presumed to conform action) is below the emissions thresholds, in which case no further action would be required. In making this determination, the BLM may elect to apply the calculated emissions in the BLM UGRB Presumed to Conform List to determine the total emissions where applicable. BLM officials will decide which individual presumed to conform action is excluded if more than one is present in a combined action.[21]

The BLM has determined as a matter of policy to implement the BLM UGRB Presumed to Conform List with respect to combined actions by balancing considerations about project segmentation,[22] connected actions

[16] The list must be used carefully because ''[w]here an action otherwise presumed to conform under paragraph (f) of this section * * * does not in fact meet one of the criteria in paragraph (g)(1) of this section, that action shall not be presumed to conform and the requirements of 93.150 and 93.155 through 93.160 shall apply for the Federal action.'' See 40 CFR 93.153(j).

[17] 40 CFR 1506.1(c)(1) and 1508.25(a), Council on Environmental Quality, Regulations for Implementing the Procedural Provisions of NEPA.

[18] 40 CFR 1508.25(1).

[19] An allowance to this provision is discussed in the following paragraph.

[20] Emissions from exempt actions are excluded in accordance with 40 CFR 93.152.

[21] Requirements and allowances for combined actions are based on interagency communications with the EPA.

[22] In the preamble to the General Conformity Rule, the EPA decided not to adopt its initial proposal to permit Federal agencies to use the NEPA concept of tiering and analyze actions in a staged manner in analyzing conformity. EPA explained, among other things: ''[T]iering could cause the segmentation of projects for conformity analysis, which might provide an overall inaccurate estimate of emissions. The segmentation of projects for conformity analyses when emissions are reasonably foreseeable is not permitted by this rule.'' (58 FR 63240).

under NEPA,[23] and the permitted exclusion of emissions attributable to presumed to conform actions under the General Conformity Rule. Regarding the latter, 40 CFR 93.152 states: ''The portion of emissions which are exempt or presumed to conform under Section 93.153(c), (d), (e), or (f) are not included in the total of direct and indirect emissions.'' Likewise, as stated in the preamble (58 FR 63233): ''The final rule requires the inclusion of the total direct and indirect emissions in the applicability and conformity determinations, except the portion of emissions which are exempt or presumed to conform.'' [24]

The BLM will apply this definition to exclude emissions for single and multiple presumed to conform actions that are not connected to one another. BLM's procedures for combined actions offer a reasonable approach by placing a more conservative limit on the permitted exclusion of presumed to conform emissions than 40 CFR 93.152.

Documentation

Documentation requirements for combined/multiple actions are typically greater than for single actions. For some projects with combined/multiple actions, the BLM may require that proponents submit a project-specific emissions inventory in lieu of using the Presumed to Conform list. This methodology is project-specific and more refined than quantifying the project emissions using the Presumed to Conform List emission estimates.

Specifically, the methodology described above must be used if the project includes: (1) One or more presumed to conform actions that are connected to non-presumed to conform actions which are being evaluated under the environmental review requirements of NEPA; or (2) actions which are not supported by emissions quantification described elsewhere in the Notice. Consistent with the goal of reducing the analysis burden for presumed to conform actions, the BLM UGRB Presumed to Conform List may be used to document emissions for select activities in lieu of a project-specific emissions inventory if the activities are represented on the Presumed to Conform List.

Also, where the emissions in the BLM UGRB Presumed to Conform List are based on specific project assumptions that vary from the project in question, the emissions in the list may be adjusted as described in the BLM Emissions Workbook if appropriate. In other words, the BLM UGRB Presumed to Conform List may be used if the project is a single action or if it is limited to multiple presumed to conform actions that are supported in the Notice.

Brian W. Davis,

Acting State Director.

[FR Doc. 2016–31631 Filed 12–28–16; 8:45 am]

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[23] 40 CFR 1508.7.

[24] The EPA gives as an example a Federal action that includes construction of a new industrial boiler project, that is exempt, and a separate office building. The emissions from the hypothetical boiler exceed de minimis levels however it is exempt and so the emissions are excluded. The emissions from the office building alone are below de minimis levels. As a result, the action as a whole does not need a conformity determination. (58 FR 63233).

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLOR957000.L14400000.BJ0000. 17XL1109AF.HAG 17–0054]

Filing of Plats of Survey: Oregon/ Washington

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The plats of survey of the following described lands are scheduled to be officially filed in the Bureau of Land Management, Oregon State Office, Portland, Oregon, 30 days from the date of this publication.

Willamette Meridian, Oregon

T. 4 S., R. 5 E., accepted December 12, 2016
T. 23 S., R. 8 W., accepted December 12, 2016
T. 19 S., R. 7 W., accepted December 12, 2016
T. 3 S., R. 3 E., accepted December 12, 2016
T. 6 S., R. 3 E., accepted December 12, 2016

ADDRESSES: A copy of the plats may be obtained from the Public Room at the Bureau of Land Management, Oregon State Office, 1220 SW. 3rd Avenue, Portland, Oregon 97204, upon required payment.

FOR FURTHER INFORMATION CONTACT: Kyle Hensley, (503) 808–6124, Branch of Geographic Sciences, Bureau of Land Management, 1220 SW. 3rd Avenue, Portland, Oregon 97204. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 1–800–877–8339 to contact the above individual during normal business hours. The service is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: A person or party who wishes to protest against this survey must file a written notice with the Oregon State Director, Bureau of Land Management, stating that they wish to protest. A statement of reasons for a protest may be filed with the notice of protest and must be filed with the Oregon State Director within thirty days after the protest is filed. If a protest against the survey is received prior to the date of official filing, the filing will be stayed pending consideration of the protest. A plat will not be officially filed until the day after all protests have been dismissed or otherwise resolved. Before including your address, phone number, email address, or other personally identifying information in your comment, you should be aware that your entire comment—including your personally identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personally identifying information from public review, we cannot guarantee that we will be able to do so.

Mary J.M. Hartel,

Chief Cadastral Surveyor of Oregon/ Washington.

[FR Doc. 2016–31618 Filed 12–28–16; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[17X LLAK980600.L1820000.XX0000. LXSIARAC0000]

Notice of Public Meeting, BLM Alaska Resource Advisory Council

AGENCY: Bureau of Land Management, Alaska State Office, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act of 1976 as amended (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the Bureau of Land Management (BLM) Alaska Resource Advisory Council (RAC) will meet as indicated below.

DATES: The meeting will be held February 2–3, 2017, at the BLM Alaska Fairbanks District Office, 220 University Avenue, Fairbanks, Alaska 99709–3844. The meeting starts at 9 a.m. in the Kobuk Conference Room and will adjourn at noon on February 3. The council will accept comments from the public from 11 a.m. to noon on February 2.

FOR FURTHER INFORMATION CONTACT: Lesli Ellis-Wouters, BLM Alaska State Office, 222 W. 7th Avenue #13, Anchorage, AK 99513; *lellis@blm.gov;* 907–271–4418. Persons who use a telecommunications device for the deaf

(TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FRS 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 15-member council advises the Secretary of the Interior, through the BLM, on a variety of planning and management issues associated with public land management in Alaska. At this meeting, the Council will receive updates on BLM mitigation, discuss preliminary alternative concepts for the Central Yukon Resource Management Plan, review the newly released Planning 2.0 program, and receive a report and recommendations from the placer mining subcommittee. An agenda will be posted to the BLM Alaska Web site (*https://www.blm.gov/get-involved/resource-advisory-council/near-you/alaska/rac*) by January 26, 2017.

All meetings are open to the public. During the public comment period, depending upon the number of people wishing to comment, time for individual oral comments may be limited. Please be prepared to submit written 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.

Individuals who plan to attend and need special assistance, such as sign language interpretation, transportation, or other reasonable accommodations, should contact the BLM RAC Coordinator listed above.

Dated: December 20, 2016.

Bud Cribley,

State Director.

[FR Doc. 2016–31654 Filed 12–28–16; 8:45 am]

BILLING CODE 4310–JA–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–470–471 and 731–TA–1169–1170 (Review)]

Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From China and Indonesia; Determinations

On the basis of the record [1] developed in the subject five-year reviews, the United States International Trade Commission (''Commission'') determines, pursuant to the Tariff Act of 1930 (''the Act''), that revocation of the countervailing and antidumping duty orders on certain coated paper suitable for high-quality graphics using sheet-fed presses from China and Indonesia would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

Background

The Commission, pursuant to section 751(c) of the Act (19 U.S.C. 1675(c)), instituted these reviews on October 1, 2015 (80 FR 59189) and determined on January 4, 2016 that it would conduct full reviews (81 FR 1966, January 14, 2016). Notice of the scheduling of the Commission's reviews and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** on June 24, 2016 (81 FR 41345). The hearing was held in Washington, DC, on October 27, 2016, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission made these determinations pursuant to section 751(c) of the Act (19 U.S.C. 1675(c)). It completed and filed its determinations in these reviews on December 22, 2016. The views of the Commission are contained in USITC Publication 4656 (December 2016), entitled *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from China and Indonesia: Investigation Nos. 701–TA–470–471 and 731–TA–1169–1170 (Review).*

By order of the Commission.

Issued: December 22, 2016.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2016–31469 Filed 12–28–16; 8:45 am]

BILLING CODE 7020–02–P

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments; Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *Certain Electronic Devices, Including Mobile Phones, Tablet Computers, and Components Thereof, DN 3190* the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing under § 210.8(b) of the Commission's Rules of Practice and Procedure (19 CFR 210.8(b)).

FOR FURTHER INFORMATION CONTACT: Lisa R. Barton, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov,* and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000.

General information concerning the Commission may also be obtained by accessing its Internet server at United States International Trade Commission (USITC) at *https://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission has received a complaint and a submission pursuant to § 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of Nokia Technologies Oy on December 22, 2016. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain electronic devices, including mobile phones, tablet computers, and components thereof. The complaint names as a respondent Apple Inc., a/k/a Apple Computer, Inc.

of Cupertino, CA. The complainant requests that the Commission issue an exclusion order and a cease and desist order.

Proposed respondents, other interested parties, and members of the public are invited to file comments, not to exceed five (5) pages in length, inclusive of attachments, on any public interest issues raised by the complaint or § 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) explain how the requested remedial orders would impact United States consumers.

Written submissions must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register.** There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to § 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the docket number (''Docket No. 3190'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, Electronic Filing Procedures.[1]) Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel,[2] solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.[3]

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of §§ 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Issued: December 22, 2016.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2016–31435 Filed 12–28–16; 8:45 am]

BILLING CODE 7020–02–P

[1] Handbook for Electronic Filing Procedures: *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf.*

[2] All contract personnel will sign appropriate nondisclosure agreements.

[3] Electronic Document Information System (EDIS): *https://edis.usitc.gov*

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–392]

Bulk Manufacturer of Controlled Substances Application: Janssen Pharmaceutical, Inc.

ACTION: Notice of application.

DATES: Registered bulk manufacturers of the affected basic classes, and applicants therefore, may file written comments on or objections to the issuance of the proposed registration in accordance with 21 CFR 1301.33(a) on or before February 27, 2017.

ADDRESSES: Written comments should be sent to: Drug Enforcement Administration, Attention: DEA Federal Register Representative/DRW, 8701 Morrissette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: The Attorney General has delegated her authority under the Controlled Substances Act to the Administrator of the Drug Enforcement Administration (DEA), 28 CFR 0.100(b). Authority to exercise all necessary functions with respect to the promulgation and implementation of 21 CFR part 1301, incident to the registration of manufacturers, distributors, dispensers, importers, and exporters of controlled substances (other than final orders in connection with suspension, denial, or revocation of registration) has been redelegated to the Assistant Administrator of the DEA Diversion Control Division (''Assistant Administrator'') pursuant to section 7 of 28 CFR part 0, appendix to subpart R.

In accordance with 21 CFR 1301.33(a), this is notice that on September 9, 2016, Janssen Pharmaceutical, Inc., Buildings 1–5 & 7–14, 1440 Olympic Drive, Athens, Georgia 30601 applied to be registered as a bulk manufacturer of the following basic classes of controlled substances:

Controlled substance	Drug code	Schedule
Methylphenidate	1724	II
Oxycodone	9143	II
Hydromorphone	9150	II
Hydrocodone	9193	II
Oripavine	9330	II
Thebaine	9333	II
Oxymorphone	9652	II
Tapentadol	9780	II
Fentanyl	9801	II

The company plans to manufacture the above-listed controlled substances in bulk for distribution to its customers.

Dated: December 21, 2016.

Louis J. Milione,

Assistant Administrator.

[FR Doc. 2016–31641 Filed 12–28–16; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Second Partial Consent Decree Under the Clean Air Act

On December 20, 2016, the Department of Justice lodged a proposed Second Partial Consent Decree with the United States District Court for the Northern District of California in the lawsuit entitled *In re: Volkswagen* ''*Clean Diesel*'' *Marketing, Sales Practices, and Products Liability Litigation,* Case No: MDL No. 2672 CRB (JSC), partially resolving Clean Air Act and various California claims (including under the California Health and Safety Code) against Volkswagen AG and others, concerning certain noncompliant 3.0 liter diesel vehicles.

On January 4, 2016, the United States, on behalf of the Environmental Protection Agency (''EPA'') filed a complaint against Volkswagen AG, Volkswagen Group of America, Inc., Volkswagen Group of America Chattanooga Operations, LLC, Audi AG, Dr. Ing. h.c. F. Porsche AG, and Porsche Cars North America, Inc. alleging that the defendants violated Sections 203(a)(1), (2), (3)(A), and (3)(B) of the Clean Air Act (''Act''), 42 U.S.C. 7522(a)(1), (2), (3)(A), and (3)(B), with regard to approximately 500,000 model year 2009 to 2015 motor vehicles containing 2.0 liter diesel engines (2.0 Liter Subject Vehicles) and approximately 80,000 model year 2009 to 2016 motor vehicles containing 3.0 liter diesel engines (3.0 Liter Subject Vehicles). An amended complaint was filed on October 7, 2016. The United States' complaint (initial and as amended) alleges that each 2.0 and 3.0 Liter Subject Vehicle contains computer algorithms that are prohibited defeat devices that cause the emissions control system of those vehicles to perform differently during normal vehicle operation and use than during emissions testing. The complaint alleges that the defeat devices cause the vehicles, during normal vehicle operation and use, to emit levels of oxides of nitrogen (''NO_X'') significantly in excess of EPA-compliant levels. The complaint seeks, among other things, injunctive relief to remedy the violations, including mitigation of excess NO_X emissions, and civil penalties.

On June 27, 2016, People of the State of California (''California''), by and through the California Air Resources Board (''CARB'') and the California Attorney General filed a complaint against defendants alleging that defendants violated Cal. Health & Safety Code §§ 43016, 43017, 43151, 43152, 43153, 43205, 43211, and 43212; Cal. Code Regs. tit. 13, §§ 1903, 1961, 1961.2, 1965, 1968.2, and 2037, and 40 CFR Sections incorporated by reference in those California regulations; Cal. Bus. & Prof. Code §§ 17200 *et seq.,* 17500 *et seq.,* and 17580.5; Cal. Civ. Code § 3494; and 12 U.S.C. 5531 *et seq.,* with regard to approximately 71,000 model year 2009 to 2015 motor vehicles containing 2.0 liter diesel engines and approximately 16,000 model year 2009 to 2016 motor vehicles containing 3.0 liter diesel engines, for a total of approximately 87,000 motor vehicles. The California complaint alleges, in relevant part, that the motor vehicles contain prohibited defeat devices and have resulted in, and continue to result in, increased NOx emissions from each such vehicle significantly in excess of CARB requirements, that these vehicles have resulted in the creation of a public nuisance, and that defendants engaged in related conduct that violated unfair competition, false advertising, and consumer protection laws.

On June 28, 2016, the United States lodged a Partial Consent Decree, Dkt. No. 1605–1 (''First Partial Consent Decree''), concerning the 2.0 Liter Subject Vehicles, which was entered into by the United States, California, and certain defendants (Volkswagen AG, Audi AG, Volkswagen Group of America, Inc., and Volkswagen Group of America Chattanooga Operations, LLC). The First Partial Consent Decree was entered by this Court on October 25, 2016, Dkt. No. 2103, and may be viewed here: *http://www.cand.uscourts.gov/crb/vwmdl.*

This Second Partial Consent Decree (''Decree'') is entered into between the United States, California, and all defendants (collectively, ''Volkswagen''). The Decree partially resolves the governments' claims for injunctive relief with respect to the 3.0 Liter Subject Vehicles, by providing remedies for the cars on the road and the environmental harm from the violations. It does not address plaintiffs' claims, *inter alia,* for prospective injunctive relief to prevent future violations of the same type that are alleged in the complaints or claims for civil penalties.

Under the Decree, Volkswagen must perform two vehicle recalls as follows (with all capitalized terms as defined in Appendix A of the Decree (Buyback, Lease Termination, Vehicle Modification, and Emissions Compliant Recall Program):

First, for Generation 1.x 3.0 Liter Subject Vehicles, Volkswagen must offer all Eligible Owners and Lessees of these vehicles the Buyback or the Lease Termination under terms described in Appendix A. In addition, if approved by EPA/CARB, Volkswagen may, in accordance with the requirements specified in Appendix B of the Decree (Vehicle Recall and Emissions Modification Program for 3.0 Liter Subject Vehicles), offer for Eligible Vehicles the option of a modification to substantially reduce NO_X emissions in accordance with standards established by EPA/CARB in the Decree.

Second, for Generation 2.x 3.0 Liter Subject Vehicles, if proposed by Volkswagen and approved by EPA/CARB, Volkswagen must offer an Emissions Compliant Recall as set forth in Appendix A to bring these vehicles into compliance with their Certified Exhaust Emission Standards in accordance with the requirements specified in Appendix B. If Volkswagen is unable to effect a recall that meets Certified Exhaust Emission Standards for a particular Test Group or Groups of Generation 2.x 3.0 Liter Subject Vehicles in accordance with the requirements specified in Appendix B, Volkswagen must offer all Eligible Owners and Lessees of such vehicles the Buyback or Lease Termination, under terms described in Appendix A, and may, if proposed by Volkswagen and approved by EPA/CARB, consistent with the provisions in Appendix B, offer to modify such vehicles to substantially reduce their NO_X emissions in accordance with standards established by EPA/CARB in this Consent Decree. *See* Decree ¶¶ 9–15; Appendices A and B.

Volkswagen must achieve a recall rate (through the buyback, lease termination, scrapped vehicles, the Emissions Compliant Recall, and any other approved vehicle modification options) of 85% by November 30, 2019 for the Generation 1.x 3.0 Liter Subject Vehicles, and by May 31, 2020 for the Generation 2.x 3.0 Liter Subject Vehicles. If it fails to do so, Volkswagen must augment the mitigation trust fund discussed below by $5.5 million for each 1% that it falls short of the 85% rate for the Generation 1.x 3.0 Liter Subject Vehicles, and by $21 million for each 1% that it falls short of the 85% rate for the Generation 2.x 3.0 Liter Subject Vehicles. Volkswagen must also achieve a separate 85% recall rate for vehicles in California, and must pay to

the mitigation trust (solely for mitigation projects in California) $900,000 for each 1% that it falls short of this target for the California Generation 1.x 3.0 Liter Subject Vehicles in and $5.5 million for each 1% that it falls short of the 85% rate for the California Generation 2.x 3.0 Liter Subject Vehicles. *See* Decree ¶¶ 10–11,13; Appendix A ¶¶ 10.1–10.3.

In connection with the buyback, in accordance with Appendix A, Volkswagen must pay Eligible Owners no less than the cost of the retail purchase of a comparable replacement vehicle of similar value, condition and mileage as of November 2, 2015 (''Retail Replacement Value''). *See* Decree ¶ 12; Appendix A ¶¶ 2.4, 2.23, 4.1, 7.1 and Appendix A–1. The buyback/lease termination program under the Decree remains open for two years after the Decree's Effective Date in the case of Generation 1.x vehicles and two years from the date offers first become available for the applicable vehicles in the case of Generation 2.x vehicles. *See* Decree Section IV.A and Appendix A ¶¶ 4.3, 7.3. If EPA and CARB approve an emissions modification or Emissions Compliant Recall, Volkswagen must offer it to consumers indefinitely. *See* Decree ¶ 94; Appendix A ¶¶ 5.2, 6.2, 8.2.

In addition, under the Decree, Volkswagen must make a payment of $225 million into the Mitigation Trust Fund that will be established under the First Partial Consent Decree. *See* Decree ¶ 17. Consistent with the use of the funds established by the First Partial Consent Decree, these funds will also be allocated to states, Puerto Rico, the District of Columbia, and Indian tribes who become Beneficiaries to perform specified NO_X mitigation projects. This amount is expected to fund projects to fully mitigate the total, lifetime excess emissions from the 3.0 Liter Subject Vehicles. *See* Decree, p. 5, ¶ 6. The trust will be administered by a trustee to be selected in accordance with the First Partial Consent Decree.

The publication of this notice opens a period for public comment on the Second Partial Consent Decree. Comments concerning the Decree should be addressed to the Assistant Attorney General, Environment and Natural Resources Division and should refer to *In re: Volkswagen ''Clean Diesel'' Marketing, Sales Practices, and Products Liability Litigation,* Case No: MDL No. 2672 CRB (JSC), and D.J. Ref. No. 90–5–2–1–11386.

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 email	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

The Second Partial Consent Decree may be viewed and downloaded from *http://www.cand.uscourts.gov/crb/vwmdl.* During the public comment period, the Partial Consent Decree may also be examined and downloaded at this Justice Department Web site: *https://www.justice.gov/enrd/consent-decrees.* We will provide a paper copy of the Partial Consent Decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

For the entire Second Partial Consent Decree and its appendices, please enclose a check or money order for $40.25 (25 cents per page reproduction cost) payable to the United States Treasury. For a copy of certain portions of the Second Partial Consent Decree, please designate which portions are requested, and provide the appropriate amount of money. For the Second Partial Consent Decree without the exhibits and signature pages, the cost is $13.25 (with signature pages, $16.50). For Appendix A, the cost is $8.50. For Appendix B, the cost is $15.25. For the Mitigation Appendix, the cost is $.25.

Karen S. Dworkin,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2016–31527 Filed 12–28–16; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF LABOR

Employment and Training Administration

Policy and Procedural Change To No Longer Publish Notices of Funding Opportunities in the Federal Register

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: This notice is to announce that the Department of Labor (DOL)'s Employment and Training Administration (ETA) will no longer publish Notices of Funding Opportunities in the **Federal Register.** ETA will continue to post the full texts of all ETA's Funding Opportunity Announcements (FOAs) at the government-wide Internet site, *http://www.grants.gov,* in accordance with the policy directive issued by the Office of Management and Budget (OMB). An applicant for funding may access the full FOA associated with a synopsis posted at *http://www.grants.gov* by following the universal resource locator (URL) link included in the synopsis, or by visiting ETA's Web site at *http://www.doleta.gov.*

DATES: Effective Date: December 29, 2016.

FOR FURTHER INFORMATION CONTACT: Laura P. Watson, 200 Constitution Avenue NW., Washington, DC 20210; telephone: 202–693–3333.

SUPPLEMENTARY INFORMATION: ETA continually searches for ways to improve its operating and economic efficiency. DOL's policies currently provide for publication of one page notices of FOAs in the **Federal Register.** In addition to the publication of notices of FOAs in the **Federal Register**, DOL, like all Federal agencies, is mandated to publish FOAs on *http://www.grants.gov.* ETA has published the full text of FOAs on both *http://www.grants.gov* and on its Web site. The Web sites provide the public with a more efficient way to complete FOAs and expedite the process of obtaining any available funding.

On October 8, 2003, OMB issued a policy directive entitled ''Requirement to Post Funding Opportunity Announcement Synopses at *http://www.grants.gov* and Related Data Elements/Format'' [68 FR 58146, Oct. 8, 2003]. The directive requires every Federal agency that awards agreements to post synopses of its funding opportunity announcements in standard format on the Internet at *http://www.grants.gov* or such Web site/Internet address that may be identified by OMB. A single government-wide Web site provides prospective applicants the opportunity to locate funding opportunities in one place rather than having to search for announcements in multiple locations. This was reinforced by OMB's issuance of its Uniform Guidance on December 26, 2014 [2 CFR 200], which specifically calls for notices of funding opportunities to include specific information when posted on *http://www.grants.gov.*

ETA has determined that, given the mandated shift towards the singular usage of *http://www.grants.gov* for funding opportunity information, it has

become redundant to continue to publish abbreviated notices for these in the **Federal Register.** Hereafter, we will suspend the use of these notices to announce funding opportunities, and continue to post the full text of FOAs at *http://www.grants.gov* and on our own Web site. The increasing use of *http://www.grants.gov* as a funding opportunity portal will allow the public to still have access to the complete application package and other details regarding the FOA.

Portia Wu,

Assistant Secretary, Employment and Training Administration.

[FR Doc. 2016–31434 Filed 12–28–16; 8:45 am]

BILLING CODE 4510–FM–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

[NARA–2017–013]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice.

SUMMARY: NARA is giving public notice that it has submitted to OMB for approval the information collection described in this notice. We invite you to comment on the proposed information collection pursuant to the Paperwork Reduction Act of 1995.

DATES: OMB must receive written comments at the address below on or before February 27, 2017.

ADDRESSES: Send comments to Mr. Nicholas A. Fraser, desk officer for NARA, by mail at Office of Management and Budget; New Executive Office Building; Washington, DC 20503; by fax at 202–395–5167; or by email at *Nicholas_A._Fraser@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Contact Tamee Fechhelm by telephone at 301–837–1694 or fax at 301–713–7409 with requests for additional information or copies of the proposed information collection and supporting statement.

SUPPLEMENTARY INFORMATION: Pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13), NARA invites the general public and other Federal agencies to comment on proposed information collections. We published a notice of proposed collection notice for this information collection on October 4, 2016 (81 FR 68459–60); and we received no comments. We have therefore submitted the described information collection to OMB for approval.

In response to this notice, comments and suggestions should address one or more of the following points: (a) Whether the proposed information collection is necessary for NARA to properly perform its functions; (b) NARA's estimate of the burden of the proposed information collection and its accuracy; (c) ways NARA could enhance the quality, utility, and clarity of the information it collects; (d) ways NARA could minimize the burden on respondents of collecting the information, including the through information technology; and (e) whether the collection affects small businesses. In this notice, NARA solicits comments concerning the following information collection:

Title: Limited Facility Report.

OMB number: 3095–00XX.

Agency form number: NA Form 16016.

Type of review: Regular.

Affected public: Not-for-profit institutions.

Estimated number of respondents: 75.

Estimated time per response: 60 minutes.

Frequency of response: On occasion.

Estimated total annual burden hours: 75 hours.

Abstract: NARA administers the National Archives Traveling Exhibits Service (NATES) in accordance with 44 U.S.C. 2108–9 to present exhibitions of our holdings and to enter into agreements with other organizations under 44 U.S.C. 2305 for support of such exhibitions.

NARA developed NA Form 16016, Limited Facility Report, to serve as an application for exhibits and to gather information from applicants on a proposed venue's facility and environmental conditions. We provide a copy of the form, requirements for exhibition security, and regulations to the applicant. NARA needs the information contained on this form to determine whether the proposed facility meets the criteria under NARA Directive 1612, Exhibition Loans and Traveling Exhibitions, and whether to grant the application for an exhibit.

Swarnali Haldar,

Executive for Information Services/CIO.

[FR Doc. 2016–31453 Filed 12–28–16; 8:45 am]

BILLING CODE 7515–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 52–027 and 52–028; NRC–2008–0441]

South Carolina Electric & Gas Company, South Carolina Public Service Authority; Virgil C. Summer Nuclear Station, Units 2 and 3; Radiologically Controlled Area Ventilation System

AGENCY: Nuclear Regulatory Commission.

ACTION: Exemption and combined license amendment; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing an exemption to allow a departure from the certification information of Tier 1 of the generic design control document (DCD) and is issuing License Amendment No. 53 to Combined Licenses (COLs), NPF–93 and NPF–94. The COLs were issued to South Carolina Electric & Gas Company, (the licensee); for construction and operation of the Virgil C. Summer Nuclear Station (VCSNS) Units 2 and 3, located in Fairfield County, South Carolina. The issuance of the exemption allows the changes to Tier 1 information requested in the amendment. Because the acceptability of the exemption was determined in part by the acceptability of the amendment, the exemption and amendment are being issued concurrently.

DATES: The exemption was issued on October 31, 2016.

ADDRESSES: Please refer to Docket ID NRC–2008–0441 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2008–0441. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *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 (if it is available in ADAMS) is provided the first time that it is mentioned in this document. The request for the amendment and exemption was submitted by letter dated December 17, 2015 (ADAMS Accession No. ML15351A165) and it was supplemented by letter dated September 6, 2016 (ADAMS Accession No. ML16250A721).

- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: William Gleaves, Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–5848; email: *Bill.Gleaves@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is issuing an exemption from Paragraph B of Section III, ''Scope and Contents,'' of Appendix D, ''Design Certification Rule for the AP1000,'' to part 52 of title 10 of the *Code of Federal Regulations* (10 CFR), and issuing License Amendment No. 53 to COLs, NPF–93 and NPF–94, to the licensee. The exemption is required by Paragraph A.4 of Section VIII, ''Processes for Changes and Departures,'' Appendix D, to 10 CFR part 52 to allow the licensee to depart from Tier 1 information. With the requested amendment, the licensee sought proposed changes to the Updated Final Safety Analysis Report in the form of departures from the incorporated plant-specific Design Control Document Tier 2 information. The proposed amendment also involves related changes to plant-specific Tier 1 information, with corresponding changes to the associated COL Appendix C information. Specifically, the licensee requested changes to the Radiologically Controlled Area Ventilation System configuration and equipment list.

Part of the justification for granting the exemption was provided by the review of the amendment. Because the exemption is necessary in order to issue the requested license amendment, the NRC granted the exemption and issued the amendment concurrently, rather than in sequence. This included issuing a combined safety evaluation containing the NRC staff's review of both the exemption request and the license amendment. The exemption met all applicable regulatory criteria set forth in 10 CFR 50.12, 10 CFR 52.7, and Section VIII.A.4 of Appendix D to 10 CFR part 52. The license amendment was also found to be acceptable. The combined safety evaluation is available in ADAMS under Accession No. ML16273A324.

Identical exemption documents (except for referenced unit numbers and license numbers) were issued to the licensee for VCSNS Units 2 and 3 (COLs NPF–93 and NPF–94). The exemption documents for VCSNS Units 2 and 3 can be found in ADAMS under Accession Nos. ML16273A305 and ML16273A312, respectively. The exemption is reproduced (with the exception of abbreviated titles and additional citations) in Section II of this document. The amendment documents for COLs NPF–93 and NPF–94 are available in ADAMS under Accession Nos. ML16273A272 and ML16273A290, respectively. A summary of the amendment documents is provided in Section III of this document.

II. Exemption

Reproduced below is the exemption document issued to Summer Units 2 and Unit 3. It makes reference to the combined safety evaluation that provides the reasoning for the findings made by the NRC (and listed under Item 1) in order to grant the exemption:

1. In a letter dated December 17, 2015, as supplemented by letter dated September 6, 2016, the licensee requested from the Commission an exemption to allow changes to plant-specific Tier 1 information from the certified AP1000 DCD that was incorporated by reference in 10 CFR part 52, Appendix D, as part of license amendment request 15–15, ''Radiologically Controlled Area Ventilation System (VAS) Design Changes.''

For the reasons set forth in Section 3.1, of the NRC staff's Safety Evaluation that supports this license amendment, which can be found in ADAMS under Accession No. ML16273A324, the Commission finds that:

A. The exemption is authorized by law;

B. the exemption presents no undue risk to public health and safety;

C. the exemption is consistent with the common defense and security;

D. special circumstances are present in that the application of the rule in this circumstance is not necessary to serve the underlying purpose of the rule;

E. the special circumstances outweigh any decrease in safety that may result from the reduction in standardization caused by the exemption; and

F. the exemption will not result in a significant decrease in the level of safety otherwise provided by the design.

2. Accordingly, the licensee is granted an exemption from the certified AP1000 DCD Tier 1 information, as described in the licensee's request dated December 17, 2015, as supplemented by letter dated September 6, 2016. This exemption is related to, and necessary for, the granting of License Amendment No. 53, which is being issued concurrently with this exemption.

3. As explained in Section 5 of the NRC staff's Safety Evaluation that supports this license amendment, this exemption meets the eligibility criteria for categorical exclusion set forth in 10 CFR 51.22(c)(9). Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment needs to be prepared in connection with the issuance of the exemption.

4. This exemption is effective as of the date of its issuance.

III. License Amendment Request

By letter dated December 17, 2015, as supplemented by letter dated September 6, 2016, the licensee requested that the NRC amend the COLs for VCSNS, Units 2 and 3, COLs NPF–93 and NPF–94. The proposed amendment is described in Section I of this **Federal Register** notice.

The Commission has determined for these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

A notice of consideration of issuance of amendment to facility operating license or combined license, as applicable, proposed no significant hazards consideration determination, and opportunity for a hearing in connection with these actions, was published in the **Federal Register** on February 16, 2016 (81 FR 7840). No comments were received during the 30-day comment period.

The Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments.

IV. Conclusion

Using the reasons set forth in the combined safety evaluation, the staff

granted the exemption and issued the amendment that the licensee requested on December 17, 2015 and supplemented on September 6, 2016.

The exemption and amendment were issued on October 31, 2016 as part of a combined package to the licensee (ADAMS Accession No. ML16273A142).

Dated at Rockville, Maryland, this 19th day of December 2016.

For the Nuclear Regulatory Commission.

Brian Hughes,

Acting Chief, Licensing Branch 4, Division of New Reactor Licensing, Office of New Reactors.

[FR Doc. 2016–31591 Filed 12–28–16; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2015–0153]

Acceptance of Commercial-Grade Design and Analysis Computer Programs for Nuclear Power Plants

AGENCY: Nuclear Regulatory Commission.

ACTION: Regulatory Guide; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing Revision 0 to Regulatory Guide (RG) 1.231, ''Acceptance of Commercial-Grade Design and Analysis Computer Programs for Nuclear Power Plants.'' This RG describes methods that the NRC considers acceptable in meeting regulatory requirements for acceptance and dedication of commercial-grade design and analysis computer programs used in safety-related applications for nuclear power plants.

DATES: Revision 0 to RG 1.231 is available on December 29, 2016.

ADDRESSES: Please refer to Docket ID NRC–2015–0153 when contacting the NRC about the availability of information regarding this document. You may obtain publically-available information related to this document, using the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2016–0153. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Document collection 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. Revision 0 to Regulatory Guide 1.231, and the regulatory analysis may be found in ADAMS under Accession Nos. ML16126A183 and ML16126A181 respectively.
- *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.

Regulatory guides are not copyrighted, and the NRC's approval is not required to reproduce them.

FOR FURTHER INFORMATION CONTACT: Greg Galletti, Office of New Reactors, telephone: 301–415–1831; email: *greg.galletti@nrc.gov;* and Stephen Burton, Office of Nuclear Regulatory Research, telephone: 301–415–7000; email: *Stephen.Burton@nrc.gov.* Both are staff of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is issuing a new guide in the NRC's ''Regulatory Guide'' series. This series was developed to describe and make available to the public information regarding methods that are acceptable to the NRC for implementing specific parts of the agency's regulations, techniques that the NRC uses in evaluating specific issues or postulated events, and data that the NRC needs in its review of applications for permits and licenses.

Revision 0 of RG 1.231 was issued with a temporary identification of Draft Regulatory Guide, DG–1305. This RG is being issued to endorse Revision 1 of EPRI Technical Report 1025243, ''Plant Engineering: Guideline for the Acceptance of Commercial-Grade Design and Analysis Computer Programs Used in Nuclear Safety-Related Applications,'' with respect to acceptance of commercial-grade design and analysis computer programs associated with basic components for nuclear power plants.

II. Additional Information

The NRC published a notice of the availability of DG–1305 in the **Federal Register** on July 1, 2015, (80 FR 37666) for a 60-day public comment period. The public comment period closed on August 31, 2015. Public comments on DG–1305 and the NRC's responses to the public comments are available in ADAMS under Accession No. ML16126A179.

III. Congressional Review Act

This regulatory guide is a rule as defined in the Congressional Review Act (5 U.S.C. 801–808). However, the Office of Management and Budget has not found it to be a major rule as defined in the Congressional Review Act.

IV. Backfitting and Issue Finality

This regulatory guide describes acceptable methods for meeting the dedication requirements in part 21 of title 10 of the *Code of Federal Regulations* (10 CFR) and § 50.55(e) with respect to design and analysis computer programs for nuclear power plants. The regulatory guide, does not constitute backfitting as defined in 10 CFR 50.109 (the Backfit Rule) and is not otherwise inconsistent with the issue finality provisions in 10 CFR part 52, ''Licenses, Certifications and Approvals for Nuclear Power Plants.'' This regulatory guide, if finalized, represents the first NRC guidance on this subject. Issuance of new guidance, by itself, does not represent backfitting unless the NRC intends to impose the guidance on existing licensees and currently-approved design certification rules issued under 10 CFR part 52. The NRC does not have such an intention.

Existing licensees and applicants of final design certification rules will not be required to comply with the positions set forth in this regulatory guide, unless the licensee or design certification rule applicant seeks a voluntary change to its licensing basis with respect to safety-related power operated valve actuators, and where the NRC determines that the safety review must include consideration of the qualification of the valve actuators. Further information on the NRC's use of the regulatory guide, is contained in the regulatory guide under Section D. Implementation.

Applicants and potential applicants are not, with certain exceptions, protected by either the Backfit Rule or any issue finality provisions under 10 CFR part 52. Neither the Backfit Rule nor the issue finality provisions under 10 CFR part 52—with certain exclusions

discussed below—were intended to every NRC action which substantially changes the expectations of current and future applicants. Therefore, the positions in any final regulatory guide, if imposed on applicants, would not represent backfitting (except as discussed below).

The exceptions to the general principle are applicable whenever a combined license applicant references a 10 CFR part 52 license (*i.e.,* an early site permit or a manufacturing license) and/or 10 CFR part 52 regulatory approval (*i.e.,* a design certification rule or design approval). The NRC does not, at this time, intend to impose the positions represented in the regulatory guide in a manner that is inconsistent with any issue finality provisions in the 10 CFR part 52 licenses and regulatory approvals. If, in the future, the NRC seeks to impose a position in this regulatory guide in a manner which does not provide issue finality as described in the applicable issue finality provision, then the NRC must address the criteria for avoiding issue finality as described in the applicable issue finality provision.

Dated at Rockville, Maryland, this 23rd day of December 2016.

For the Nuclear Regulatory Commission.

Edward O'Donnell,

Acting Chief, Regulatory Guidance and Generic Issues Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. 2016–31603 Filed 12–28–16; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2017–59 and CP2017–87; MC2017–60 and CP2017–88; MC2017–61 and CP2017–89; MC2017–62 and CP2017–90; MC2017–63 and CP2017–91; MC2017–64 and CP2017–92; MC2017–65 and CP2017–93; MC2017–66 and CP2017–94]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing recent Postal Service filings for the Commission's consideration concerning negotiated service agreements. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* January 3, 2017 (Comment due date applies to MC2017–59 and CP2017–87; MC2017–60 and CP2017–88; MC2017–61 and CP2017–89; MC2017–62 and CP2017–90; MC2017–63 and CP2017–91); and January 4, 2017 (Comment due date applies to MC2017–64 and CP2017–92; MC2017–65 and CP2017–93; MC2017–66 and CP2017–94.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

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I. Introduction
II. Docketed Proceeding(s)

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's Web site (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3007.40.

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3010, and 39 CFR part 3020, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3015, and 39 CFR part 3020, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* MC2017–59 and CP2017–87; *Filing Title:* Request of the United States Postal Service to Add Priority Mail Contract 279 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* December 21, 2016; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Christopher C. Mohr; *Comments Due:* January 3, 2017.

2. *Docket No(s).:* MC2017–60 and CP2017–88; *Filing Title:* Request of the United States Postal Service to Add Priority Mail Contract 280 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* December 21, 2016; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Christopher C. Mohr; *Comments Due:* January 3, 2017.

3. *Docket No(s).:* MC2017–61 and CP2017–89; *Filing Title:* Request of the United States Postal Service to Add Priority Mail Contract 281 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* December 21, 2016; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Christopher C. Mohr; *Comments Due:* January 3, 2017.

4. *Docket No(s).:* MC2017–62 and CP2017–90; *Filing Title:* Request of the United States Postal Service to Add First-Class Package Service Contract 71 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* December 21, 2016; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Max E. Schnidman; *Comments Due:* January 3, 2017.

5. *Docket No(s).:* MC2017–63 and CP2017–91; *Filing Title:* Request of the United States Postal Service to Add Priority Mail Express & Priority Mail Contract 39 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* December 21, 2016;

Filing Authority: 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Kenneth R. Moeller; *Comments Due:* January 3, 2017.

6. *Docket No(s).:* MC2017–64 and CP2017–92; *Filing Title:* Request of the United States Postal Service to Add Priority Mail Express & Priority Mail Contract 40 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* December 21, 2016; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Kenneth R. Moeller; *Comments Due:* January 4, 2017.

7. *Docket No(s).:* MC2017–65 and CP2017–93; *Filing Title:* Request of the United States Postal Service to Add Parcel Select Contract 18 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* December 21, 2016; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Katalin K. Clendenin; *Comments Due:* January 4, 2017.

8. *Docket No(s).:* MC2017–66 and CP2017–94; *Filing Title:* Request of the United States Postal Service to Add Parcel Select Contract 19 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* December 21, 2016; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Katalin K. Clendenin; *Comments Due:* January 4, 2017.

This notice will be published in the **Federal Register**.

Stacy L. Ruble,

Secretary.

[FR Doc. 2016–31436 Filed 12–28–16; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL SERVICE

Product Change—First-Class Package Service 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:* December 29, 2016.

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 December 21, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add First-Class Package Service Contract 71 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–62, CP2017–90.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–31519 Filed 12–28–16; 8:45 am]

BILLING CODE 7710–12–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:* December 29, 2016.

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 December 21, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Contract 281 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–61, CP2017–89.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–31518 Filed 12–28–16; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Parcel Select 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:* December 29, 2016.

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 December 21, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Parcel Select Contract 19 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–66, CP2017–94.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–31524 Filed 12–28–16; 8:45 am]

BILLING CODE 7710–12–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:* December 29, 2016.

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 December 21, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Contract 279 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–59, CP2017–87.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–31516 Filed 12–28–16; 8:45 am]

BILLING CODE 7710–12–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:* December 29, 2016.

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 December 21, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Contract 280 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–60, CP2017–88.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–31517 Filed 12–28–16; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express and 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: December 29, 2016.*

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 December 21, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Express & Priority Mail Contract 39 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–63, CP2017–91.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–31520 Filed 12–28–16; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Parcel Select 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:* December 29, 2016.

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 December 21, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Parcel Select Contract 18 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–65, CP2017–93.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–31523 Filed 12–28–16; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express and 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:* December 29, 2016.

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 December 21, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Express & Priority Mail Contract 40 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–64, CP2017–92.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–31522 Filed 12–28–16; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79674; File No. SR–NYSE–2016–45]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Amendment No. 3 to Proposed Rule Change Amending the Co-Location Services Offered by the Exchange To Add Certain Access and Connectivity Fees

December 22, 2016.

On July 29, 2016, the New York Stock Exchange LLC (''NYSE'' or the ''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 amend the co-location services offered by the Exchange to: (1) Provide additional information regarding the access to various trading and execution services; connectivity to market data feeds and testing and certification feeds; connectivity to Third Party Systems; and connectivity to DTCC provided to Users using data center local area networks; and (2) establish fees relating to a User's access to various trading and execution services; connectivity to market data feeds and testing and certification feeds; connectivity to DTCC; and other services. The proposed rule change was published for comment in the **Federal Register** on August 17, 2016.[3] The Exchange filed Amendment No. 1 to the proposed rule change on August 16, 2016.[4] Amendment No. 1

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 34–78556 (August 11, 2016), 81 FR 54877.

[4] Amendment No. 1 (i) amended the third party data feed MSCI from 20 Gigabite (''Gb'') to 25 Gb and amended the price from $2,000 to $1,200; (ii) clarified the costs associated with providing a greater amount of bandwidth for Premium NYSE Data Products for a particular market as compared to the bandwidth requirements for the Included Data Products for that same market; (iii) provided further details on Premium NYSE Data Products, including their composition, product release dates, and further detail on the reasonableness of their applicable fees; (iv) added an explanation for the varying fee differences for the same Gb usage for third party data feeds, DTCC, and Virtual Control Circuit.

was published for comment in the **Federal Register** on September 26, 2016.[5] The Commission received one comment in response to the proposed rule change, as modified by Amendment No. 1 and the Exchange responded.[6] On October 4, 2016, the Commission extended the time period within which to 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 November 15, 2016.[7]

On November 2, 2016, the Exchange filed Amendment No. 2 to the proposed rule change.[8] On November 21, 2016, the Commission instituted proceedings to determine whether to approve or disapprove the proposed rule change, as modified by Amendment Nos. 1 and 2.[9] In response to the Order Instituting Proceedings, the Commission received additional comment letters regarding the proposed rule change.[10]

On December 9, 2016, the Exchange filed Amendment No. 3 to the proposed rule change as described in Items I and II below, which Items have been prepared by Exchange. The Commission is publishing this notice to solicit comments on Amendment No. 3 to the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Amendment

The Exchange proposes to amend the co-location services offered by the Exchange to establish fees relating to Users' access to third party trading and execution services; connectivity to third party data feeds and testing and certification feeds; access to clearing; and other services. In addition, this proposed rule change reflects changes to the Exchange's Price List related to these co-location services. This Amendment No. 3 supersedes the original filing and Amendments 1 and 2 in their entirety.[11] 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 the co-location[12] services offered by the Exchange to establish fees relating to Users'[13] access to third party trading and execution services; connectivity to third party data feeds and testing and certification feeds; access to clearing; and other services.

More specifically, the Exchange proposes to revise the Price List to include:

a. Fees for connectivity to:

- The execution systems of third party markets and other content service providers (''Third Party Systems'');
- data feeds from third party markets and other content service providers (the ''Third Party Data Feeds'');
- third party testing and certification feeds;
- Depository Trust & Clearing Corporation (''DTCC'') services; and

b. fees for virtual control circuits (''VCCs'') between two Users. VCCs are unicast connections between two participants over dedicated bandwidth.[14]

The Exchange provides access to the Third Party Systems (''Access'') and connectivity to Third Party Data Feeds, third party testing and certification feeds, and DTCC (collectively, ''Connectivity'') as conveniences to Users. Use of Access or Connectivity is completely voluntary, and several other

[5] *See* Securities Exchange Act Release No. 34–78887 (September 20, 2016), 81 FR 66095.

[6] *See* letter to Brent J. Fields, Secretary, Commission, from John Ramsay, Chief Market Policy Officer, Investors Exchange LLC (IEX), dated September 9, 2016.

On September 23, 2016, the NYSE submitted a response to the IEX letter.

[7] *See* Securities Exchange Act Release No. 34–78966 (September 28, 2016), 81 FR 68475.

[8] Amendment No. 2 is available on the Commission's Web site at *https://www.sec.gov/comments/sr-nyse-2016-45/nyse201645-4.pdf.*

[9] *See* Securities Exchange Act Release 34–79316 (November 15, 2016), 81 FR 83303.

[10] *See* letter to Brent J. Fields, Commission, from Adam C. Cooper, Senior Managing Director and Chief Legal Officer, Citadel Securities, dated December 12, 2016; letter to Brent J. Fields, Commission, from Melissa MacGregor, Managing Director and Associate General Counsel, SIFMA, dated December 12, 2016; letter to Brent J. Fields, Commission, from Joe Wald, Chief Executive Officer, Clearpool Group, dated December 16, 2016; letter to Brent J. Fields, Secretary, Commission, from John Ramsay, Chief Market Policy Officer, Investors Exchange LLC (IEX), dated December 21, 2016. All comments received by the Commission on the proposed rule change are available on the Commission's Web site at: *https://www.sec.gov/comments/sr-nyse-2016-45/nyse201645.shtml.*

[11] The Securities and Exchange Commission (''Commission'') has issued an order instituting proceedings to determine whether to approve or disapprove the proposed rule change, as modified by amendments 1 and 2. *See* Securities Exchange Act Release No. 79316 (November 15, 2016), 81 FR 83303 (November 21, 2016) (SR–NYSE–2016–45) (the ''November 15 Order''). In its filing, as amended by amendments 1 and 2, the Exchange proposed adding to the Price List (a) a more detailed description of the connectivity to certain market data products (the ''Included Data Products'') that Users receive with connections to the local area networks available in the data center; and (b) connectivity fees for connecting to other market data products of the Exchange and its affiliates, NYSE MKT LLC and NYSE Arca, Inc. (the ''Premium NYSE Data Products''). In the November 15 Order, the Commission cites language from the proposed rule change:

the Exchange also stated that the expectation of co-location was that normally Users would expect reduced latencies in . . . receiving market data from the Exchange by being colocated. Therefore, as the Exchange states in Amendment No. 2, both Included Data Products and Premium NYSE Data Products are 'directly related to the purpose of co-location.'

Id., at 83307. It goes on to say that, if Included Data Products and Premium NYSE Data Products are ''integral to co-located Users for trading on the Exchange,'' it was questionable whether obtaining the information from another source is a viable alternative. *Id.* The Exchange disagrees with the Commission's description of Included Data Products and Premium NYSE Data Products as ''integral'' to Users for trading on the Exchange. Being related to the purpose of co-location is not the same as being integral for trading. A User is not required to receive either Included Data Products or Premium NYSE Data Products in order to trade on the Exchange.

[12] The Exchange initially filed rule changes relating to its co-location services with the Commission in 2010. *See* Securities Exchange Act Release No. 62960 (September 21, 2010), 75 FR 59310 (September 27, 2010) (SR–NYSE–2010–56) (the ''Original Co-location Filing''). The Exchange operates a data center in Mahwah, New Jersey (the ''data center'') from which it provides co-location services to Users.

[13] For purposes of the Exchange's co-location services, a ''User'' means any market participant that requests to receive co-location services directly from the Exchange. *See* Securities Exchange Act Release No. 76008 (September 29, 2015), 80 FR 60190 (October 5, 2015) (SR–NYSE–2015–40). As specified in the Price List, a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange's affiliates NYSE MKT LLC (''NYSE MKT'') and NYSE Arca, Inc. (''NYSE Arca'' and, together with NYSE MKT, the ''Affiliate SROs''). *See* Securities Exchange Act Release No. 70206 (August 15, 2013), 78 FR 51765 (August 21, 2013) (SR–NYSE–2013–59).

[14] Information flows over existing network connections in two formats: ''unicast'' format, which is a format that allows one-to-one communication, similar to a phone line, in which information is sent to and from the Exchange; and ''multicast'' format, which is a format in which information is sent one-way from the Exchange to multiple recipients at once, like a radio broadcast.

access and connectivity options are available to a User. As alternatives to using the Access and Connectivity provided by the Exchange, a User may access or connect to such services and products through another User or through a connection to an Exchange access center outside the data center, third party access center, or third party vendor. The User may make such connection through a third party telecommunication provider, third party wireless network, the Exchange's Secure Financial Transaction Infrastructure (''SFTI'') network, or a combination thereof.

Similarly, the Exchange provides VCCs as a convenience to Users. Use of a VCC is completely voluntary. As an alternative to an Exchange-provided VCC, a User may connect to another User through a fiber connection (''cross connect'').[15]

Connectivity

Connectivity to Third Party Systems

The Exchange proposes to revise the Price List to provide that Users may obtain connectivity to Third Party Systems of multiple third party markets and other content service providers for a fee. Users connect to Third Party Systems over the internet protocol (''IP'') network, a local area network available in the data center.[16] The Exchange selects what connectivity to Third Party Systems to offer in the data center based on User demand.

In order to obtain access to a Third Party System, a User enters into an agreement with the relevant third party content service provider, pursuant to which the third party content service provider charges the User for access to the Third Party System. The Exchange then establishes a unicast connection between the User and the relevant third party content service provider over the IP network. The Exchange charges the User for the connectivity to the Third Party System. A User only receives, and is only charged for, access to Third Party Systems for which it enters into agreements with the third party content service provider.

With the exception of the Intercontinental Exchange (''ICE'') feed,[17] the Exchange has no ownership interest in the Third Party Systems. Establishing a User's access to a Third Party System does not give the Exchange any right to use the Third Party Systems. Connectivity to a Third Party System does not provide access or order entry to the Exchange's execution system, and a User's connection to a Third Party System is not through the Exchange's execution system.[18]

The Exchange charges a monthly recurring fee for connectivity to a Third Party System. Specifically, when a User requests access to a Third Party System, it identifies the applicable third party market or other content service provider and what bandwidth connection it requires.

The monthly recurring fee the Exchange charges Users for unicast connectivity to each Third Party System varies by the bandwidth of the connection, as follows:

Bandwidth of connection to third party system	Monthly recurring fee per connection to third party system
1 Mb	$200
3 Mb	400
5 Mb	500
10 Mb	800
25 Mb	1,200
50 Mb	1,800
100 Mb	2,500
200 Mb	3,000
1 Gb	3,500

The Exchange provides connectivity to the following Third Party Systems:

Americas Trading Group (ATG)
BATS
Boston Options Exchange (BOX)
Chicago Board Options Exchange (CBOE)
Credit Suisse
International Securities Exchange (ISE)
Nasdaq
National Stock Exchange
NYFIX Marketplace

In addition to the connectivity fees, the Exchange proposes to add language to its Price List stating the following:

Pricing for access to the execution systems of third party markets and other service providers (Third Party Systems) is for connectivity only. Connectivity to Third Party Systems is subject to any technical provisioning requirements and authorization from the provider of the data feed. Connectivity to Third Party Systems is over the IP network. Any applicable fees are charged independently by the relevant third party content service provider. The Exchange is not the exclusive method to connect to Third Party Systems.

Connectivity to Third Party Data Feeds

The Exchange proposes to revise the Price List to provide that Users may obtain connectivity to Third Party Data Feeds for a fee. The Exchange receives Third Party Data Feeds from multiple national securities exchanges and other content service providers at its data center. It then provides connectivity to that data to Users for a fee. With the exceptions of Global OTC and NYSE Global Index, Users connect to Third Party Data Feeds over the IP network.[19]

The Exchange notes that charging Users a monthly fee for connectivity to Third Party Data Feeds is consistent with the monthly fee Nasdaq charges its co-location customers for connectivity to third party data. For instance, Nasdaq charges its co-location customers monthly fees of $1,500 and $4,000 for connectivity to BATS Y and BATS, respectively, and of $2,500 for connectivity to EDGA or EDGX.[20]

In order to connect to a Third Party Data Feed, a User enters into a contract with the relevant third party market or other content service provider, pursuant to which the content service provider charges the User for the Third Party Data Feed. The Exchange receives the Third Party Data Feed over its fiber optic network and, after the data provider and User enter into the contract and the Exchange receives authorization from the data provider, the Exchange re-transmits the data to the User over the User's port. The Exchange charges the User for the connectivity to the Third Party Data Feed. A User only receives, and is only charged for, connectivity to the Third Party Data Feeds for which it enters into contracts.

With the exception of the ICE, Global OTC and NYSE Global Index feeds,[21]

[15] *See* Original Co-location Filing, *supra* note 5, at 59311 and Securities Exchange Act Release No. 74222 (February 6, 2015), 80 FR 7888 (February 12, 2015) (SR–NYSE–2015–05) (notice of filing and immediate effectiveness of proposed rule change to include IP network connections and fiber cross connects between a User's cabinet and non-User's equipment as co-location services) (the ''IP Network Release'').

[16] *See id.,* at 7889.

[17] ICE is owned by the Exchange's ultimate parent, Intercontinental Exchange, Inc., and so the Exchange has an indirect interest in the ICE feeds. The ICE feeds include both market data and trading and clearing services, but the Exchange includes it as a Third Party Data Feed. In order for a User to receive an ICE feed, ICE must provide authorization for the User to receive both data and trading and clearing services.

[18] The Exchange has a dedicated network connection to each of the Third Party Systems.

[19] *See* IP Network Release, *supra* note 8, at 7889 (''The IP network also provides Users with access to away market data products.''). Users can connect to Global OTC and NYSE Global Index over the IP network or the Liquidity Center Network (''LCN''), a local area network available in the data center.

[20] *See* Nasdaq Stock Market Rule 7034.

[21] ICE and the Global OTC alternative trading system are both owned by the Exchange's ultimate parent, Intercontinental Exchange, Inc., and so the Exchange has an indirect interest in the ICE and Global OTC feeds. The NYSE Global Index feed includes index and exchange traded product valuations data, with data drawn from the Exchange, the Affiliate SROs, and third party exchanges. Because it includes third party data, the NYSE Global Index feed is considered a Third Party Data Feed. As with all Third Party Data Feeds, the

Continued

the Exchange has no affiliation with the sellers of the Third Party Data Feeds. It has no right to use the Third Party Data Feeds other than as a redistributor of the data. The Third Party Data Feeds do not provide access or order entry to the Exchange's execution system. With the exception of the ICE feeds, the Third Party Data Feeds do not provide access or order entry to the execution systems of the third party generating the feed.[22] The Exchange receives Third Party Data Feeds via arms-length agreements and it has no inherent advantage over any other distributor of such data.

The Exchange charges a monthly recurring fee for connectivity to each Third Party Data Feed. The monthly recurring fee is per Third Party Data Feed, with the exception that the monthly recurring feed for SuperFeed and MSCI varies by the bandwidth of the connection. Depending on its needs and bandwidth, a User may opt to receive all or some of the feeds or services included in a Third Party Data Feed.

The following table shows the feeds that connectivity to each Third Party Data Feed provides, together with the applicable monthly recurring fee.

Third party data feed	Monthly recurring connectivity fee per third party data feed
Bats BZX Exchange (BZX) and Bats BYX Exchange (BYX)	$2,000
Bats EDGX Exchange (EDGX) and Bats EDGA Exchange (EDGA)	2,000
Boston Options Exchange (BOX)	1,000
Chicago Board Options Exchange (CBOE)	2,000
Chicago Stock Exchange (CHX)	400
Euronext	600
Financial Industry Regulatory Authority (FINRA)	500
Global OTC	100
Intercontinental Exchange (ICE)	1,500
Montréal Exchange (MX)	1,000
MSCI 5 Mb	500
MSCI 25 Mb	1,200
NASDAQ Stock Market	2,000
NASDAQ OMX Global Index Data Service	100
NASDAQ OMDF	100
NASDAQ UQDF & UTDF	500
NYSE Global Index	100
OTC Markets Group	1,000
SR Labs—SuperFeed ≤500 Mb	250
SR Labs—SuperFeed >500 Mb to ≤1.25 Gb	800
SR Labs—SuperFeed >1.25 Gb	1,000
TMX Group	2,500

In addition to the above connectivity fees, the Exchange proposes to add the following language to its Price List:

Pricing for data feeds from third party markets and other content service providers (Third Party Data Feeds) is for connectivity only. Connectivity to Third Party Data Feeds is subject to any technical provisioning requirements and authorization from the provider of the data feed. Connectivity to Third Party Data Feeds is over the IP network, with the exception that Users can connect to Global OTC and NYSE Global Index over the IP network or LCN. Market data fees are charged independently by the relevant third party market or content service provider. The Exchange is not the exclusive method to connect to Third Party Data Feeds.

Third Party Data Feed providers may charge redistribution fees, such as Nasdaq's Extranet Access Fees and OTC Markets Group's Access Fees.[23] When the Exchange receives a redistribution fee, it passes through the charge to the User, without change to the fee. The fee is labeled as a pass-through of a redistribution fee on the User's invoice. The Exchange proposes to add language to the Price List accordingly.

The Exchange provides third party markets or content providers that are also Users connectivity to their own Third Party Data Feeds. The Exchange does not charge Users that are third party markets or content providers for connectivity to their own feeds, as in the Exchange's experience such parties generally receive their own feeds for purposes of diagnostics and testing. The Exchange proposes to add language to the Price List accordingly.

Connectivity to Third Party Testing and Certification Feeds

The Exchange offers Users connectivity to third party certification and testing feeds. Certification feeds are used to certify that a User conforms to any of the relevant content service provider's requirements for accessing Third Party Systems or receiving Third Party Data, while testing feeds provide Users an environment in which to conduct tests with non-live data.[24] Such feeds, which are solely used for certification and testing and do not carry live production data, are available over the IP network.

The Exchange proposes to revise the Price List to include connectivity to third party certification and testing feeds. The Exchange charges a connectivity fee of $100 per month per feed.

The Exchange proposes to add the following connectivity fees and language to its Price List:

Connectivity to third party certification and testing feeds—$100 monthly recurring fee per feed.

The Exchange provides connectivity to third party testing and certification feeds provided by third party markets and other content service providers. Pricing for third party testing and certification feeds is for connectivity only. Connectivity to third party testing and certification feeds is subject to any technical provisioning requirements and authorization from the provider of the data feed. Connectivity to third party testing and certification feeds is over the IP network. Any applicable fees are charged independently by the relevant third party market or content service provider. The Exchange is not the exclusive method to connect to third party testing and certification feeds.

Connectivity to DTCC

The Exchange provides Users connectivity to DTCC for clearing, fund transfer, insurance, and settlement services.[25] The Exchange proposes to revise the Price List to include connectivity to DTCC. The Exchange charges a connectivity fee of $500 per month for connections to DTCC of 5 Mb and $2,500 for connections of 50 Mb. Connectivity to DTCC is available over the IP network.

In order to connect to DTCC, a User enters into a contract with DTCC, pursuant to which DTCC charges the User for the services provided. The Exchange receives the DTCC feed over

Exchange is not the exclusive method to connect to the ICE, Global OTC or NYSE Global Index feeds.

[22] Unlike other Third Party Data Feeds, the ICE feeds include both market data and trading and clearing services. In order to receive the ICE feeds, a User must receive authorization from ICE to receive both market data and trading and clearing services.

[23] *See* NASDAQ Stock Market LLC Rule 7025, ''Extranet Access Fee'', and OTC Markets Market Data Distribution Agreement Appendix B, ''Fees'' at *http://www.otcmarkets.com/content/doc/market-data-fees-2016.pdf. See also* Securities Exchange Act Release No. 74040 (January 13, 2015), 80 FR 2460 (January 16, 2015) (SR–NASDAQ–2015–003).

[24] For example, a User that trades on a third party exchange may wish to test the exchange's upcoming releases and product releases or may wish to test a new algorithm in a testing environment prior to making it live.

[25] Such connectivity to DTCC is distinct from the access to shared data services for clearing and settlement services that a User receives when it purchases access to the LCN or IP network. The shared data services allow Users and other entities with access to the Trading Systems to post files for settlement and clearing services to access.

its fiber optic network and, after DTCC and the User enter into the services contract and the Exchange receives authorization from DTCC, the Exchange provides connectivity to DTCC to the User over the User's IP network port. The Exchange charges the User for the connectivity to DTCC.

Connectivity to DTCC does not provide access or order entry to the Exchange's execution system, and a User's connection to DTCC is not through the Exchange's execution system.

The Exchange proposes to add the following connectivity fees and language to its Price List:

5 Mb connection to DTCC—$500 monthly recurring fee.
50 Mb connection to DTCC—$2,500 monthly recurring fee.

Pricing for connectivity to DTCC feeds is for connectivity only. Connectivity to DTCC feeds is subject to any technical provisioning requirements and authorization from DTCC. Connectivity to DTCC feeds is over the IP network. Any applicable fees are charged independently by DTCC. The Exchange is not the exclusive method to connect to DTCC feeds.

Virtual Control Circuits

Finally, the Exchange proposes to revise the Price List to offer VCCs between two Users. VCCs are connections between two points over dedicated bandwidth using the IP network. A VCC (previously called a ''peer to peer'' connection) is a two-way connection which the two participants can use for any purpose.

The Exchange bills the User requesting the VCC, but will not set up a VCC until the other User confirms that it wishes to have the VCC set up.

The Exchange proposes to revise the Price List to include VCCs between two Users. The fee for VCCs is based on the bandwidth utilized, as follows:

Type of Service	Description	Amount of Charge
Virtual Control Circuit between two Users	1 Mb	$200 monthly charge.
	3 Mb	400 monthly charge.
	5 Mb	500 monthly charge.
	10 Mb	800 monthly charge.
	25 Mb	1,200 monthly charge.
	50 Mb	1,800 monthly charge.
	100 Mb	2,500 monthly charge.

General

As is the case with all Exchange co-location arrangements, (i) neither a User nor any of the User's customers would be permitted to submit orders directly to the Exchange unless such User or customer is a member organization, a Sponsored Participant or an agent thereof (*e.g.,* a service bureau providing order entry services); (ii) use of the co-location services proposed herein would be completely voluntary and available to all Users on a non-discriminatory basis; [26] and (iii) a User would only incur one charge for the particular co-location service described herein, regardless of whether the User connects only to the Exchange or to the Exchange and one or both the Affiliate SROs.[27]

The proposed change is not otherwise intended to address any other issues relating to co-location services and/or related fees, and the Exchange is not aware of any problems that Users would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[28] in general, and furthers the objectives of Sections 6(b)(5) of the Act,[29] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, to protect investors and the public interest and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed changes remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, protect investors and the public interest because, by offering Access and Connectivity, the Exchange gives each User additional options for addressing its access and connectivity needs, responding to User demand for access and connectivity options. Providing Access and Connectivity helps each User tailor its data center operations to the requirements of its business operations by allowing it to select the form and latency of access and connectivity that best suits its needs. The Exchange provides Access and Connectivity as conveniences to Users. Use of Access or Connectivity is completely voluntary, and each User has several other access and connectivity options available to it. As alternatives to using the Access and Connectivity provided by the Exchange, a User may access or connect to such services and products through another User or through a connection to an Exchange access center outside the data center, third party access center, or third party vendor. The User may make such connection through a third party telecommunication provider, third party wireless network, the SFTI network, or a combination thereof.

The Exchange believes that providing access to Third Party Systems and connectivity to Third Party Data Feeds, third party testing and certification feeds and DTCC, as well as revising the Price List to describe such services, would remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, protect investors and the public interest because the proposed changes would make the descriptions of market participants' access and connectivity options and the related fees more accessible and

[26] As is currently the case, Users that receive co-location services from the Exchange will not receive any means of access to the Exchange's trading and execution systems that is separate from, or superior to, that of other Users. In this regard, all orders sent to the Exchange enter the Exchange's trading and execution systems through the same order gateway, regardless of whether the sender is co-located in the data center or not. In addition, co-located Users do not receive any market data or data service product that is not available to all Users, although Users that receive co-location services normally would expect reduced latencies in sending orders to, and receiving market data from, the Exchange.

[27] *See* SR–NYSE–2013–59, *supra* note 6 at 51766. The Affiliate SROs have also submitted substantially the same proposed rule change to propose the changes described herein. *See* SR–NYSEMKT–2016–63 and SR–NYSEArca–2016–89.

[28] 15 U.S.C. 78f(b).

[29] 15 U.S.C. 78f(b)(5).

transparent, thereby providing market participants with clarity as to what options for connectivity are available to them and what the related costs are. Including a description of the access to Third Party Systems and connectivity to Third Party Data Feeds that Users receive is consistent with Nasdaq's Rule 7034, which includes similar information.[30]

In addition, the Exchange believes that providing connectivity to third party testing and certification feeds removes impediments to, and perfects the mechanisms of, a free and open market and a national market system and, in general, protects investors and the public interest because such feeds provide Users an environment in which to conduct tests with non-live data, including testing for upcoming releases and product enhancements or the User's own software development, and allow Users to certify conformance to any applicable technical requirements. Similarly, the Exchange believes that providing connectivity to DTCC removes impediments to, and perfects the mechanisms of, a free and open market and a national market system and, in general, protects investors and the public interest because it provides efficient connection to clearing, fund transfer, insurance, and settlement services.

The Exchange believes that providing Users with VCCs removes impediments to, and perfects the mechanisms of, a free and open market and a national market system because VCCs provide each User with an additional option for connectivity to another User, helping it tailor its data center operations to the requirements of its business operations by allowing it to select the form of connectivity that best suits its needs. The Exchange provides VCCs as a convenience to Users. Use of a VCC is completely voluntary. As an alternative to an Exchange-provided VCC, a User may connect to another User through a cross connect.

The Exchange also believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,[31] 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 fees changes are consistent with Section 6(b)(4) of the Act for multiple reasons. The Exchange operates in a highly competitive market in which exchanges offer co-location services as a means to facilitate the trading and other market activities of those market participants who believe that co-location enhances the efficiency of their operations. Accordingly, fees charged for co-location services are constrained by the active competition for the order flow of, and other business from, such market participants. If a particular exchange charges excessive fees for co-location services, affected market participants will opt to terminate their co-location arrangements with that exchange, and adopt a possible range of alternative strategies, including placing their servers in a physically proximate location outside the exchange's data center (which could be a competing exchange), or pursuing strategies less dependent upon the lower exchange-to-participant latency associated with co-location. Accordingly, the exchange charging excessive fees would stand to lose not only co-location revenues but also the liquidity of the formerly co-located trading firms, which could have additional follow-on effects on the market share and revenue of the affected exchange.

The Exchange believes that the services and fees proposed herein are equitably allocated and not unfairly discriminatory because, in addition to the services being completely voluntary, they are available to all Users on an equal basis (*i.e.,* the same products and services are available to all Users). All Users that voluntarily select to receive access to Third Party Systems, connectivity to Third Party Data Feeds, third party testing and certification feeds and DTCC, or a VCC between Users, would be charged the same amount for the same services.

The Exchange believes that the services and fees proposed herein are reasonable, equitably allocated and not unfairly discriminatory because the Exchange provides Access and Connectivity as conveniences to Users. Use of Access or Connectivity is completely voluntary, and each User has several other access and connectivity options available to it. As alternatives to using the Access and Connectivity provided by the Exchange, a User may access or connect to such services and products through another User or through a connection to an Exchange access center outside the data center, third party access center, or third party vendor. The User may make such connection through a third party telecommunication provider, third party wireless network, the SFTI network, or a combination thereof. Users that opt to use Access or Connectivity would not receive access or connectivity that is not available to all Users, as all market participants that contract with the relevant market or content provider may receive access or connectivity. Similarly, the Exchange provides VCCs between Users as a convenience to Users. Use of a VCC is completely voluntary. As an alternative to an Exchange-provided VCC, a User may connect to another User through a cross connect.

The Exchange believes that the proposed charges are reasonable, equitably allocated and not unfairly discriminatory because the Exchange offers Access, Connectivity, and VCCs as conveniences to Users, but in order to do so must provide, maintain and operate the data center facility hardware and technology infrastructure. The Exchange must handle the installation, administration, monitoring, support and maintenance of such services, including by responding to any production issues. Since the inception of co-location, the Exchange has made numerous improvements to the network hardware and technology infrastructure and has established additional administrative controls. The Exchange has expanded the network infrastructure to keep pace with the increased number of services available to Users, including the increasing bandwidth required for Access and Connectivity, including resilient and redundant feeds. In addition, in order to provide connectivity to Third Party Data Feeds, Third Party Systems, third party testing and certification feeds and DTCC, the Exchange must maintain multiple connections to each Third Party Data Feed, Third Party System, and DTCC, allowing the Exchange to provide resilient and redundant connections; adapt to any changes made by the relevant third party; and cover any applicable fees (other than redistribution fees) charged by the relevant third party, such as port fees.

The Exchange believes that charging separate connectivity fees for Third Party Data Feeds and access to Third Party Systems, third party testing and certification feeds and connectivity to DTCC is reasonable and not unfairly discriminatory because, in the Exchange's experience, not all Users connect to Third Party Data Feeds, Third Party Systems, third party testing and certification feeds or DTCC. By

[30] *See* Nasdaq Stock Market Rule 7034—Market Data Connectivity (''Pricing is for connectivity only and is similar to connectivity fees imposed by other vendors. The fees are generally based on the amount of bandwidth needed to accommodate a particular feed and Nasdaq is not the exclusive method to get market data connectivity. Market data fees are charged independently by the Nasdaq Stock Market and other exchanges.'')

[31] 15 U.S.C. 78f(b)(4).

charging only those Users that receive such connectivity, only the Users that directly benefit from it support its cost. In addition, Users are not required to use any of their bandwidth to connect to Third Party Data Feeds, third party testing and certification feeds or DTCC, or to access Third Party Systems, unless they wish to do so.

The Exchange believes the fees for connectivity to Third Party Data Feeds are reasonable because they allow the Exchange to defray or cover the costs associated with offering Users connectivity to Third Party Data Feeds while providing Users the convenience of receiving such Third Party Data Feeds within co-location, helping them tailor their data center operations to the requirements of their business operations by allowing them to select the form and latency of connectivity that best suits their needs. The Exchange believes that its proposed charges for connectivity to Third Party Data Feeds are similar to the connectivity fees Nasdaq imposes on its co-location customers. For instance, Nasdaq charges its co-location customers monthly fees of $1,500 and $4,000 for connectivity to BATS Y and BATS, respectively, and of $2,500 for connectivity to EDGA or EDGX.[32]

The Exchange believes that its connectivity fees for access to Third Party Systems are reasonable because they allow the Exchange to defray or cover the costs associated with offering such access while providing Users the convenience of being able to access such Third Party Systems, helping them tailor their data center operations to the requirements of their business operations by allowing them to select the form and latency of connectivity that best suits their needs. Similarly, the Exchange believes that its fees for connectivity to DTCC are reasonable because they allow the Exchange to defray or cover the costs associated with offering such access while providing Users the benefit of an efficient connection to clearing, fund transfer, insurance, and settlement services.

The monthly recurring fees the Exchange charges Users for connectivity to Third Party Systems, the MSCI and SuperFeed Third Party Data Feeds, and DTCC, as well as for VCCs between Users, vary by the bandwidth of the connection. The Exchange also believes such fees are reasonable because the monthly recurring fee varies by the bandwidth of the connection, and so is generally proportional to the bandwidth required. The Exchange notes that some of the monthly recurring fees for connectivity to SuperFeed and DTCC differ from the fees for the other connections of the same bandwidth. The Exchange believes that such difference in pricing is reasonable, equitably allocated and not unfairly discriminatory because, although the bandwidth may be the same, the competitive considerations and the costs the Exchange incurs in providing such connections and VCCs may differ.

The Exchange also believes that its connectivity fees for access to third party testing and certification feeds are reasonable because they allow the Exchange to defray or cover the costs associated with offering such access while providing Users the benefit of having an environment in which to conduct tests with non-live data, including testing for upcoming releases and product enhancements or the User's own software development, and to certify conformance to any applicable technical requirements.

The Exchange believes it is reasonable that redistribution fees charged by providers of Third Party Data Feeds are passed through to the User, without change to the fee. If not passed through, the cost of the re-distribution fees would be factored into the proposed fees for connectivity to Third Party Data Feeds. The Exchange believes that passing through the fees makes them more transparent to the User, allowing the User to better assess the cost of the connectivity to a Third Party Data Feed by seeing the individual components of the cost, *i.e.* the Exchange's fee and the redistribution fee.

The Exchange believes that it is reasonable that it does not charge third party markets or content providers for connectivity to their own Third Party Data Feeds, as in the Exchange's experience such parties generally receive their own feeds for purposes of diagnostics and testing. The Exchange believes that it removes impediments to, and perfects the mechanisms of, a free and open market and a national market system and, in general, protects investors and the public interest to facilitate such diagnostics and testing.

Finally, the Exchange also believes that its fees for VCCs between two Users are reasonable because they allow the Exchange to defray or cover the costs associated with offering such VCCs while providing Users the benefit of an additional option for connectivity to another User, helping them tailor their data center operations to the requirements of their business operations by allowing them to select the form of connectivity that best suits their needs. As an alternative to an Exchange-provided VCC, a User may connect to another User through a cross connect.

For the reasons above, the proposed changes do not unfairly discriminate between or among market participants that are otherwise capable of satisfying any applicable co-location fees, requirements, terms and conditions established from time to time by the Exchange.

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,[33] the Exchange believes that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because, in addition to the proposed services being completely voluntary, they are available to all Users on an equal basis (*i.e.* the same products and services are available to all Users).

The Exchange believes that providing Users with access to Third Party Systems and connectivity to Third Party Data Feeds, third party testing and certification feeds, and DTCC does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because such Access and Connectivity satisfies User demand for access and connectivity options, and each User has several other access and connectivity options available to it. As alternatives to using the Access and Connectivity provided by the Exchange, a User may access or connect to such services and products through another User or through a connection to an Exchange access center outside the data center, third party access center, or third party vendor. The User may make such connection through a third party telecommunication provider, third party wireless network, the SFTI network, or a combination thereof. Users that opt to use Access or Connectivity would not receive access or connectivity that is not available to all Users, as all market participants that contract with the relevant market or content provider may receive access or connectivity. In this way, the proposed changes would enhance competition by helping Users tailor their Access and Connectivity to the needs of their business operations by allowing them to select the form and latency of access and connectivity that best suits their needs.

Similarly, the Exchange believes that providing VCCs between Users does not

[32] *See* Nasdaq Stock Market Rule 7034.

[33] 15 U.S.C. 78f(b)(8).

impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because providing VCCs satisfies User demand for an alternative to cross connects.

The Exchange believes that revising the Price List to provide a more detailed description of the Access and Connectivity available to Users would make such descriptions more accessible and transparent, thereby providing market participants with clarity as to what Access and Connectivity is available to them and what the related costs are, thereby enhancing competition by ensuring that all Users have access to the same information regarding Access and Connectivity.

Finally, the Exchange operates in a highly competitive market in which exchanges offer co-location services as a means to facilitate the trading and other market activities of those market participants who believe that co-location enhances the efficiency of their operations. Accordingly, fees charged for co-location services are constrained by the active competition for the order flow of, and other business from, such market participants. If a particular exchange charges excessive fees for co-location services, affected market participants will opt to terminate their co-location arrangements with that exchange, and adopt a possible range of alternative strategies, including placing their servers in a physically proximate location outside the exchange's data center (which could be a competing exchange), or pursuing strategies less dependent upon the lower exchange-to-participant latency associated with co-location. Accordingly, the exchange charging excessive fees would stand to lose not only co-location revenues but also the liquidity of the formerly co-located trading firms, which could have additional follow-on effects on the market share and revenue of the affected exchange. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as amended by Amendment Nos. 1, 2, and 3 is consistent with the Exchange 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–NYSE–2016–45 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File No. SR–NYSE–2016–45. 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 No. SR–NYSE–2016–45, and should be submitted on or before January 19, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[34]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–31486 Filed 12–28–16; 8:45 am]

BILLING CODE 8011–01–P

[34] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79660; File No. SR-Phlx-2016–120]

Self-Regulatory Organizations; NASDAQ PHLX LLC; Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1 Thereto, To Permit Phlx To Accept Inbound Options Orders Routed by Nasdaq Execution Services LLC

December 22, 2016.

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 December 9, 2016, NASDAQ PHLX LLC (''Phlx'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change. On December 20, 2016, the Exchange filed Amendment No. 1 to the proposed rule change, which amended and replaced the original filing in its entirety. The proposed rule change, as modified by Amendment No. 1, is 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, as modified by Amendment No. 1 thereto, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to permit Phlx to accept inbound options orders routed by Nasdaq Execution Services LLC (''NES'') from the International Securities Exchange, LLC (''ISE'') ISE Gemini, LLC (''ISE Gemini'') and ISE Mercury, LLC (''ISE Mercury'') (collectively ''ISE Exchanges'').

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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

In conjunction with the ISE Exchanges seeking approval to provide outbound routing services to all options markets using an affiliated routing broker, NES,[3] Phlx proposes that NES be permitted to route orders from the ISE Exchanges to Phlx, subject to certain limitations and conditions, as described below.

NES is a broker-dealer and member of The Nasdaq Options Market LLC (''NOM''), Nasdaq BX, Inc. (''BX'') and Phlx (collectively ''Nasdaq Exchanges''). NES provides all routing functions for the Nasdaq Exchanges. The Nasdaq Exchanges and NES are permitted affiliates.[4] Accordingly, the affiliate relationship between Phlx and NES, its member, raises the issue of an exchange's affiliation with a member of such exchange. Specifically, in connection with prior filings, the Commission has expressed concern that the affiliation of an exchange with one of its members raises the potential for unfair competitive advantage and potential conflicts of interest between an exchange's self-regulatory obligations and its commercial interests.[5]

Specifically, in connection with prior filings, the Commission has expressed concern that the affiliation of an exchange with one of its members raises the potential for unfair competitive advantage and potential conflicts of interest between an exchange's self-regulatory obligations and its commercial interests.[6] The Nasdaq Exchanges received approval from the Commission to permit NES to become a member of these three markets subject to certain limitations and conditions in order to perform certain routing and other functions, respectively.[7] Also recognizing that the Commission has expressed concern regarding the potential for conflicts of interest in instances where a member firm is affiliated with an exchange to which it is routing orders, the Nasdaq Exchanges previously proposed, and the Commission approved,[8] NES's affiliation with the Nasdaq Exchanges to permit the Exchange to accept inbound orders that NES routes in its capacity as a facility from other Nasdaq Exchanges, subject to the certain limitations and conditions. Phlx now proposes to permit Phlx to accept inbound options orders that NES routes in its capacity as a facility of the ISE Exchanges, subject to the following limitations and conditions:[9]

- First, the Exchange and FINRA maintain a Regulatory Services Agreement (''RSA''), as well as an agreement pursuant to Rule 17d–2 under the Act (''17d–2 Agreement'').[10] Pursuant to the RSA and the 17d–2 Agreement, FINRA is allocated regulatory responsibilities to review NES's compliance with certain Exchange rules.[11] Pursuant to the RSA, however, Phlx retains ultimate responsibility for enforcing its rules with respect to NES.
- Second, FINRA monitors NES for compliance with the Exchange's trading rules, and collects and maintains certain related information.[12]
- Third, FINRA provides a report to the Exchange's chief regulatory officer (''CRO''), on a quarterly basis, that: (i) Quantifies all alerts (of which the Exchange or FINRA is aware) that identify NES as a participant that has potentially violated Commission or Exchange rules, and (ii) lists all investigations that identify NES as a participant that has potentially violated Commission or Exchange rules.
- Fourth, Phlx has in place Phlx Rule 985(c)(2) which requires Nasdaq, Inc., as the holding company owning both the Exchange and NES, to establish and maintain procedures and internal controls reasonably designed to ensure that NES does not develop or implement changes to its system, based on non-public information obtained regarding planned changes to the Exchange's systems as a result of its affiliation with the Exchange, until such information is available generally to similarly situated Exchange members, in connection with the provision of inbound order routing to the Exchange.[13]

The Exchange has met all the above-listed conditions in connection with

[3] *See* SR–ISE–2016–27, SR–ISEGemini–2016–16 and SR–ISE–Mercury–2016–22 (not yet published).

[4] *See* Phlx Rule 985, Nasdaq Rule 2160 and BX Rule 2140.

[5] *See* Securities Exchange Act Release Nos. 59153 (December 23, 2008), 73 FR 80485 (December 31, 2008) (SR–NASDAQ–2008–098); and 62736 (August 17, 2010), 75 FR 51861 (August 23, 2010) (SR–NASDAQ–2010–100). *See also* Securities Exchange Act Release No. 58135 (July 10, 2008), 73 FR 40898 (July 16, 2008) (SR–NASDAQ–2008–061) (Permitting NOS to be affiliated with Phlx).

[6] Securities Exchange Act Release Nos. 71416 (January 28, 2014), 79 FR 6244 (February 3, 2014) (SR–Phlx–2014–05); 71419 (January 28, 2014), 79 FR 6247 (February 3, 2014) (SR–NASDAQ–2014–007); and 714121 (January 28, 2014), 79 FR 6264 (February 3, 2014) (SR–BX–2014–003).

[7] *See* Securities Exchange Act Release Nos. 59721 (April 7, 2009), 74 FR 17245 (April 14, 2009) (SR–Phlx–2009–32); 59779 (April 16, 2009) 74 FR 18600 (April 23, 2009) (SR–Phlx–2009–32, Amendment No. 1) notice of filing of proposed rule change relating to enhanced electronic trading platform for options); 61667 (March 5, 2010), 75 FR 11964 (March 12, 2016) (SR–Phlx–2010–36) (notice of filing and immediate effectiveness of proposed rule changes to establish procedures to prevent information advantages resulting from the affiliation between Phlx and NES); and 71416 (January 28, 2014), 79 FR 6244 (February 3, 2014) (SR–Phlx–2014–05) (notice of filing and immediate effectiveness of proposed rule change to inbound routing of options orders). Nasdaq Options Services was the affiliated broker-dealer prior to a rule change to utilize NES, another affiliated broker-dealer of Nasdaq. *See also* Securities Exchange Act Release Nos. 63769 (January 25, 2011), 76 FR 5423 (January 31, 2011) (SR–BX–2011–003); 63859 (February 7, 2011), 76 FR 8391 (February 14, 2011) (SR–BX–2011–007) (notice of filing of proposed rule change relating to permanent approval of the BX and NES inbound routing relationship); 71420 (January 28, 2014), 79 FR 6256 (February 3, 2014) (SR–BX–2014–004) (notice of filing and immediate effectiveness of proposed rule change to inbound routing). *See also* Securities Exchange Act Release Nos. 65554 (October 13, 2011), 76 FR 65311 (October 20, 2011) (SR–NASDAQ–2011–142); 71418 (January 28, 2014), 79 FR 6262 (February 3, 2014) (SR–NASDAQ–2014–008) (notice of filing and immediate effectiveness of proposed rule change to inbound routing).

[8] *Id.*

[9] The Exchange notes that similar filings are proposed for the Nasdaq and BX markets. *See* SR–Nasdaq–2016–169 and SR–BX–2016–068 (not published).

[10] 17 CFR 240.17d–2. FINRA reviews NES' compliance for certain common rules. The RSA with FINRA specifies the types of business activities that NES may undertake and it also indicates the obligations to which NES is subject under the RSA. Among other things, NES must maintain a certain amount of net capital pursuant to SEC Rule 15c3–1(a)(1)(ii) and operate pursuant to SEC Rule 15c3–3(k)(2)(ii). NES is permitted to route orders in options to the appropriate market center for execution in accordance with member order and requirements.

[11] NES is also subject to independent oversight by FINRA, its designated examining authority, for compliance with financial responsibility requirements.

[12] Pursuant to the RSA, both FINRA and Phlx collect and maintain all alerts, complaints, investigations and enforcement actions in which NES (in its capacity as a facility of BX and NOM routing orders to Phlx) is identified as a participant that has potentially violated applicable Commission or Exchange rules. The Exchange and FINRA retain these records in an easily accessible manner in order to facilitate any potential review conducted by the Commission's Office of Compliance Inspections and Examinations. Pursuant to the RSA, the Exchange and FINRA would be required to perform these activities with respect to NES acting in its capacity as a facility of each of the affiliated entities routing orders to Phlx.

[13] *See* Securities Exchange Act Release Nos. 59721 (April 7, 2009), 74 FR 17245 (April 14, 2009) (SR–Phlx–2009–32); 59779 (April 16, 2009), 74 FR 18600 (April 23, 2009) (SR–Phlx–2009–32, Amendment No. 1) notice of filing of proposed rule change relating to enhanced electronic trading platform for options); 61667 (March 5, 2010), 75 FR 11964 (March 12, 2016) (SR–Phlx–2010–36) (notice of filing and immediate effectiveness of proposed rule changes to establish procedures to prevent information advantages resulting from the affiliation between Phlx and NES); and 71416 (January 28, 2014), 79 FR 6244 (February 3, 2014) (SR–Phlx–2014–05) (notice of filing and immediate effectiveness of proposed rule change to inbound routing of options orders). Nasdaq Options Services was the affiliated broker-dealer prior to a rule change to utilize NES, another affiliated broker-dealer of Nasdaq.

NES routing in its capacity as a facility of BX and NOM. By meeting the above conditions, the Exchange has set up mechanisms that protect the independence of the Exchange's regulatory responsibility with respect to NES, as well as demonstrate that NES cannot use any information advantage it may have because of its affiliation with the Exchange. Because the Exchange has met all the above-listed conditions, it now seeks to permit an inbound routing relationship with the ISE Exchanges pursuant to the same conditions. The Exchange will continue to comply with the four conditions stated above.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[14] in general, and with Sections 6(b)(5) of the Act,[15] in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, because the proposed rule change will allow the Exchange to continue to receive inbound orders from NES, acting in its capacity as a facility of BX and NOM, in a manner consistent with prior approvals and established protections and will further be permitted to receive inbound orders from the ISE Exchanges, for which NES will also act in its capacity as a facility of those markets. The Exchange believes that the proposed conditions establish mechanisms that protect the independence of the Exchange's regulatory responsibility with respect to NES, as well as ensure that NES cannot use any information it may have because of its affiliation with the Exchange, or affiliation with other Nasdaq Exchanges or ISE Exchanges, to its advantage.

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. Permitting Phlx to receive inbound orders from the ISE Exchanges does not create any issues of intra-market competition because it involves inbound routing from affiliated markets. Nor does it result in a burden on competition among exchanges, because there are many competing options exchanges that provide routing services, including through an affiliate.

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 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, as modified by Amendment No. 1, 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–2016–120 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2016–120. 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–Phlx–2016–120, and should be submitted on or before January 19, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–31475 Filed 12–28–16; 8:45 am]

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[14] 15 U.S.C. 78f.

[15] 15 U.S.C. 78f(b)(5).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79679; File No. SR–ISEGemini–2016–18]

Self-Regulatory Organizations; ISE Gemini, LLC; Notice of Filing of Proposed Rule Change To Amend the Opening Process

December 22, 2016.

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 December 16, 2016, ISE Gemini, LLC (''ISE Gemini'' 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.

[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 proposes to amend the opening process.

The text of the proposed rule change is available on the Exchange's Web site at *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 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 rule change is to amend the ISE Gemini opening process in connection with a technology migration to a Nasdaq, Inc. (''Nasdaq'') supported architecture. INET is the proprietary core technology utilized across Nasdaq's global markets and utilized on The NASDAQ Options Market LLC (''NOM''), NASDAQ PHLX LLC (''Phlx'') and NASDAQ BX, Inc. (''BX'') (collectively ''Nasdaq Exchanges''). The migration of ISE Gemini to the Nasdaq INET architecture would result in higher performance, scalability, and more robust architecture. With this system migration, the Exchange intends to adopt the Phlx opening process.

The Exchange intends to begin implementation of the proposed rule change in Q1 2017. The migration will be on a symbol by symbol basis, and the Exchange will issue an alert to Members to provide notification of the symbols that will migrate and the relevant dates.

Generally

With the re-platform, the Exchange will now be built on the Nasdaq INET architecture, which allows certain trading system functionality to be performed in parallel. The Exchange believes that this architecture change will improve the Member experience by reducing overall latency compared to the current ISE Gemini system because of the manner in which the system is segregated into component parts to handle processing.

Opening Rotation

ISE Gemini will replace its current opening process at Rule 701 with Phlx's Opening Process.[3] The Exchange believes that the proposed opening process will provide a similar experience for Members and investors that trade on ISE Gemini to the experience that they receive on Phlx today.

Current Opening Process

Today, for each class of options that has been approved for trading, the opening rotation is conducted by the Primary Market Maker (''PMM'') appointed to such class of options pursuant to ISE Gemini Rule 701(b)(1). The Exchange may direct that one or more trading rotations be employed on any business day to aid in producing a fair and orderly market pursuant to ISE Gemini Rule 701(a)(1). For each rotation so employed, except as the Exchange may direct, rotations are conducted in the order and manner the PMM determines to be appropriate under the circumstances pursuant to ISE Gemini Rule 701(a)(2). The PMM, with the approval of the Exchange, has the authority to determine the rotation order and manner and may also employ multiple trading rotations simultaneously pursuant to ISE Gemini Rule 701(a)(3).

Trading rotations are employed at the opening of the Exchange each business day and during the reopening of the market after a trading halt pursuant to ISE Gemini Rule 701(b). The opening rotation in each class of options is held promptly following the opening of the market for the underlying security.[4] The opening rotation for options contracts in an underlying security is delayed until the market for such underlying security has opened unless the Exchange determines that the interests of a fair and orderly market are best served by opening trading in the options contracts pursuant to ISE Gemini Rule 701(b)(3).

Market Makers on ISE Gemini are held to quoting obligations as outlined in ISE Gemini Rule 803. Further, Market Makers quotes prior to the opening rotation, including PMM quotes, are permitted with spread differential of no more than $0.25 between the bid and offer for each options contract for which the bid is less than $2, no more than $0.40 where the bid is at least $2 but does not exceed $5, no more than $0.50 where the bid is more than $5 but does not exceed $10, no more than $0.80 where the bid is more than $10 but does not exceed $20, and no more than $1 where the bid is $20 or greater, provided that the Exchange may establish differences other than the above for one or more options series, as specified in ISE Gemini Rule 803(b)(4). These differentials are defined as Valid Width Quotes for purposes of this rule proposal.

The PMM appointed to an option class can initiate the rotation process by sending a rotation request to the Exchange or by authorizing the Exchange to auto-rotate the class. In addition, there are instances where the PMM is unable to initiate the rotation process. In such instances the Exchange may initiate the rotation process by using the Exchange's ''Delayed Opening Process,'' which provides an alternative method for opening an option class when the PMM is unable to initiate the rotation process.[5] Once the PMM or Exchange initiates the opening rotation, the Exchange will automatically process displayed quotes and orders via a process that determines the price at which the maximum number of contracts can trade within certain established boundary prices. In order to protect interest from trading at bad prices, quotes and orders are not executed outside of the established boundary prices. If there are no quotes or orders that lock or cross each other, the Exchange will open a series by disseminating the Exchange's best bid and offer among quotes and orders under certain conditions.

The Exchange proposes to replace this process with an opening process similar to a recently approved Phlx opening process as noted above.[6]

Opening Process

The Exchange will adopt a ''Definitions'' section at proposed ISE Gemini Rule 701(a), similar to Phlx Rule

[3] *See* Phlx Rule 1017. *See also* Securities Exchange Act Release No. 79274 (November 9, 2016), 81 FR 80694 (November 16, 2016) (SR–Phlx–2017–79) (notice of Filing of Partial Amendment No. 2 and Order Granting Approval of a Proposed Rule Change, as Modified by Partial Amendment No. 2, to Amend PHLX Rule 1017, Openings in Options).

[4] The ''market for the underlying security'' is either the primary listing market, the primary volume market (defined as the market with the most liquidity in that underlying security for the previous two calendar months), or the first market to open the underlying security, as determined by the Exchange on an issue-by-issue basis. *See* ISE Gemini Rule 701(b)(2).

[5] Certain conditions must be met for the Delayed Opening Process to be used to initiate the opening process.

[6] *See* note 3 above.

1017(a), to define several terms that are used throughout the opening rule. Similar to today, the Exchange will conduct an electronic opening for all option series traded on the Exchange using its trading system (hereinafter ''system'').

The Exchange proposes to define the following terms, which are described below: ''ABBO,'' ''market for the underlying security,'' ''Opening Price,'' ''Opening Process,'' ''Pre-Market BBO,'' ''Potential Opening Price,'' ''Quality Opening Market,'' ''Valid Width Quote,'' and ''Zero Bid Market.''

The Exchange proposes to define ''Opening Process'' at proposed Rule 701(a)(4) by cross-referencing proposed Rule 701(c). The Exchange proposes to define ''Opening Price'' at proposed Rule 701(a)(3) by cross-referencing proposed Rule 701(h) and (j). The Exchange proposes to define ''Potential Opening Price'' at proposed Rule 701(a)(5) by cross-referencing proposed Rule 701(g). The Exchange proposes to define ''ABBO'' at proposed Rule 701(a)(1) as the Away Best Bid or Offer. The ABBO does not include ISE Gemini's market. The Exchange proposes to define ''market for the underlying security'' at proposed Rule 702(a)(2) as either the primary listing market or the primary volume market (defined as the market with the most liquidity in that underlying security for the previous two calendar months), as determined by the Exchange by underlying and announced to the membership on the Exchange's Web site.[7] The Exchange notes that the term ''Market Makers'' is currently defined in ISE Gemini Rule 100(a)(25) as referring to Primary Market Makers or ''PMMs'' and Competitive Market Makers or ''CMMs,'' collectively. The next definition is ''Pre-Market BBO'' defined at proposed Rule 701(a)(6) as the highest bid and the lowest offer among Valid Width Quotes.[8] The term ''Quality Opening Market'' is defined at proposed Rule 701(a)(7) as a bid/ask differential applicable to the best bid and offer from all Valid Width Quotes defined in a table to be determined by the Exchange and published on the Exchange's Web site.[9] This calculation of Quality Opening Market is based on the best bid and offer of Valid Width Quotes. The differential between the best bid and offer are compared to reach this determination. The allowable differential, as determined by the Exchange, takes into account the type of security (for example, Penny Pilot versus non-Penny Pilot issue), volatility, option premium, and liquidity. The Exchange utilizes its experience with products to make this determination. Next, a ''Valid Width Quote'' is defined at proposed Rule 701(a)(8) as a two-sided electronic quotation submitted by a Market Maker that consists of a bid/ask differential that is compliant with Rule 803(b)(4). The term ''Zero Bid Market'' is defined at proposed 701(a)(9) where the best bid for an options series is zero. The Exchange believes that these definitions will bring additional clarity to the proposed rule.

Eligible Interest

The first part of the Opening Process determines what constitutes eligible interest. The Exchange proposes to adopt in proposed paragraph (b) of Rule 701 a provision that eligible opening interest includes: (i) Valid Width Quotes; (ii) Opening Sweeps; and (iii) orders. Market Makers may submit quotes,[10] Opening Sweeps and orders, but quotes other than Valid Width Quotes will not be included in the Opening Process. All-or-None Orders [11] that can be satisfied, and the displayed and non-displayed portions of Reserve Orders are considered for execution and in determining the Opening Price throughout the Opening Process.

The Exchange notes that Opening Sweeps may be submitted through the new Specialized Quote Feed or ''SQF'' protocol which permits one-sided orders to be entered by a Market Maker. Today, orders are entered by all participants through FIX and/or DTI on ISE Gemini. After the re-platform [sic] the INET architecture, all participants will continue to be able to submit orders through FIX, however, DTI will no longer be available. An Opening Sweep is a Market Maker order submitted for execution against eligible interest in the system during the Opening Process.[12] It is similar to an Opening Only Order [13] that can be entered for the opening rotation only and any portion of the order that is not executed during the opening rotation is cancelled. However, it should also be noted that an Opening Sweep may only be submitted by a Market Maker when he/she has a Valid Width Quote in the affected series whereas, there is no such restriction on Opening Only Orders. Since the protocol over which an Opening Sweep is submitted is used for Market Maker quoting, the acceptance of an Opening Sweep was structured to rely on the Valid Width Quote. If a Market Maker does not want to submit or is unable to maintain a Valid Width Quote, the Market Maker can submit Opening Only Order instead.

Opening Sweep

Proposed Rule 701(b)(1)(i) provides that a Market Maker assigned in a particular option may only submit an Opening Sweep if, at the time of entry of the Opening Sweep, that Market Maker has already submitted and maintains a Valid Width Quote. All Opening Sweeps in the affected series entered by a Market Maker will be cancelled immediately if that Market Maker fails to maintain a continuous quote with a Valid Width Quote in the affected series. Opening Sweeps may be entered at any price with a minimum price variation applicable to the affected series, on either side of the market, at single or multiple price level(s), and may be cancelled and re-entered. A single Market Maker may enter multiple Opening Sweeps, with each Opening Sweep at a different price level. If a Market Maker submits multiple Opening Sweeps, the system will consider only the most recent Opening Sweep at each price level submitted by such Market Maker in determining the Opening Price. Unexecuted Opening Sweeps will be cancelled once the affected series is open.[14]

Proposed Rule 701(b)(2) states that the system will aggregate the size of all eligible interest for a particular participant category [15] at a particular price level for trade allocation purposes pursuant to ISE Gemini Rule 713. Eligible interest may be submitted into ISE Gemini's system and will be received starting at the times noted herein. Proposed Rule 701(c) provides that Market Maker Valid Width Quotes and Opening Sweeps received starting at 9:25 a.m. Eastern Time, or 7:25 a.m.

[7] Today, all are the primary listing market. The Exchange would consider switching to primary volume market if a different market begins to trade more volume than the primary listing market and the primary volume market becomes a more reliable source of prices with more liquidity.

[8] Valid Width Quotes is defined at proposed Rule 701(a)(8).

[9] Phlx maintains a table on its Web site with this information. *See http://www.nasdaqtrader.com/content/phlxxl/phlxiisys_overview.pdf.* ISE Gemini will publish similar details on its Web site.

[10] The term quotes shall refer to a two-sided quote.

[11] An All-or-None Order is a Limit or Market Order that is to be executed in its entirety or not at all. *See* ISE Gemini Rule 715(c). If the contingency of the size could not be satisfied the All-or-None Order will not be considered in the Opening Process.

[12] *See* proposed ISE Gemini Rule 715(t).

[13] *See* ISE Gemini Rule 715(o).

[14] *See* proposed ISE Gemini Rule 701(b)(1)(ii). *See also* proposed ISE Gemini Rule 715(t).

[15] ISE Gemini allocates first to Priority Customers and then to all other Members by pro-rata. This is different from Phlx which allocates to Customers first, then to market makers pro-rata and then to all others pro-rata. *See* ISE Gemini Rule 713 and Phlx Rule 1014(g)(vii).

Eastern Time for U.S. dollar-settled foreign currency options, are included in the Opening Process.[16] Orders entered at any time before an option series opens are included in the Opening Process. Orders may be entered at any time before an options series opens and are included in the Opening Process. This proposed language adds specificity to the rule regarding the submission of orders. The 9:25 a.m. Eastern Time and 7:25 a.m. Eastern Time triggers are intended to tie the option Opening Process to quoting in the underlying security;[17] it presumes that option quotes submitted before any indicative quotes have been disseminated for the underlying security may not be reliable or intentional. Therefore, the Exchange has chosen a reasonable timeframe at which to begin utilizing option quotes, based on the Exchange's experience when underlying quotes start becoming available.

Proposed Rule 701(c)(1) describes when the Opening Process can begin with specific time-related triggers. The proposed rule provides that the Opening Process for an option series will be conducted pursuant to proposed Rule 701(f) though (j) on or after 9:30 a.m. Eastern Time, or on or after 7:30 a.m. Eastern Time for U.S. dollar-settled foreign currency options, if: The ABBO, if any is not crossed and the system has received, within two minutes (or such shorter time as determined by the Exchange and disseminated to membership on the Exchange's Web site) of the opening trade or quote on the market for the underlying security in the case of equity options or, in the case of index options, within two minutes of the receipt of the opening price in the underlying index (or such shorter time as determined by the Exchange and disseminated to membership on the Exchange's Web site), or within two minutes of market opening for the underlying security in the case of U.S. dollar-settled foreign currency options (or such shorter time as determined by the Exchange and disseminated to membership on the Exchange's Web site)[18] any of the following: (i) The PMM's Valid Width Quote; (ii) the Valid Width Quotes of at least two CMMs; or (iii) if neither the PMM's Valid Width Quote nor the Valid Width Quotes of two CMMs have been submitted within such timeframe, one CMM has submitted a Valid Width Quote.[19] These three requirements are intended to tie the option Opening Process to receipt of liquidity. If one of the above three conditions are not met, the Exchange will not initiate the Opening Process or continue an ongoing Opening Process if we do not have one of the three conditions (i, ii or iii); thus, a Forced Opening pursuant to proposed Rule 701(j)(5) could not occur.

The Exchange is proposing to state in proposed Rule 701(c)(2) that the underlying security, including indexes, must be open on the primary market for a certain time period for all options to be determined by the Exchange for the Opening Process to commence. The Exchange is proposing that the time period be no less than 100 milliseconds and no more than 5 seconds.[20] This proposal is intended to permit the price of the underlying security to settle down and not flicker back and forth among prices after its opening. It is common for a stock to fluctuate in price immediately upon opening; such volatility reflects a natural uncertainty about the ultimate Opening Price, while the buy and sell interest is matched. The Exchange is proposing a range of no less than 100 milliseconds and no more than 5 seconds in order to ensure that it has the ability to adjust the period for which the underlying security must be open on the primary market. The Exchange may determine that in periods of high/low volatility that allowing the underlying to be open for a longer/shorter period of time may help to ensure more stability in the marketplace prior to initiating the Opening Process.

Proposed Rule 701(c)(3) states that the PMM assigned in a particular equity option must enter a Valid Width Quote not later than one minute following the dissemination of a quote or trade by the market for the underlying security or, in the case of index options, following the receipt of the opening price in the underlying index. The PMM assigned in a particular U.S. dollar-settled foreign currency option must enter a Valid Width Quote not later than one minute after the announced market opening. Furthermore, a CMM that submits a quote pursuant to proposed Rule 701 in any option series when the PMM's quote has not been submitted shall be required to submit continuous, two-sided quotes[21] in such option series until such time as the PMM submits his/her quote, after which the Market Maker that submitted such quote shall be obligated to submit quotations pursuant to Rule 804(e). The Opening Process will stop and an option series will not open if the ABBO becomes crossed or a Valid Width Quote(s) pursuant to proposed Rule 701(c)(1) is no longer present. Once each of these conditions no longer exists, the Opening Process in the affected option series will start again pursuant to proposed Rule 701(e)–(j) as proposed in Rule 701(c)(4). All eligible opening interest will continue to be considered during the Opening Process when the process is re-started. The proposed rule reflects that the ABBO cannot be crossed because it is indicative of uncertainty in the marketplace of where the option series should be valued. In this case, the Exchange will wait for the ABBO to become uncrossed before initiating the Opening Process to ensure that there is stability in the marketplace in order to assist the Exchange in determining the Opening Price.

Reopening After a Trading Halt

This section is intended to provide information regarding the manner in which a trading halt would impact the Opening Process. Proposed Rule 701(d) states that the procedure described in this Rule may be used to reopen an

[16] The timing is different to open U.S. dollar-settled foreign currency options because these options normally open earlier in the day on ISE Gemini as compared to other option series which open in the day at 9:30 a.m. Eastern Time . These times are not being amended. *See* ISE Rule 2008 (the rules contained in ISE Chapter 22 are incorporated by reference into ISE Gemini Chapter 22), for transactions in options on a Foreign Currency Index may be effected on the Exchange between the hours of 7:30 a.m. Eastern Time and 4:15 p.m. Eastern Time.

[17] For purposes of this rule, the underlying security can also be an index.

[18] The Exchange anticipates initially setting the timeframe during which a PMM Valid Width quote or the presence of at least two CMM Valid Width Quotes will initiate the Opening Process at 30 seconds. The timeframe is consistent with the current timeframe utilized on Phlx. The Exchange believes 30 seconds is the appropriate amount of time as it provides time for the PMM and CMMs to assess the underlying security or index price and submit Valid Width Quotes as well as ample time for the underlying security or index price to stabilize. After this 30 second period, the Exchange will initiate the Opening Process provided one CMM has submitted a Valid Width Quote since the market for the underlying security or index has had opportunity to stability. The Exchange may reduce this timeframe if it is determined that the Opening Process is taking longer to initiate than the marketplace expects. The Exchange will provide notice of the initial setting to Members. The Exchange will provide notice of the shorter time period to Members if the Exchange determines to reduce the timeframe.

[19] *See* proposed Rule 701(c)(1)(i)–(iii).

[20] The Phlx Opening Process is set at 100 milliseconds. The Exchange believes that 100 milliseconds is the appropriate amount of time given the experience with the Phlx market. The Exchange would set the timer for ISE Gemini initially at 100 milliseconds. The Exchange will issue a notice to provide the initial setting and would thereafter issue a notice if it were to change the timing, which may be between 100 milliseconds and 5 seconds. If the Exchange were to select a time not between 100 milliseconds and 5 seconds it would be required to file a rule proposal with the Commission.

[21] The Exchange has regulatory surveillances in place with respect to Market Maker continuous quoting obligations both at the opening and during the other trading sessions. *See* ISE Gemini Rule 804 regarding quoting obligations.

option after a trading halt. The Exchange is adding that if there is a trading halt or pause in the underlying security, the Opening Process will start again irrespective of the specific times listed in proposed Rule 701(c)(1). This is because these times relate to the normal market opening in the morning.

Opening With a BBO

This next section describes when the Exchange may open with a quote on its market. Proposed Rule 701(e), ''Opening with a BBO (No Trade),'' provides that if there are no opening quotes or orders that lock or cross each other and no routable orders locking or crossing the ABBO, the system will open with an opening quote by disseminating the Exchange's best bid and offer among quotes and orders (''BBO'') that exist in the system at that time, unless all three of the following conditions exist: (i) A Zero Bid Market; (ii) no ABBO; and (iii) no Quality Opening Market. A Quality Opening Market is determined by reviewing all Valid Width Quotes and determining if the difference of the best bid of those Valid Width Quotes and the best offer of those Valid Width Quotes are of no more than a certain width.[22] The Exchange utilizes the quotes to assist in determining a fair and reasonable Opening Price. Quotes are utilized because Members are obligated to provide both a bid and sell price, providing a reasonable baseline of where the marketplace views fair value.

If all three of these conditions exist, the Exchange will calculate an Opening Quote Range pursuant to paragraph (i) and conduct the Price Discovery Mechanism or ''PDM'' pursuant to paragraph (j). The Exchange believes that when all three of these conditions exist, further price discovery is warranted to validate or perhaps update the Potential Opening Price and to attract additional interest to perhaps render an opening trade possible, because: (i) A Zero Bid Market reflects a lack of buying interest that could benefit from price discovery; (ii) the lack of an ABBO means there is no external check on the Exchange's market for that options series; and (iii) the lack of a Quality Opening Market indicates that the Exchange's market is wide. If no quotes or orders lock/cross each other, nothing matches and there can be no trade. The Exchange believes that when these conditions exist, it is difficult to arrive at a reasonable and expected price. If the provisions in proposed Rule 701(e)(i) through (iii) exist, an Opening Quote Range is calculated pursuant to proposed Rule 701(i) and thereafter, the PDM in proposed Rule 701(j) will initiate.[23]

Further Opening Processes

If an opening did not occur pursuant to proposed Rule 701(e) and there are opening Valid Width Quotes, or orders, that lock or cross each other, the system will calculate the Pre-Market BBO.[24]

Proposed Rule 701(g) describes the general concept of how the system calculates the Potential Opening Price under all circumstances once the Opening Process is triggered. Specifically, the system will take into consideration all Valid Width Quotes, Opening Sweeps and orders (except All-or-None Orders that cannot be satisfied and displayed and non-displayed portions of Reserve Orders) for the option series and identify the price at which the maximum number of contracts can trade (''maximum quantity criterion''). Proposed Rule 701(h)(3)(i) and proposed Rule 701(i) at paragraphs (5) through (7) contain additional provisions related to Potential Opening Price which are discussed in further detail herein. The proposal attempts to maximize the number of contracts that can trade, and is intended to find the most reasonable and suitable price, relying on the maximization to reflect the best price.

Proposed Rule 701(g)(1) presents the scenario for more than one Potential Opening Price. When two or more Potential Opening Prices would satisfy the maximum quantity criterion and leave no contracts unexecuted, the system takes the highest and lowest of those prices and takes the mid-point; if such mid-point is not expressed as a permitted minimum price variation, it will be rounded to the minimum price variation that is closest to the closing price for the affected series from the immediately prior trading session. If there is no closing price from the immediately prior trading session, the system will round up to the minimum price variation to determine the Opening Price.

If two or more Potential Opening Prices for the affected series would satisfy the maximum quantity criterion and leave contracts unexecuted, the Opening Price will be either the lowest executable bid or highest executable offer of the largest sized side.[25] This, again, bases the Potential Opening Price on the maximum quantity that is executable. The Potential Opening Price calculation is bounded by the away market price that cannot be satisfied with the Exchange routable interest.[26] The Exchange does not open with a trade that trades through another market. This process, importantly, breaks a tie by considering the largest sized side and away markets, which are relevant to determining a fair Opening Price.

The system applies certain boundaries to the Potential Opening Price to help ensure that the price is a reasonable one by identifying the quality of that price; if a well-defined, fair price can be found within these boundaries, the option series can open at that price without going through a further PDM. Proposed Rule 701(h), ''Opening with Trade,'' provides the Exchange will open the option series for trading with a trade of Exchange interest only at the Opening Price, if certain conditions described below take place. The first condition is provided in proposed Rule 701(h)(1), the Potential Opening Price is at or within the best of the Pre-Market BBO and the ABBO. The second condition is provided for in Rule 701(h)(2), the Potential Opening Price is at or within the non-zero bid ABBO if the Pre-Market BBO is crossed. The third provision is provided for in proposed Rule 701(h)(3), where there is no ABBO, the Potential Opening Price is at or within the Pre-Market BBO which is also a Quality Opening Market.

These boundaries serve to validate the quality of the Opening Price. Proposed Rule 701(h) provides that the Exchange will open with a trade as long as it is within the defined boundaries regardless of any imbalance. The Exchange believes that since the Opening Price can be determined within a well-defined boundary and not trading through other markets, it is fair to open the market immediately with a trade and to have the remaining interest available to be executed in the displayed market. Using a boundary-based price counterbalances opening faster at a less bounded and perhaps less expected price and reduces the possibility of leaving an imbalance.

Proposed Rule 701(h)(3)(i) provides that if there is more than one Potential Opening Price which meets the conditions set forth in proposed Rule 701(h)(1), (2) or (3), where (A) no contracts would be left unexecuted and (B) any value used for the mid-point calculation (which is described in proposed Rule 701(g)) would cross either: (I) The Pre-Market BBO or (II) the

[22] Phlx maintains a table on its Web site with this information. *See http://www.nasdaqtrader.com/content/phlxxl/phlxiisys_overview.pdf.* ISE Gemini will publish similar details on its Web site.

[23] OQR and PDM processes may also initiate pursuant to proposed Rule 701(h).

[24] *See* proposed Rule 701(f).

[25] *See* proposed Rule 701(g)(2).

[26] *See* proposed Rule 701(g)(3).

ABBO, then the Exchange will open the option series for trading with an execution and use the best price which the Potential Opening Price crosses as a boundary price for the purpose of the mid-point calculation. If these aforementioned conditions are not met, an Opening Quote Range is calculated as described in proposed Rule 701(i) and the PDM, described in proposed Rule 701(j), would commence. The proposed rule explains the boundary as well as the price basis for the mid-point calculation for immediate opening with a trade, which improves the detail included in the rule. The Exchange believes that this process is logical because it seeks to select a fair and balanced price.

Proposed Rule 701(i) provides that the system will calculate an Opening Quote Range (''OQR'') for a particular option series that will be utilized in the PDM if the Exchange has not opened subject to any of the provisions described above. Provided the Exchange has been unable to open the option series under Rule 701(e) or (h), the OQR would broaden the range of prices at which the Exchange may open. This would allow additional interest to be eligible for consideration in the Opening Process. The OQR is an additional type of boundary beyond the boundaries mentioned in proposed Rule 701(g) and (h). OQR is intended to limit the Opening Price to a reasonable, middle ground price and thus reduce the potential for erroneous trades during the Opening Process. Although the Exchange applies other boundaries such as the BBO, the OQR provides a range of prices that may be able to satisfy additional contracts while still ensuring a reasonable Opening Price. The Exchange seeks to execute as much volume as is possible at the Opening Price.

Specifically, to determine the minimum value for the OQR, an amount, as defined in a table to be determined by the Exchange,[27] will be subtracted from the highest quote bid among Valid Width Quotes on the Exchange and on the away market(s), if any, except as provided in proposed Rule 701(i) paragraphs (3) and (4). To determine the maximum value for the OQR, an amount, as defined in a table to be determined by the Exchange, will be added to the lowest quote offer among Valid Width Quotes on the Exchange and on the away market(s), if any, except as provided in proposed Rule 701(i) paragraphs (3) and (4).[28] However, if one or more away markets are collectively disseminating a BBO that is not crossed, and there are Valid Width Quotes on the Exchange that cross each other or that cross the away market ABBO, then the minimum value for the OQR will be the highest away bid.[29] In addition, the maximum value for the OQR will be the lowest away offer.[30] And if, however, there are opening quotes on the Exchange that cross each other, and there is no away market in the affected option series, the minimum value for the OQR will be the lowest quote bid among Valid Width Quotes on the Exchange, and the maximum value for the OQR will be the highest quote offer among Valid Width Quotes on the Exchange.[31]

If there is more than one Potential Opening Price possible where no contracts would be left unexecuted, any price used for the mid-point calculation (which is described in proposed Rule 701(g)(1)) that is outside of the OQR will be restricted to the OQR price on that side of the market for the purposes of the mid-point calculation. Rule 701(i)(5) continues the theme of relying on both maximizing executions and looking at the correct side of the market to determine a fair price.

Proposed Rule 701(i)(6) deals with the situation where there is an away market price involved. If there is more than one Potential Opening Price possible where no contracts would be left unexecuted and the price used for the mid-point calculation (which is described in proposed Rule 701(g)(1)) is an away market price, pursuant to proposed Rule 701(g)(3), when contracts will be routed, the system will use the away market price as the Potential Opening Price. The Exchange is seeking to execute the maximum amount of volume possible at the Opening Price. The Exchange will enter into the Order Book any unfilled interest at a price equal to or inferior to the Opening Price. It should be noted, the Exchange will not trade through an away market.

Finally, proposed Rule 701(i)(7) provides if the Exchange determined that non-routable interest can receive the maximum number of Exchange interest, after routable interest has been determined by the system to satisfy the away market, then the Potential Opening Price is the price at which the maximum number of contracts can be executed, excluding the interest which will be routed to an away market, which may be executed on the Exchange as described in proposed Rule 701(g). The system will route Public Customer interest in price/time priority to satisfy the away market. This continues the theme of trying to satisfy the maximum amount of interest during the Opening Process.

Price Discovery Mechanism

If the Exchange has not opened pursuant to proposed Rule 701(e) or (h), and after the OQR is calculated pursuant to proposed Rule 701(i), the Exchange will conduct a PDM pursuant to proposed Rule 701(j). The PDM is the process by which the Exchange seeks to identify an Opening Price having not been able to do so following the process outlined thus far herein. The principles behind the PDM are, as described above, to satisfy the maximum number of contracts possible by identifying a price that may leave unexecuted contracts. However, the PDM applies a proposed, wider boundary to identify the Opening Price and the PDM involves seeking additional liquidity.

The Exchange believes that conducting the price discovery process in these situations protects opening orders from receiving a random price that does not reflect the totality of what is happening in the markets on the opening and also further protects opening interest from receiving a potentially erroneous execution price on the opening. Opening immediately has the benefit of speed and certainty, but that benefit must be weighed against the quality of the execution price and whether orders were left unexecuted. The Exchange believes that the proposed rule strikes an appropriate balance.

The proposed rule attempts to open using Exchange interest only to determine an Opening Price, provided certain conditions contained in proposed Rule 701(i) are present to ensure market participants receive a quality execution in the opening. The proposed rule does not consider away market liquidity for purposes of routing interest to other markets until the PDM, rather the away market prices are considered for purposes of avoiding trade-throughs. As a result, the Exchange might open without routing if all of the conditions described above are met. The Exchange believes that the benefit of this process is a more rapid opening with quality execution prices.

Specifically, proposed Rule 701(j)(1) provides that the system will broadcast an Imbalance Message for the affected series (which includes the symbol, side of the imbalance (unmatched contracts), size of matched contracts, size of the imbalance, and Potential Opening Price bounded by the Pre-Market BBO) to participants, and begin an ''Imbalance

[27] *See* note 22 above.

[28] *See* proposed Rule 701(i)(2).

[29] *See* proposed Rule 701(i)(3)(i).

[30] *See* proposed Rule 701(i)(3)(ii).

[31] *See* proposed Rule 701(i)(4)(i) and (ii).

Timer,'' not to exceed three seconds. The Imbalance Timer would initially be set 200 milliseconds.[32] The Imbalance Message is intended to attract additional liquidity, much like an auction, using an auction message and timer.[33] The Imbalance Timer would be for the same number of seconds for all options traded on the Exchange. Pursuant to this proposed rule, as described in more detail below, the Exchange may have up to 4 Imbalance Messages which each run its own Imbalance Timer.

Proposed Rule 701(j)(2), states that any new interest received by the system will update the Potential Opening Price. If during or at the end of the Imbalance Timer, the Opening Price is at or within the OQR the Imbalance Timer will end and the system will open with a trade at the Opening Price if the executions consist of Exchange interest only without trading through the ABBO and without trading through the limit price(s) of interest within OQR which is unable to be fully executed at the Opening Price. If no new interest comes in during the Imbalance Timer and the Potential Opening Price is at or within OQR and does not trade through the ABBO, the Exchange will open at the end of the Imbalance Timer at the Potential Opening Price. This reflects that the Exchange is seeking to identify a price on the Exchange without routing away, yet which price may not trade through another market and the quality of which is addressed by applying the OQR boundary.

Provided the option series has not opened pursuant to proposed Rule 701(j)(2),[34] pursuant to proposed Rule 701(j)(3) the system will send a second Imbalance Message with a Potential Opening Price that is bounded by the OQR (without trading through the limit price(s) of interest within OQR which is unable to be fully executed at the Opening Price) and includes away market volume in the size of the imbalance to participants; and concurrently initiate a Route Timer, not to exceed one second.[35] The Route Timer is intended to give Exchange users an opportunity to respond to an Imbalance Message before any opening interest is routed to away markets and, thereby, maximize trading on the Exchange. If during the Route Timer, interest is received by the system which would allow the Opening Price to be within OQR without trading through away markets and without trading through the limit price(s) of interest within OQR which is unable to be fully executed at the Opening Price, the system will open with a trade at the Opening Price and the Route Timer will simultaneously end. The system will monitor quotes received during the Route Timer period and make ongoing corresponding changes to the permitted OQR and Potential Opening Price to reflect them.[36] This proposal serves to widen the boundary of available Opening Prices, which should similarly increase the likelihood that an Opening Price can be determined. The Route Timer, like the Imbalance Timer, is intended to permit responses to be submitted and considered by the system in calculating the Potential Opening Price. The system does not route away until the Route Timer ends.

Proposed Rule 701(j)(3)(iii) provides when the Route Timer expires, if the Potential Opening Price is within OQR (without trading through the limit price(s) of interest within OQR that is unable to be fully executed at the Opening Price), the system will determine if the total number of contracts displayed at better prices than the Exchange's Potential Opening Price on away markets (''better priced away contracts'') would satisfy the number of marketable contracts available on the Exchange. This provision protects the unexecuted interest and should result in a fairer price. The Exchange will open the option series by routing and/or trading on the Exchange, pursuant to proposed Rule 701(j)(3)(iii) paragraphs (A) through (C).

Proposed Rule 701(j)(3)(iii)(A) provides if the total number of better priced away contracts would satisfy the number of marketable contracts available on the Exchange on either the buy or sell side, the system will route all marketable contracts on the Exchange to such better priced away markets as Intermarket Sweep Order (''ISO'') designated as Immediate-or-Cancel (''IOC'') order(s), and determine an opening Best Bid or Offer (''BBO'') that reflects the interest remaining on the Exchange. The system will price any contracts routed to away markets at the Exchange's Opening Price or pursuant to proposed Rule 701(j)(3)(iii)(B) or (C) described hereinafter. Routing away at the Exchange's Opening Price is intended to achieve the best possible price available at the time the order is received by the away market.

Proposed Rule 701(j)(3)(iii)(B) provides if the total number of better priced away contracts would not satisfy the number of marketable contracts the Exchange has, the system will determine how many contracts it has available at the Exchange Opening Price. If the total number of better priced away contracts plus the number of contracts available at the Exchange Opening Price would satisfy the number of marketable contracts on the Exchange on either the buy or sell side, the system will contemporaneously route a number of contracts that will satisfy interest at away markets at prices better than the Exchange Opening Price, and trade available contracts on the Exchange at the Exchange Opening Price. The system will price any contracts routed to away markets at the better of the Exchange Opening Price or the order's limit price pursuant to Rule 701(j)(vi)(C)(3)(ii). This continues with the theme of maximum possible execution of the interest on the Exchange or away markets.

Proposed Rule 701(j)(3)(iii)(C) provides if the total number of better priced away contracts plus the number of contracts available at the Exchange Opening Price plus the contracts available at away markets at the Exchange Opening Price would satisfy the number of marketable contracts the Exchange has on either the buy or sell side, the system will contemporaneously route a number of contracts that will satisfy interest at away markets at prices better than the Exchange Opening Price (pricing any contracts routed to away markets at the better of the Exchange Opening Price or the order's limit price), trade available contracts on the Exchange at the Exchange Opening Price, and route a number of contracts that will satisfy interest at other markets at prices equal to the Exchange Opening Price. This provision is intended to introduce routing to away markets potentially both at a better price than the Exchange Opening Price as well as at the Exchange Opening Price to access as much liquidity as possible to maximize

[32] The Phlx timer is set at 200 milliseconds. The Exchange will issue a notice to provide the initial setting and would thereafter issue a notice if it were to change the timing. If the Exchange were to select a time which exceeds 3 seconds it would be required file a rule proposal with the Commission.

[33] For example, *see* COOP and COLA descriptions in Phlx Rule 1098.

[34] The Exchange notes that the system would not open pursuant to proposed Rule 701(j)(2) if the Potential Opening Price is outside of the OQR or if the Potential Opening Price is at or within the OQR, but would otherwise trade through the ABBO or through the limit price(s) of interest within the OQR which is unable to be fully executed at the Potential Opening Price.

[35] The Route Timer would be a brief timer that operates as a pause before an order is routed to an away market. Currently, the Phlx Route Timer is set to one second. The ISE Gemini Route Timer will also be initially set to one second. The Exchange will issue a notice to Members to provide the initial setting and would thereafter issue a notice to Members if it were to change the timing within the range of up to one second. If the Exchange were to select a time beyond one second it would be required file a rule proposal with the Commission.

[36] *See* proposed Rule 701(j)(3)(ii).

the number of contracts able to be traded as part of the Opening Process. The Exchange routes at the better of the Exchange's Opening Price or the order's limit price to first ensure the order's limit price is not violated. Routing away at the Exchange's Opening Price is intended to achieve the best possible price available at the time the order is received by the away market.

Proposed Rule 701(j)(4) provides that the system may send up to two additional Imbalance Messages [37] (which may occur while the Route Timer is operating) bounded by OQR and reflecting away market interest in the volume. These boundaries are intended to assist in determining a reasonable price at which an option series might open.

This provision is proposed to further state that after the Route Timer has expired, the processes in proposed Rule 701(j)(3) will repeat (except no new Route Timer will be initiated). No new Route Timer is initiated because the Exchange believes that after the Route Timer has been initiated and subsequently expired, no further delay is needed before routing contracts if at any point thereafter the Exchange is able to satisfy the total number of marketable contracts the Exchange has by executing on the Exchange and routing to other markets.

Proposed Rule 701(j)(5), entitled ''Forced Opening,'' will describe what happens as a last resort in order to open an options series when the processes described above have not resulted in an opening of the options series. Under this process, called a Forced Opening, after all additional Imbalance Messages have occurred pursuant to proposed Rule 701(j)(4), the system will open the series executing as many contracts as possible by routing to away markets at prices better than the Exchange Opening Price for their disseminated size, trading available contracts on the Exchange at the Exchange Opening Price bounded by OQR (without trading through the limit price(s) of interest within OQR which is unable to be fully executed at the Opening Price). The system will also route contracts to away markets at prices equal to the Exchange Opening Price at their disseminated size. In this situation, the system will price any contracts routed to away markets at the better of the Exchange Opening Price or the order's limit price. Any unexecuted contracts from the imbalance not traded or routed will be cancelled back to the entering participant if they remain unexecuted and priced through the Opening Price.

The boundaries of OQR and limit prices within the OQR are intended to ensure a quality Opening Price as well as protect the unexecutable interest entered with a limit price which may not be able to be fully executed. There is some language in the Phlx rule that is not applicable to the ISE Gemini opening because ISE Gemini does not have automatic re-pricing of orders resting in the Rulebook. Phlx's rule permits members to provide instructions to re-enter the remaining size of an unexecuted order for automatic submission as a new order, the ISE Gemini rule will not permit this submission.

Proposed Rule 701(j)(6) provides the system will execute orders at the Opening Price that have contingencies (such as without limitation, All-or-None and Reserve Orders) and non-routable orders such as ''Do-Not-Route'' or ''DNR'' Orders,[38] to the extent possible. The system will only route non-contingency Public Customer orders, except that the full volume of Public Customer Reserve Orders may route. The Exchange is adding this detail to memorialize the manner in which the system will execute orders at the opening. The Exchange desires to provide certainty to market participants as to which contingency orders will execute and which orders will route during the Opening Process.

Proposed Rule (j)(6)(i) provides the system will cancel (1) any portion of a Do-Not-Route order that would otherwise have to be routed to the exchange(s) disseminating the ABBO for an opening to occur, (2) an All-or-None Order that is not executed during the opening and is priced through the Opening Price or (3) any order that is priced through the Opening Price. All other interest will remain in the system and be eligible for trading after opening. The Exchange cancels these orders since it lacks enough liquidity to satisfy these orders on the opening yet their limit price gives the appearance that they should have been executed. The Exchange believes that participants would prefer to have these orders returned to them for further assessment rather than have these orders immediately entered onto the order book at a price which is more aggressive than the price at which the Exchange opened.

Proposed Rule 701(k) provides during the opening of the option series, where there is an execution possible, the system will give priority to Market Orders [39] first, then to resting Limit Orders [40] and quotes. The allocation provisions of ISE Gemini Rule 713 and the Supplementary Material to that rule apply with respect to other orders and quotes with the same price. The Exchange is providing certainty to market participants as to the priority scheme during the Opening Process. Market Orders will be immediately executed first because these orders have no specified price and Limit Orders will be executed thereafter in accordance with the prices specified.

Finally, proposed Rule 701(l) provides upon opening of the option series, regardless of an execution, the system disseminates the price and size of the Exchange's best bid and offer (BBO).[41] This provision simply makes known the manner in which the Exchange establishes the BBO for purposes of reference upon opening.

There are some differences between the Phlx and ISE Gemini rules. ISE Gemini has a Reserve Order and Phlx does not have this order type. With Reserve Orders, the displayed and non-displayed portions of Reserve Orders are considered for execution and in determining the Opening Price throughout the Opening Process. Today, ISE Gemini permits orders to route during regular trading, however, the Exchange does not perform away market routing during the opening rotation. With this proposal, routing is considered during the Opening Process.

With respect to the Opening Sweep, the Exchange proposes to adopt an order type at new Rule 715(t) entitled ''Opening Sweep.'' This order type is proposed to be a Market Maker order submitted for execution against eligible interest in the system during the Opening Process pursuant to Rule 701(b)(i) [sic]. The Exchange believes that describing this order type within

[37] The first two Imbalance Messages always occur if there is interest which will route to an away market. If the Exchange is thereafter unable to open at a price without trading through the ABBO, up to two more Imbalance Messages may occur based on whether or not the Exchange has been able to open before repeating the Imbalance Process. The Exchange may open prior to the end of the first two Imbalance Messages provided routing is not necessary.

[38] A Do-Not-Route order is a market or limit order that is to be executed in whole or in part on the Exchange only. Due to prices available on another options exchange (as provided in Chapter 19 (Order Protection; Locked and Crossed Markets)), any balance of a do-not-route order that cannot be executed upon entry, or placed on the Exchange's limit order book, will be automatically cancelled. *See* Rule 715(m).

[39] A Market Orders [sic] is defined as an order to buy or sell a stated number of options contracts that is to be executed at the best price obtainable when the order reaches the Exchange. *See* ISE Gemini Rule 715(a).

[40] A Limit Order is an order to buy or sell a stated number of options contracts at a specified price or better. *See* ISE Gemini Rule 715(b).

[41] *See* proposed Rule 701(j)(F) [sic].

Rule 715 will provide clarity to the introduction of Opening Sweeps.

Opening Process Examples:

The following examples are intended to demonstrate the Opening Process.

Example 1. Proposed Rule 701(e) Opening with an Exchange BBO (No Trade). Suppose the PMM in an option enters a quote, 2.00 (100) bid and 2.10 (100) offer and a buy order to pay 2.05 for 10 contracts is present in the system. The System also observes an ABBO is present with CBOE quoting a spread of 2.05 (100) and 2.15 (100). Given the Exchange has no interest which locks or crosses each other and does not cross the ABBO, the option opens for trading with an Exchange BBO of 2.05 (10) × 2.10 (100) and no trade. Since there is an ABBO and no Zero Bid Market, the System does not conduct the PDM and the option opens without delay.

Example 2a. Proposed Rule 701(h) Opening with Trade. Suppose the PMM enters the same quote in an option, 2.00 (100) bid and 2.10 (100) offer. This quote defines the pre-market BBO. CBOE disseminates a quote of 2.01 (100) by 2.09 (100), making up the ABBO. Firm A enters a buy order at 2.04 for 50 contracts. Firm B enters a sell order at 2.04 for 50 contracts. The Exchange opens with the Firm A and Firm B orders fully trading at an Opening Price of 2.04 which satisfies the condition defined in proposed Rule 701(h)(i), the Potential Opening Price is at or within the best of the Pre-Market BBO and the ABBO.

Example 2b. Proposed Rule 701(h) Opening with Trade. Similarly, suppose the PMM enters the same quote in an option, 2.00 (100) bid and 2.10 (100) offer. A Market Maker enters a quote of 2.00 (100) × 2.12 (100). The pre-market BBO is therefore 2.00 bid and 2.10 offer. CBOE disseminates a quote of 2.05 (100) by 2.15 (100), making up the ABBO. Firm A enters a buy order at 2.11 for 300 contracts. Firm B enters a sell order at 2.11 for 100 contracts. The option does not open for trading because the Potential Opening Price of 2.11 does not satisfy the condition defined in proposed Rule 701(h)(i), as the Potential Opening Price is outside the Pre-Market BBO. The System thereafter calculates the OQR and initiates the PDM, as discussed in proposed Rule 701(j), to facilitate the Opening Process for the option.

Example 3. Proposed Rule 701(j)(2) Price Discovery Mechanism and first iteration. Assume the set up described in Example 2b and an allowable OQR of 0.04. When the PDM is initiated, the System broadcasts an Imbalance Message. At the end of the Imbalance Timer, the option opens with an Opening Price of 2.11 because it is within OQR and the ABBO. The maximum value for OQR is the lowest quote offer of 2.10 plus 0.04.

Example 4. Proposed Rule 701(j)(3) Price Discovery Mechanism and second iteration with routing. Suppose the PMM enters a quote, 2.00 (100) bid and 2.10 (100) offer and the defined allowable OQR is 0.04. If CBOE disseminates a quote of 2.00 (100) by 2.09 (100), the away offer is better than the PMM quote. Customer A enters a routable buy order at 2.10 for 150 contracts. The PDM initiates because the Potential Opening Price (2.10) is equal to the Pre-Market BBO but outside of the ABBO. The Potential Opening Price is 2.10 because there is both buy and sell interest at that price point. The System is unable to open after the first iteration of Imbalance since the Potential Opening Price is within the OQR but outside of the ABBO. The System proceeds with the PDM and initiates a Route Timer and broadcasts a second Imbalance Message (assume no additional interest is received during the imbalance period). The System opens the option for trading after the Route Timer has expired and the Imbalance Timer has completed since the Potential Opening Price is within OQR. The System routes 100 contracts of the Customer order to the better priced away offer at CBOE. The Exchange would route to CBOE at an Opening Price of 2.10 to execute against the interest at 2.09 on CBOE. The 50 options contracts open and execute on the Exchange with an Opening Price of 2.10. The Exchange routes to CBOE using the Exchange's Opening Price to ensure, if there is market movement, that the routed order is able to access any price point equal to or better than the Exchange's Opening Price.

Example 5. Proposed Rule 701(j)(5) Forced Opening. Suppose the PMM enters a quote, 2.00 (100) bid and 2.10 (100) offer and the defined allowable OQR is 0.04. A Market Maker enters a quote for 2.05 (100) × 2.14 (100). Firm A enters a buy order of 250 contracts for 2.15 which is more aggressive than the expected OQR of 2.14. The PDM initiates because the Potential Opening Price of 2.15 is outside the Pre-Market BBO (2.05 × 2.10). Assume no additional interest is received during the PDM. After the final Imbalance Timer, the System opens the option for trading with an execution of 200 contracts at an Opening Price of 2.14, which is the boundary of OQR. The residual 50 contracts from Firm A are cancelled back to the participant because the limit order price of 2.15 is priced through the Opening Price of 2.14.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[42] in general, and furthers the objectives of Section 6(b)(5) of the Act,[43] 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 for the reasons stated below.

The Exchange's proposal to adopt the Phlx Opening Process is consistent with the Act because the new rule seeks to find the best price. The proposal permits the price of the underlying security to settle down and not flicker back and forth among prices after its opening. It is common for a stock to fluctuate in price immediately upon opening; such volatility reflects a natural uncertainty about the ultimate Opening Price, while the buy and sell interest is matched. The proposed rule provides for a range of no less than 100 milliseconds and no more than 5 seconds in order to ensure that it has the ability to adjust the period for which the underlying security must be open on the primary market. The Exchange may determine that in periods of high/low volatility that allowing the underlying to be open for a longer/shorter period of time may help to ensure more stability in the marketplace prior to initiating the Opening Process.

Definitions

The Exchange's proposal to adopt a ''Definitions'' section is consistent with the Act because the terms will assist market participants in understanding the meaning of terms used throughout the proposed Rule. The Exchange added the definitions to provide clarity and consistency throughout the proposed rule.

Eligible Interest

The first part of the Opening Process determines what constitutes eligible interest. The Exchange's proposal seeks to make clear what type of eligible opening interest is included. The Exchange notes that Valid Width Quotes; Opening Sweeps; and orders are included. The Exchange further notes that Market Makers may submit quotes, Opening Sweeps and orders, but quotes other than Valid Width Quotes will not be included in the Opening Process.

[42] 15 U.S.C. 78f(b).

[43] 15 U.S.C. 78f(b)(5).

Finally, All-or-None Orders [44] that can be satisfied, and the displayed and non-displayed portions of Reserve Orders are considered for execution and in determining the Opening Price throughout the Opening Process. The Exchange believes that defining what qualifies as eligible interest is consistent with the Act because market participants will be provided with certainty when submitting interest as to which type of interest will be considered in the Opening Process.

Opening Sweep

The Exchange believes that it is consistent with the Act to introduce the concept of an Opening Sweep and memorialize this order type within Rule 715(t). While the Opening Sweep is similar to an Opening Only Order,[45] it can be entered for the opening rotation only and any portion of the order that is not executed during the opening rotation is cancelled. An Opening Sweep may only be submitted by a Market Maker when he/she has a Valid Width Quote in the affected series [46] whereas, there is no such restriction on Opening Only Orders. The Exchange believes the addition of this order type is consistent with the Act because it provides for a specific type of order that may be entered during the Opening Process similar to Phlx for proposes [sic] of qualifying as eligible interest. The Exchange notes that this order type would be not valid outside of the opening in other trading sessions. The Exchange is providing definitive rules that concern the manner in which Opening Sweeps may be entered into the system. For example, an Opening Sweep may be entered at any price with a minimum price variation applicable to the affected series, on either side of the market, at single or multiple price level(s), and may be cancelled and re-entered. A single Market Maker may enter multiple Opening Sweeps, with each Opening Sweep at a different price level. If a Market Maker submits multiple Opening Sweeps, the system will consider only the most recent Opening Sweep at each price level submitted by such Market Maker. Unexecuted Opening Sweeps will be cancelled once the affected series is open.[47] The Exchange believes that the addition of Opening Sweep will also provide certainty to market participants as to the manner in which the system will handle such interest.

With respect to trade allocation, the proposal notes at Rule 701(b)(2) that the system will aggregate the size of all eligible interest for a particular participant category [48] at a particular price level for trade allocation purposes pursuant to ISE Gemini Rule 713. The Exchange believes that this allocation is consistent with the Act because it mirrors the current allocation process on ISE Gemini in other trading sessions.

The proposed rule notes the specific times that eligible interest may be submitted into ISE Gemini's system. The Exchange's proposed times for entering Market Maker Valid Width Quotes and Opening Sweeps (9:25 a.m. Eastern Time) and U.S. dollar-settled foreign currency options (7:25 a.m. Eastern Time) eligible to participate in the Opening Process, are consistent with the Act because the times are intended to tie the option Opening Process to quoting in the underlying security;[49] it presumes that option quotes submitted before any indicative quotes have been disseminated for the underlying security may not be reliable or intentional. The Exchange believes these times represent a reasonable timeframe at which to begin utilizing option quotes, based on the Exchange's experience when underlying quotes start becoming available. This proposed language adds specificity to the rule regarding the submission of orders.

The Exchange's proposal at Rule 701(c)(1) describes when the Opening Process can begin with specific time-related triggers. The proposed rule, which provides that the Opening Process for an option series will be conducted on or after 9:30 a.m. Eastern Time, or on or after 7:30 a.m. Eastern Time for U.S. dollar-settled foreign currency options, provided the ABBO, if any, is not crossed and the system has received within specified time periods certain specified interest,[50] is consistent with the Act because this requirement is intended to tie the option Opening Process to receipt of liquidity. If one of the above three conditions specified in proposed Rule 701(c)(1)(i)–(iii) is not met, the Exchange will not initiate the Opening Process or continue an ongoing Opening Process. The Exchange's proposed rule considers the liquidity present on its market before initiating other processes to obtain additional pricing information. The Exchange's proposal to adopt the Phlx Opening Process is consistent with the Act because the new rule seeks to find the best price.

The Exchange's proposed rule considers the underlying security, including indexes, which must be open on the primary market for a certain time period for all options to be determined by the Exchange for the Opening Process to commence. The Exchange proposes a time period be no less than 100 milliseconds and no more than 5 seconds to permit the price of the underlying security to settle down and not flicker back and forth among prices after its opening. Since it is common for a stock to fluctuate in price immediately upon opening, the Exchange accounts for such volatility in its process. The volatility reflects a natural uncertainty about the ultimate Opening Price, while the buy and sell interest is matched. The Exchange's proposed range is consistent with the Act because it ensures that it has the ability to adjust the period for which the underlying security must be open on the primary market. The Exchange may determine that in periods of high/low volatility that allowing the underlying to be open for a longer/shorter period of time may help to ensure more stability in the marketplace prior to initiating the Opening Process.

The Exchange's proposal at Rule 701(c)(3) requires the PMM assigned in a particular equity option to enter a Valid Width Quote not later than one minute following the dissemination of a quote or trade by the market for the underlying security or, in the case of index options, following the receipt of the opening price in the underlying index. The PMM assigned in a particular U.S. dollar-settled foreign currency option must enter a Valid Width Quote also not later than one minute after the announced market opening.

Furthermore, the Exchange proposes that a CMM that submits a quote pursuant to proposed Rule 701 in any option series when the PMM's quote has not been submitted shall be required to submit continuous, two-sided quotes in such option series until such time as the PMM submits his/her quote, after which the Market Maker that submitted such quote shall be obligated to submit quotations pursuant to Rule 804(e). This proposal is consistent with the Act because the Exchange will not open if the ABBO becomes crossed or a Valid Width Quote(s) pursuant to proposed Rule 701(c)(1) is no longer present.

[44] *See* note 11 above.

[45] *See* ISE Gemini Rule 715(o).

[46] All Opening Sweeps in the affected series entered by a Market Maker will be cancelled immediately if that Market Maker fails to maintain a continuous quote with a Valid Width Quote in the affected series.

[47] *See* proposed ISE Gemini Rule 701(b)(1)(ii). *See also* proposed ISE Gemini Rule 715(t).

[48] ISE Gemini allocates first to Priority Customers and then to all other Members by pro-rata. This is different from Phlx which allocates to Customers first, then to market makers pro-rata and then to all others pro-rata. *See* ISE Gemini Rule 713 and Phlx Rule 1014(g)(vii).

[49] For purposes of this rule, the underlying security can also be an index.

[50] *See* proposed Rule 701(c)(1)(i)–(iii).

Instead the process would restart and all eligible opening interest will continue to be considered during the Opening Process when the process is re-started. The Exchange's proposal is consistent with the Act and promotes just and equitable principles of trade because the rule reflects that the ABBO cannot be crossed because it is indicative of uncertainty in the marketplace of where the option series should be valued. The Exchange will wait for the ABBO to become uncrossed before initiating the Opening Process to ensure that there is stability in the marketplace in order to assist the Exchange in determining the Opening Price.

Reopening After a Trading Halt

In order to provide certainty to market participants in the event of a trading halt, the Exchange provides in its proposal information regarding the manner in which a trading halt would impact the Opening Process. Proposed Rule 701(d) provides if there is a trading halt or pause in the underlying security, the Opening Process will start again irrespective of the specific times listed in Rule 701(c)(1). The Exchange's proposal to restart in the event of a trading halt is consistent with the Act and promotes just and equitable principles of trade because the proposed rule ensures that there is stability in the marketplace in order to assist the Exchange in determining the Opening Price.

Opening With a BBO

The Exchange's proposed rule accounts for a situation where there are no opening quotes or orders that lock or cross each other and no routable orders locking or crossing the ABBO. In this situation, the system will open with an opening quote by disseminating the Exchange's best bid and offer among quotes and orders (''BBO'') that exist in the system at that time, unless all three of the following conditions exist: (i) A Zero Bid Market; (ii) no ABBO; and (iii) no Quality Opening Market.[51] The Exchange utilizes the quotes to assist in determining a fair and reasonable Opening Price, which is consistent with the Act because Members are obligated to provide both a bid and sell price. The Exchange believes that this measure provides a reasonable baseline of where the marketplace views fair value.

If all three of these conditions exist, the Exchange will calculate an OQR pursuant to paragraph (i) and conduct the PDM pursuant to paragraph (j). This approach is consistent with the Act because the [sic] when all three of these conditions exist, further price discovery is warranted to validate or perhaps update the Exchange's BBO and to attract additional interest to perhaps render an opening trade possible. The Exchange notes that a Zero Bid Market reflects a lack of buying interest to assist in validating a reasonable opening BBO, the lack of an ABBO means there is no external check on the Exchange's market for that options series; and the lack of a Quality Opening Market indicates that the Exchange's market is wide. For these reasons, the Exchange believes that when these conditions exist, it is difficult to determine if the Exchange BBO is reasonable and therefore an OQR is calculated pursuant to proposed Rule 701(i) and thereafter, the PDM in proposed Rule 701(j) will initiate.

The Exchange believes that [sic] proposed rule promotes just and equitable principles of trade, because the proposed conditions involving Zero Bid Markets, no ABBO and no Quality Opening Market trigger the PDM rather than an immediate opening in order to validate the Opening Price against away markets or by attracting additional interest to address the specific condition. This is consistent with the Act because it should avoid opening executions in very wide or unusual markets where an opening execution price cannot be validated.

Further Opening Processes and Price Discovery Mechanism

The proposed rule promotes just and equitable principles of trade because in arriving at the Potential Opening Price the rule considers the maximum number of contracts that can be executed, which results in a price that is logical and reasonable in light of away markets and other interest present in the system. As noted herein, the Exchange's Opening Price is bounded by the OQR without trading through the limit price(s) of interest within OQR which is unable to fully execute at the Opening Price in order to provide participants with assurance that their orders will not be traded through. Although the Exchange applies other boundaries such as the BBO, the OQR provides a range of prices that may be able to satisfy additional contracts while still ensuring a reasonable Opening Price. The Exchange seeks to execute as much volume as is possible at the Opening Price. When choosing between multiple Opening Prices when some contracts would remain unexecuted, using the lowest bid or highest offer of the largest sized side of the market promotes just and equitable principles of trade because it uses size as a tie breaker. The Exchange's method for determining the Potential Opening Price and Opening Price is consistent with the Act because the proposed process seeks to discover a reasonable price and considers both interest present in ISE Gemini's system as well as away market interest. The Exchange's method seeks to validate the Opening Price and avoid opening at aberrant prices. The rule provides for opening with a trade, which is consistent with the Act because it enables an immediate opening to occur within a certain boundary without need for the price discovery process. The boundary provides protections while still ensuring a reasonable Opening Price.

The proposed rule considers more than one Potential Opening Price, which is consistent with the Act because it forces the Potential Opening Price to fall within the OQR boundary, thereby providing price protection. Specifically, the mid-point calculation balances the price among interest participating in the Opening when there is more than one price at which the maximum number of contracts could execute. Limiting the mid-point calculation to the OQR when a price would otherwise fall outside of the OQR ensures the final mid-point price will be within the protective OQR boundary. If there is more than one Potential Opening Price possible where no contracts would be left unexecuted and any price used for the mid-point calculation is an away market price when contracts will be routed, the system will use the away market price as the Potential Opening Price.

The PDM reflects what is generally known as an imbalance process and is intended to attract liquidity to improve the price at which an option series will open as well as to maximize the number of contracts that can be executed on the opening. This process will only occur of the Exchange has not been able to otherwise open an option series utilizing the other processes available in proposed Rule 701. The Exchange believes the process presented in the PDM is consistent with just and equitable principles of trade because the process applies a proposed, wider boundary to identify the Opening Price and seeks additional liquidity. The PDM also promotes just and equitable principles of trade by taking into account whether all interest can be fully executed, which helps investors by including as much interest as possible in the Opening Process. The Exchange believes that conducting the price discovery process in these situations

[51] The Exchange nots [sic] herein that a Quality Opening Market is determined by reviewing all Valid Width Quotes and determining if the difference of the best bid of those Valid Width Quotes and the best offer of those Valid Width Quotes are of no more than a certain width.

protects opening orders from receiving a random price that does not reflect the totality of what is happening in the markets on the opening and also further protects opening interest from receiving a potentially erroneous execution price on the opening. Opening immediately has the benefit of speed and certainty, but that benefit must be weighed against the quality of the execution price and whether orders were left unexecuted. The Exchange believes that the proposed rule strikes an appropriate balance.

It is consistent with the Act to not consider away market liquidity, *i.e.* away market volume, until the PDM occurs because this proposed process provides for a swift, yet conservative opening. The Exchange is bounded by the Pre-Market BBO when determining an Opening Price. The away market prices would be considered, albeit not immediately. It is consistent with the Act to consider interest on the Exchange prior to routing to an away market because the Exchange is utilizing the interest currently present on its market to determine a quality opening price. The Exchange will attempt to match interest in the system, which is within the OQR, and not leave interest unsatisfied that was otherwise at that price. The Exchange will not trade-through the away market interest in satisfying this interest at the Exchange. The proposal attempts to maximize the number of contracts that can trade, and is intended to find the most reasonable and suitable price, relying on the maximization to reflect the best price.

With respect to the manner in which the Exchange sends an Imbalance Message as proposed within Rule 701(j)(1), the Imbalance Message is intended to attract additional liquidity, much like an auction, using an auction message and timer. The Imbalance Timer is consistent with the Act because it would provide a reasonable time for participants to respond to the Imbalance Message before any opening interest is routed to away markets and, thereby, maximize trading on the Exchange. The Imbalance Timer would be for the same number of seconds for all options traded on the Exchange. This process will repeat, up to four iterations, until the options series opens. The Exchange believes that this process is consistent with the Act because the Exchange is seeking to identify a price on the Exchange without routing away, yet which price may not trade through another market and the quality of which is addressed by applying the OQR boundary.

Proposed Rule 701(j)(3)(iii)(C) provides if the total number of better priced away contracts plus the number of contracts available at the Exchange Opening Price plus the contracts available at away markets at the Exchange Opening Price would satisfy the number of marketable contracts the Exchange has on either the buy or sell side, the system will contemporaneously route a number of contracts that will satisfy interest at away markets at prices better than the Exchange Opening Price (pricing any contracts routed to away markets at the better of the Exchange Opening Price or the order's limit price), trade available contracts on the Exchange at the Exchange Opening Price, and route a number of contracts that will satisfy interest at other markets at prices equal to the Exchange Opening Price. This provision is consistent with the Act because it considers routing to away markets potentially both at a better price than the Exchange Opening Price as well as at the Exchange Opening Price to access as much liquidity as possible to maximize the number of contracts able to be traded as part of the Opening Process. The Exchange routes at the better of the Exchange's Opening Price or the order's limit price to first ensure the order's limit price is not violated. Routing away at the Exchange's Opening Price is intended to achieve the best possible price available at the time the order is received by the away market.

Proposed Rule 701(j)(5), entitled ''Forced Opening,'' provides for the situation where, as a last resort, in order to open an options series when the processes described above have not resulted in an opening of the options series. Under a Forced Opening, the system will open the series executing as many contracts as possible by routing to away markets at prices better than the Exchange Opening Price for their disseminated size, trading available contracts on the Exchange at the Exchange Opening Price bounded by OQR (without trading through the limit price(s) of interest within OQR which is unable to be fully executed at the Opening Price). The system will also route contracts to away markets at prices equal to the Exchange Opening Price at their disseminated size. In this situation, the system will price any contracts routed to away markets at the better of the Exchange Opening Price or the order's limit price. Any unexecuted contracts from the imbalance not traded or routed will be cancelled back to the entering participant if they remain unexecuted and priced through the Opening Price. The Exchange believes that this process is consistent with the Act because after attempting to open by soliciting interest on ISE Gemini and considering other away market interest and considering interest responding to Imbalance Messages, the Exchange could not otherwise locate a fair and reasonable price with which to open options series.

The Exchange's proposal to memorialize the manner in which proposed rule will cancel and prioritize interest provides certainty to market participants as to the priority scheme during the Opening Process.[52] The Exchange's proposal to execute Market Orders first and then Limit Orders is consistent with the Act because these orders have no specified price and Limit Orders will be executed thereafter in accordance with the prices specified due to the nature of these order types. This is consistent with the manner in which these orders execute after the opening today.

Finally, proposed Rule 701(l) provides upon opening of the option series, regardless of an execution, the system dissemination of the price and size of the Exchange's BBO is consistent with the Act because it clarifies the manner in which the Exchange establishes the BBO for purposes of reference upon opening.

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 proposal does not change the intense competition that exists among the options markets for options business including on the opening. Nor does the Exchange believe that the proposal will impose any burden on intra-market competition; the Opening Process involves many types of participants and interest.

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 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

[52] *See* proposed Rule 701(j)(6)(i) and (k).

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–ISEGemini–2016–18 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISEGemini–2016–18. 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–ISEGemini–2016–18, and should be submitted on or before January 19, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[53]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–31491 Filed 12–28–16; 8:45 am]

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[53] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79670; File No. SR–IEX–2016–22]

Self-Regulatory Organizations: Investors Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Retention of Jurisdiction Over Members and Persons Associated with Members Upon Termination, Revocation, or Cancellation of Membership or Association Thereof

December 22, 2016.

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 December 16, 2016, the Investors Exchange LLC (''IEX'' or the ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or 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

Pursuant to the provisions of Section 19(b)(1) under the Securities Exchange Act of 1934 (''Act''),[4] and Rule 19b-4 thereunder,[5] Investors Exchange LLC (''IEX'' or ''Exchange'') is filing with the Securities and Exchange Commission (''Commission'') a proposed rule change to amend Rule 2.230, which is currently reserved, to specify the circumstances under which the Exchange retains disciplinary jurisdiction over a Member or persons associated with a Member upon termination, revocation, or cancellation of membership or association thereof. 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.[6]

The text of the proposed rule change is available at the Exchange's Web site at *www.iextrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and the 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

IEX proposes to amend Rule 2.230, which is currently reserved, to specify the circumstances under which the Exchange retains disciplinary jurisdiction over a Member or persons associated with a Member upon termination, revocation or cancellation of membership or association thereof. As a national securities exchange and self-regulatory organization (''SRO''), IEX is subject to several provisions of the Act with respect to rule enforcement and discipline of Members and persons associated with Members. First, Section 6(b)(1)[7] of the Act requires the Exchange to enforce compliance by its members and persons associated with its members with applicable provisions of the Act, the rules and regulations thereunder and Exchange rules. In addition, Section 6(b)(6)[8] of the Act requires that IEX rules must provide that its members and persons associated with its members shall be appropriately disciplined for such violations of applicable provisions of the Act, the rules and regulations thereunder and Exchange rules (*i.e.,* rule violations). And finally, Section 6(b)(7)[9] of the Act provides that IEX rules must provide a fair procedure for the disciplining of

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] 15 U.S.C. 78s(b)(1).

[5] 17 CRF 240.19b–4.

[6] 17 CFR 240.19b–4(f)(6)(iii).

[7] 15 U.S.C. 78f(b)(1).

[8] 15 U.S.C. 78f(b)(6).

[9] 15 U.S.C. 78f(b)(7).

members and persons associated with members for rule violations.

In furtherance of these obligations, IEX has retained FINRA, pursuant to a regulatory services agreement (''RSA'') and subject to IEX oversight, to perform certain regulatory functions on behalf of IEX, including surveillance and examination of trading activity on IEX to identify rule violations, and related investigations of and disciplinary actions against IEX members and persons associated with members for any such rule violations. Investigations and disciplinary actions are conducted in accordance with Chapters 8 and 9 of the IEX Rules. Chapter 8 contains provisions related to investigations and sanctions, that require, among other things, that a Member, person associated with a Member or any other person subject to IEX's jurisdiction provide information or testimony or permit an inspection and copying of books, records, or accounts to the Exchange upon request.[10] Rule 8.310 provides for the imposition of sanctions,[11] after compliance with Chapter 9 of IEX Rules, on a Member or person associated with a Member for rule violations, as well as for any neglect or refusal to comply with an order, direction, or decision issued under the IEX Rules. Chapter 9 of the IEX Rules contains the Code of Procedure and includes proceedings for, among other things, disciplining a Member or person associated with a Member.

IEX Rule 2.190 governs a member's right to voluntarily terminate its IEX membership. The rule provides that a termination shall not take effect until 30 days after certain specified conditions have been satisfied, including: any Exchange investigation or disciplinary action brought against the Member has reached a final disposition and any examination by the Exchange of such Member is completed and all exceptions noted have been reasonably resolved.[12] These provisions are designed to assure that FINRA, on IEX's behalf, can complete and resolve or finalize a pending regulatory matter involving a Member that is open at the time a Member seeks to terminate its membership and thus that a Member cannot terminate its membership to avoid a regulatory or disciplinary matter.

However, IEX Rule 2.190 does not fully address the possibility that FINRA, on behalf of the Exchange, may need to conduct an investigation and/or initiate a disciplinary action with respect to a former Member or person associated with a Member for rule violations that occurred prior to termination of membership or association thereof, but were not known to FINRA at that time. Accordingly, IEX proposes to amend Rule 2.230 to add a retention of jurisdiction provision. Specifically, Rule 2.230(a) would provide that an IEX Member whose membership is revoked, terminated or cancelled shall continue to be subject to the filing of a complaint under IEX rules based upon conduct which commenced prior to the effective date of the revocation, termination or cancellation. Any such complaint, however, shall be filed within two years after the effective date of revocation, termination or cancellation. Proposed Rule 2.230(b) applies to persons associated with a Member and provides that a person whose association with a Member has been revoked, terminated or cancelled and who is no longer associated with any Member shall continue to be subject to the filing of a complaint under IEX rules based upon conduct that commenced prior to the termination, revocation or cancellation or upon such person's failure, while subject to IEX's jurisdiction to provide information requested by IEX pursuant to IEX rules. Any such complaint must be filed within: two years after the effective date of termination of registration with IEX pursuant to Rule 2.160(r)(1), provided however that any amendment to a notice of termination filed pursuant to Rule 2.160(r)(2) that is filed within two years of the original notice that discloses that such person may have engaged in conduct actionable under any applicable statute, rule, or regulation shall operate to recommence the running of the two-year period under this subsection; two years after the effective date of revocation or cancellation of registration pursuant to IEX rules; or in the case of an unregistered person, two years after the date upon which such person ceased to be associated with the member. This proposed rule change is substantially similar to Article IV, Section 6 of the FINRA By-Laws with respect to members and Article V, Section 4 with respect to persons associated with a member.[13]

2. Statutory Basis

IEX believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[14] in general and furthers the objectives of Section 6(b)(1)[15] of the Act in that it is designed to enable the Exchange to enforce compliance by its members and persons associated with its members with applicable provisions of the Act, the rules and regulations thereunder and Exchange rules. In addition, the Exchange believes that the proposed rule change is consistent with Section 6(b)(6)[16] of the Act in that it is designed to provide authority to the Exchange to appropriately discipline former members and persons associated with its members for such rule violations that occurred during membership or association with a member. Further, the Exchange believes that the proposed rule change is consistent with Section 6(b)(7)[17] of the Act because it would support a fair procedure for the disciplining of members and persons associated with members for rule violations. Specifically, IEX believes that it is appropriate to retain jurisdiction over members and persons associated with members for a reasonable period of time for rule violations that occurred while the firm was a Member or an individual was associated with a member. IEX believes that two years is reasonable in that it provides adequate time for FINRA, on its behalf, to file a complaint without subjecting former members and persons formerly associated with members to an excessively long period of time to learn of a disciplinary matter. The Exchange notes that FINRA, New York Stock Exchange (''NYSE'') and the Nasdaq Stock Market LLC (''Nasdaq'') also provide a two-year retention of jurisdiction period.[18]

B. Self-Regulatory Organization's Statement on Burden on Competition

IEX does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. The proposed rule change is not designed to address any competitive issues but rather to provide for appropriate retention of jurisdiction of former members and persons associated with a member.

[10] *See* Rule 8.210.

[11] Specified sanctions include censure, fine, membership suspension or expulsion, cease and desist order, or other fitting sanction.

[12] Rule 2.190 provides that the Exchange Board may declare a resignation effective at an earlier time.

[13] There are minor differences related to terminology. In addition, provisions substantially similar to Article V, Section 4(b) of the FINRA By-Laws related to failure to comply with an arbitration award are contained in IEX Rule 9.554(a).

[14] 15 U.S.C. 78f.

[15] 15 U.S.C. 78f(b)(1).

[16] 15 U.S.C. 78f(b)(6).

[17] 15 U.S.C. 78f(b)(7).

[18] *See* Article IV, Section 6 of the FINRA By-Laws, NYSE Rule 8130, and Nasdaq Rule 1031(f).

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 Exchange has designated this rule filing as non-controversial under Section 19(b)(3)(A) [19] of the Act and Rule 19b–4(f)(6) [20] thereunder. 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, it has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6) thereunder.

A proposed rule change filed under Rule 19b–4(f)(6) [21] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[22] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay as the proposed implementation of the two-year retention of jurisdiction is consistent with the rules of other SROs and will enable the Exchange to immediately retain jurisdiction over a register representative who may have been engaged in unlawful activity. Based on the foregoing, the Commission believes that it is consistent with the protection of investors and the public interest to waive the 30-day operative date so that the proposal may take effect upon filing.[23]

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 under Section 19(b)(2)(B) [24] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–IEX–2016–22 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–IEX–2016–22. This file number should be included in 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 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 the IEX's principal office and on its Internet Web site at *www.iextrading.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–IEX–2016–22 and should be submitted on or before January 19, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–31492 Filed 12–28–16; 8:45 am]

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[19] 15 U.S.C. 78s(b)(3)(A).

[20] 17 CFR 240.19b–4(f)(6).

[21] 17 CFR 240.19b–4(f)(6).

[22] 17 CFR 240.19b–4(f)(6)(iii).

[23] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[24] 15 U.S.C. 78s(b)(2)(B).

[25] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79659; File No. SR–NYSE–2016–87]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change To Conform to Proposed Amendments to Securities Exchange Act Rule 15c6–1(a) To Shorten the Standard Settlement Cycle From Three Business Days After the Trade Date ("T+3") to Two Business Days After the Trade Date ("T+2")

December 22, 2016.

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 December 15, 2016, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes new Rules 14T, Dealings and SettlementsT (Rules 45—299C), 64T, 235T, 236T, 282.65T and 257T, and new Section 703.02T (part 2) of the Listed Company Manual to conform to proposed amendments to Securities Exchange Act Rule 15c6–1(a) to shorten the standard settlement cycle from three business days after the trade date (''T+3'') to two business days after the trade date (''T+2''). 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to adopt the following new rules to conform to proposed amendments to Securities Exchange Act Rule 15c6–1(a) [4] to shorten the standard settlement cycle from T+3 to T+2:

- Rule 14T (Non-Regular Way Settlement Instructions);
- Dealings and SettlementsT (Rules 45–299C);
- Rule 64T (Bonds, Rights and 100-Share-Unit Stocks);
- Rule 235T (Ex-Dividend, Ex-Rights);
- Rule 236T (Ex-Warrants);
- Rule 257T (Deliveries After ''Ex'' Date);
- Rule 282.65T (Failure to Deliver and Liability Notice Procedures); and
- Section 703.02T (part 2) of the Listed Company Manual (Stock Split/Stock Rights/Stock Dividend Listing Process).

The proposed new rules would have the same numbering as the current rules, but with the modifier ''T'' appended to the rule number. For example, Rule 14, governing non-regular way settlement instructions for orders, would remain unchanged and continue to apply to non-regular way settlements on the Exchange. Proposed Rule 14T would reflect that a regular way settlement would be two days and not the current three days. As discussed below, because the Exchange would not implement the proposed rules until after the final implementation of T+2, the Exchange proposes to retain the current versions of each rule on its books and not delete it until after the proposed rules are approved. The Exchange also proposes to file separate proposed rule changes to establish the operative date of the proposed rules and to delete the current version of each rule.

Background

In 1993, the Securities and Exchange Commission (the ''SEC'' or ''Commission'') adopted Rule 15c6–1(a) [5] under the Act, which established three business days after trade date instead of five business days (''T+5''), as the standard trade settlement cycle for most securities transactions. The rule became effective in June 1995.[6] In November 1994, the Exchange amended its rules to be consistent with the T+3 settlement cycle for securities transactions.[7]

On September 28, 2016, the SEC proposed amendments to Rule 15c6–1(a) to shorten the standard settlement cycle from T+3 to T+2 on the basis that the shorter settlement cycle would reduce the risks that arise from the value and number of unsettled securities transactions prior to completion of settlement, including credit, market and liquidity risk faced by U.S. market participants.[8] The proposed rule amendment was published for comment in the **Federal Register** on October 5, 2016.[9] In light of this action by the SEC, the Exchange proposes new rules to reflect ''regular way'' settlement as occurring on T+2.[10]

Proposed Rule Change

The Exchange proposes the following new rules identified with the modifier ''T'' in order to reflect a T+2 settlement cycle. Except for changes reflecting the shortened settlement period, the proposed rules are the same as their current counterparts.

Rule 14

- Current Rule 14(a)(i) defines non-regular way settlement instructions as instructions that allow for settlement other than regular way, that is, ''settlement on the third business day following trade date for securities other than U.S. Government Securities''. The Exchange proposes a new Rule 14T that replaces ''third'' business day with ''second.''
- Current Dealings and Settlements (Rules 45–299C) defines regular way as ''due on the third business day following the day of the contract.'' The Exchange proposes a new version that changes ''third'' business day to ''second'';
- Current Rule 64(a) defines ''regular way'' as ''for delivery on the third business day following the day of the contract.'' The Exchange proposes a new Rule 64T(a) that changes ''third'' business day to ''second.'' Current Rule 64(a)(ii) provides that on the second and third business days preceding the final day for subscription, bids and offers in rights to subscribe shall be made only ''next day.'' To conform with the move to a T+2 settlement cycle, proposed Rule 64T(a)(ii) would not contain a clause referring to the third business day preceding the final day for subscription because the third business day preceding the final day for subscription in a T+2 settlement cycle would simply be a regular way settlement. Finally, current Rule 64(c) requires ''seller's option'' trades, defined as trades for delivery between two and 60 business days, to be reported to the tape only in calendar day. Proposed Rule 64T(c) would define ''seller's option'' trades as trades for delivery between three and 60 business days to reflect the shortened settlement period. Further, the final sentence of current Rule 64 provides that the settlement date of a ''seller's option'' transaction printed as calendar days cannot coincide with the normal three business day ''regular way'' settlement. In proposed Rule 64T, the Exchange would change the reference to ''regular way'' settlements to two business day.[11]
- Current Rule 235 provides that transactions in stocks, except those made for ''cash'' as prescribed in Rule 14, shall be ex-dividend or ex-rights on the second business day preceding the record date fixed by the corporation or the date of the closing of transfer books. The Exchange proposes to adopt proposed Rule 235T that would delete the word ''second'' so the reference

[4] *See* 17 CFR 240.15c6–1(a); *see also* notes 8–9, *infra.*

[5] 17 CFR 240.15c6–1(a).

[6] *See* Securities Exchange Act Release Nos. 33023 (October 6, 1993), 58 FR 52891 (order adopting Rule 15c6–1) and 34952 (November 9, 1994), 59 FR 59137 (order changing the effective date from June 1, 1995, to June 7, 1995).

[7] *See* Securities Exchange Act Release Nos. 35110 (December 16, 1994), 59 FR 0 (December 23, 1994) (SR–NYSE–94–40) (Notice) and 35506 (March 17, 1995), 60 FR 15618 (March 24, 1995) (SR–NYSE–94–40) (Approval Order).

[8] *See* SEC Press Release 2016–200: ''SEC Proposes Rule Amendment to Expedite Process for Settling Securities Transactions'' (September 28, 2016).

[9] *See* Securities Exchange Act Release No. 78962 (September 28, 2016), 81 FR 69240 (October 5, 2016) (File No. S7–22–16) (''SEC Proposing Release'').

[10] Earlier this year the MSRB also filed a rule change to reflect ''regular way'' settlement as occurring on T+2. *See* Securities Exchange Act Release Nos. 77744 (April 29, 2016), 81 FR 26851 (May 4, 2016) (SR–MSRB–2016–04) (approving proposed amendments to MSRB Rules G–12 and G–15 to define regular-way settlement for municipal securities transactions as occurring on a two-day settlement cycle and technical conforming amendments).

[11] The Exchange also proposes to make a non-substantive change and remove the bold from the ''(a)'' in proposed Rule 64T(a).

would be to the ''business day'' preceding the record date. The current Rule further provides that if the record date or closing of transfer books occurs upon a day other than a business day, Rule 235 shall apply for the third preceding business day. The Exchange proposes to change ''third preceding business day'' to ''second preceding business day'' in proposed Rule 235T;

- Current Rule 236 prescribes that ex-warrant trading will begin on the second business day preceding the date of expiration of the warrants, except that when expiration occurs on a non-business day, in which case it will begin on the third business day preceding date of expiration. The Exchange proposes to adopt proposed Rule 236T and change the warrant period to the business day preceding expiration of the warrants instead of the second business day. Under the proposed Rule, when warrant expiration occurs on other than a business day, the ex-warrant period will begin on the second business day preceding the expiration date instead of on the third business day;
- Current Rule 257 prescribes the time frame for delivery of dividends or rights for securities sold before the ''ex'' date but delivered after the record date. The current time frame is within three days after the record date. Consistent with the T+2 initiative, proposed Rule 257T would shorten the time frame to two days;
- Subdivision (1)(A) of Supplementary Material .65 to current Rule 282 sets forth the fail-to-deliver and liability notice procedures where a securities contract is for warrants, rights, convertible securities or other securities which have been called for redemption; are due to expire by their terms; are the subject of a tender or exchange offer; or are subject to other expiring events such as a record date for the underlying security and the last day on which the securities must be delivered or surrendered is the settlement date of the contract or later.

Under current Rule 282.65(1)(A), the receiving member organization delivers a liability notice to the delivering member organization as an alternative to the close-out procedures set forth in the Rule. The liability notice sets a cutoff date for the delivery or surrender of the securities and provides notice to the delivering member organization of the liability attendant to its failure to deliver or surrender the securities in time. If the delivering member organization delivers or surrenders the securities in response to the liability notice, it has met its delivery obligation. If the delivering member organization fails to deliver or surrender the securities on the expiration date, it will be liable for any damages that may accrue thereby.

Current Rule 282.65(1)(A) further provides that when the parties to a contract are both participants in a Qualified Clearing Agency that has an automated service for notifying a failing party of the liability that will be attendant to a failure to deliver, the transmission of the liability notice must be accomplished through such automated notification service. When the parties to a contract are not both participants in a Qualified Clearing Agency [12] that has an automated service for notifying a failing party of the liability that will be attendant to a failure to deliver, such notice must be issued using written or comparable electronic media having immediate receipt capabilities no later than one business day prior to the latest time and the date of the offer or other event in order to obtain the protection provided by this Rule.[13]

Given the proposed shortened settlement cycle, and in order to address concerns that the requirement for the delivering member organization to deliver a liability notice to the receiving member no later than one business day prior to the latest time and the date of the offer or other event in order to obtain the protection provided by the Rule may no longer be appropriate in a T+2 environment,[14] the Exchange proposes to amend Rule 282.65(1)(A) in situations where both parties to a contract are not participants of a registered clearing agency with an automated notification service by extending the time frame for delivery of the liability notice. Rule 282.65(1)(A) would accordingly be amended to provide that in such cases, the receiving member organization must send the liability notice to the delivering member organization as soon as practicable but not later than two hours prior to the cutoff time set forth in the instructions on a specific offer or other event to obtain the protection provided by the Rule. The proposed change would be the only change to the text of current Supplementary Material .65.

- Current Section 703.02 (part 2) of the Listed Company Manual (Stock Split/Stock Rights/Stock Dividend Listing Process) provides that a distribution of less than 25% of a company's common stock is traded ''ex'' (without the distribution) on and after the second business day prior to the record date based on the Exchange's three-day delivery rule, pursuant to which contracts made on the Exchange for the purchase and sale of securities are settled by delivery on the third business day after the contract is made, unless other terms of settlement specify otherwise. Given the change to a two day delivery rule, the Exchange's proposed Section 703.02 would change the first sentence if the rule to reflect that a distribution of less than 25% of a company's common stock is traded ''ex'' on and after the business day prior to the record date. The second sentence in the proposed Rule would refer to the Exchange's two-day delivery rule pursuant to which contracts made on the Exchange for the purchase and sale of securities are settled by delivery on the second business day after the contract is made.

Operative Date Preambles

As noted above, because the Exchange would not implement the proposed rules until after the final implementation of T+2, the Exchange proposes to retain the current versions of each rule on its books and not delete them until after the proposed rules are approved. The Exchange also proposes to file separate proposed rule changes as necessary to establish the operative date of the proposed rules and to delete the current version of each rule.

To reduce the potential for confusion regarding which version of a given rule governs, the Exchange proposes to add a preamble to each current rule providing that: (1) the rule will remain operative until the Exchange files separate proposed rule changes as necessary to establish the operative date

[12] Rule 180 governs failure to deliver and provides in part that ''[w]hen the parties to a contract are both participants in a registered clearing agency which has an automated service for notifying a failing party of the liability that will be attendant to a failure to deliver and that contract was to be settled through the facilities of said registered clearing agency, the transmission of the liability notification must be accomplished through use of said automated notification service.'' Rule 180 does not address the transmission of the liability notification for parties to a contract that are not both participants in a registered clearing agency, which is governed by Rule 282.65.

[13] The one-day time frame also appears in comparable provisions of other SROs. *See, e.g.,* FINRA Rule 11810(j)(1)(A); NSCC Rules & Procedures, Procedure X (Execution of Buy-Ins) (Effective August 10, 2016); and Nasdaq Rule IM–11810 (Buying-in).

[14] *See, e.g.,* Letter from Thomas F. Price, Managing Director, Operations, Technology & BCP, Securities Industry and Financial Markets Association, to Marcia E. Asquith, Corporate Secretary, FINRA, dated April 4, 2016 (''SIFMA'') (April 4, 2016), noting in connection with FINRA Rule 11810(j), the comparable provision to Rule 282.65(1)(A), that the ''industry has identified a number of situations where one-day notice may no longer be appropriate in a T+2 environment, including (1) where the delivery obligation is transferred to another party as a result of continuous net settlement, (2) settlements outside of National Securities Clearing Corporation (the ''NSCC'') and (3) settlements where the third party is not a[n NYSE] member.''

of the revised rule, to delete the current rule and proposed preamble, and to remove the preamble text from the revised rule; and (2) in addition to filing the necessary proposed rule changes, the Exchange will announce via Information Memo the operative date of the deletion of the current rule and implementation of the proposed rule designated with a T.

The Exchange also proposes to add a preamble to each proposed rule that would provide that: (1) The Exchange will file a separate rule change to establish the operative date of the proposed rule, delete the current version and the proposed preamble, and remove the preamble text from the revised rule; and (2) until such time, the current version of the rule will remain operative and that, in addition to filing the necessary proposed rule changes, the Exchange will announce via Information Memo the implementation of the proposed rule and the operative date of the deletion of the current rule.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[15] in general, and furthers the objectives of Section 6(b)(5) of the Act,[16] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, 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 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 the proposed rule change supports the industry-led initiative to shorten the settlement cycle to two business days. Moreover, the proposed rule change is consistent with the SEC's proposed amendment to SEA Rule 15c6–1(a) to require standard settlement no later than T+2. The Exchange believes that the proposed rule change will provide the regulatory certainty to facilitate the industry-led move to a T+2 settlement cycle. Further, the Exchange believes that, by shortening the time period for settlement of most securities transactions, the proposed rule change would protect investors and the public interest by reducing the number of unsettled trades in the clearance and settlement system at any given time, thereby reducing the risk inherent in settling securities transactions to clearing corporations, their members and public investors. The Exchange also believes that adding a preamble to each current rule and to each proposed rule clarifying the operative dates of the respective versions would remove impediments to and perfect the mechanism of a free and open market and a national market system by adding clarity and transparency to the Exchange's rules, reducing potential confusion, and making the Exchange's rules easier to navigate.

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 is not designed to address any competitive issue but rather facilitate the industry's transition to a T+2 regular-way settlement cycle. The Exchange also believes that the proposed rule change will serve to promote clarity and consistency, thereby reducing burdens on the marketplace and facilitating investor protection. Moreover, the proposed rule changes are consistent with the SEC's proposed amendment to SEA Rule 15c6–1(a) to require standard settlement no later than T+2. Accordingly, the Exchange believes that the proposed changes do not impose any burdens on the industry in addition to those necessary to implement amendments to SEA Rule 15c6–1(a) as described and enumerated in the SEC Proposing Release.[17]

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 such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove 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–2016–87 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2016–87. 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–2016–87, and should be submitted on or before January 19, 2017.

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(5).

[17] *See* note 9, *supra.*

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–31474 Filed 12–28–16; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79672; File No. SR–NYSEMKT–2016–63]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing of Amendment Nos. 2 and 3 to Proposed Rule Change Amending the Co-Location Services Offered by the Exchange To Add Certain Access and Connectivity Fees

December 22, 2016.

On August 16, 2016, NYSE MKT LLC (the ''Exchange'' or ''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 thereunder,[2] a proposed rule change to amend the co-location services offered by the Exchange to: (1) Provide additional information regarding the access to various trading and execution services; connectivity to market data feeds and testing and certification feeds; connectivity to Third Party Systems; and connectivity to DTCC provided to Users using data center local area networks; and (2) establish fees relating to a User's access to various trading and execution services; connectivity to market data feeds and testing and certification feeds; connectivity to DTCC; and other services. The proposed rule change was published for comment in the **Federal Register** on August 26, 2016.[3] The Commission received no comments in response to the proposed rule change.[4] On October 4, 2016, the Commission extended the time period within which to 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 November 24, 2016.[5]

On November 2, 2016, the Exchange filed Amendment No. 1 to the proposed rule change.[6] On November 29, 2016, the Commission instituted proceedings to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.[7] In response to the Order Instituting Proceedings, the Commission received additional comments letters regarding the proposed rule change.[8]

On December 9, 2016, the Exchange filed Amendment No. 2 to the proposed rule change as described in Items I and II below, which Items have been prepared by Exchange. On December 13, 2016 the Exchange filed Amendment No. 3 to the proposed rule change.[9] The Commission is publishing this notice to solicit comments on Amendment Nos. 2 and 3 to the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Amendments

The Exchange proposes to amend the co-location services offered by the Exchange to establish fees relating to Users' access to third party trading and execution services; connectivity to third party data feeds and testing and certification feeds; access to clearing; and other services. In addition, this proposed rule change reflects changes to the NYSE MKT Equities Price List (''Price List'') and the NYSE Amex Options Fee Schedule (''Fee Schedule'') related to these co-location services. This Amendment No. 2 [10] supersedes the original filing and Amendment 1 in their entirety.[11]

The proposed 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.

[18] 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. 34–78629 (August 22, 2016), 81 FR 58992.

[4] The Commission notes that it did receive one comment letter on a related filing, NYSE–2016–45 (the ''NYSE Companion Filing''), which is equally relevant to this filing. *See* letter to Brent J. Fields, Secretary, Commission, from John Ramsay, Chief Market Policy Officer, Investors Exchange LLC (IEX), dated September 9, 2016.

On September 23, 2016, the NYSE submitted a response to the IEX letter.

[5] *See* Securities Exchange Act Release No. 34–78968 (September 28, 2016), 81 FR 68493.

[6] Amendment No. 1 is available on the Commission's Web site at *https://www.sec.gov/comments/sr-nysemkt-2016-63/nysemkt201663-1.pdf.*

[7] *See* Securities Exchange Act Release 34–79378 (November 22, 2016), 81 FR 86050.

[8] *See* letter to Brent J. Fields, Commission, from Melissa MacGregor, Managing Director and Associate General Counsel, SIFMA, dated December 12, 2016; letter to Brent J. Fields, Commission, from Joe Wald, Chief Executive Officer, Clearpool Group, dated December 16, 2016; letter to Brent J. Fields, Secretary, Commission, from John Ramsay, Chief Market Policy Officer, Investors Exchange LLC (IEX), dated December 21, 2016. All comments received by the Commission on the proposed rule change are available on the Commission's Web site at: *https://www.sec.gov/comments/sr-nysemkt-2016-63/nysemkt201663.shtml.*

The Commission notes that it received an additional letter on the NYSE Companion Filing. *See* letter to Brent J. Fields, Commission, from Adam C. Cooper, Senior Managing Director and Chief Legal Officer, Citadel Securities, dated December 12, 2016. All comments received by the Commission on the NYSE Companion Filing are available on the Commission's Web site at: *https://www.sec.gov/comments/sr-nyse-2016-45/nyse201645.shtml.*

[9] The Commission notes that the Exhibit 5 filed with Amendment No. 2 contained erroneous rule text and therefore was corrected in Amendment No. 3. Amendment Nos. 2 and 3 are available at *https://www.sec.gov/comments/sr-nysemkt-2016-63/nysemkt201663-3.pdf.*

[10] *See* supra note 9, noting that Amendment No. 2 was modified in part by Amendment No. 3. Accordingly, the Commission notes that Amendment Nos. 2 and 3 together supersede the original filing, as modified by Amendment No. 1, in its entirety.

[11] The Securities and Exchange Commission (''Commission'') has issued an order instituting proceedings to determine whether to approve or disapprove the proposed rule change, as modified by amendments 1 and 2. *See* Securities Exchange Act Release No. 79378 (November 22, 2016), 81 FR 86050 (November 29, 2016) (SR–NYSEMKT–2016–63) (the ''November 22 Order''). In its filing, as amended by amendment 1, the Exchange proposed adding to the Fee Schedules (a) a more detailed description of the connectivity to certain market data products (the ''Included Data Products'') that Users receive with connections to the local area networks available in the data center; and (b) connectivity fees for connecting to other market data products of the Exchange and its affiliates, New York Stock Exchange LLC and NYSE Arca, Inc. (the ''Premium NYSE Data Products''). In the November 22 Order, the Commission cites language from the proposed rule change:

the Exchange also stated that the expectation of co-location was that normally Users would expect reduced latencies in . . . receiving market data from the Exchange by being colocated. Therefore, as the Exchange states in Amendment No. 2, both Included Data Products and Premium NYSE Data Products are 'directly related to the purpose of co-location.'

Id., at 86053. It goes on to say that, if Included Data Products and Premium NYSE Data Products are ''integral to co-located Users for trading on the Exchange,'' it was questionable whether obtaining the information from another source is a viable alternative. *Id.* The Exchange disagrees with the Commission's description of Included Data Products and Premium NYSE Data Products as ''integral'' to Users for trading on the Exchange. Being related to the purpose of co-location is not the same as being integral for trading. A User is not required to receive either Included Data Products or Premium NYSE Data Products in order to trade on the Exchange.

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 the co-location [12] services offered by the Exchange to establish fees relating to Users' [13] access to third party trading and execution services; connectivity to third party data feeds and testing and certification feeds; access to clearing; and other services.

More specifically, the Exchange proposes to revise the Price List and Fee Schedule to include:

a. Fees for connectivity to:

- The execution systems of third party markets and other content service providers (''Third Party Systems'');
- data feeds from third party markets and other content service providers (the ''Third Party Data Feeds'');
- third party testing and certification feeds;
- Depository Trust & Clearing Corporation (''DTCC'') services; and

b. fees for virtual control circuits (''VCCs'') between two Users. VCCs are unicast connections between two participants over dedicated bandwidth.[14]

The Exchange provides access to Third Party Systems (''Access'') and connectivity to Third Party Data Feeds, third party testing and certification feeds, and DTCC (collectively, ''Connectivity'') as conveniences to Users. Use of Access or Connectivity is completely voluntary, and several other access and connectivity options are available to a User. As alternatives to using the Access and Connectivity provided by the Exchange, a User may access or connect to such services and products through another User or through a connection to an Exchange access center outside the data center, third party access center, or third party vendor. The User may make such connection through a third party telecommunication provider, third party wireless network, the Exchange's Secure Financial Transaction Infrastructure (''SFTI'') network, or a combination thereof.

Similarly, the Exchange provides VCCs as a convenience to Users. Use of a VCC is completely voluntary. As an alternative to an Exchange-provided VCC, a User may connect to another User through a fiber connection (''cross connect'').[15]

Connectivity

Connectivity to Third Party Systems

The Exchange proposes to revise the Price List and Fee Schedule to provide that Users may obtain connectivity to Third Party Systems of multiple third party markets and other content service providers for a fee. Users connect to Third Party Systems over the internet protocol (''IP'') network, a local area network available in the data center.[16] The Exchange selects what connectivity to Third Party Systems to offer in the data center based on User demand.

In order to obtain access to a Third Party System, a User enters into an agreement with the relevant third party content service provider, pursuant to which the third party content service provider charges the User for access to the Third Party System. The Exchange then establishes a unicast connection between the User and the relevant third party content service provider over the IP network. The Exchange charges the User for the connectivity to the Third Party System. A User only receives, and is only charged for, access to Third Party Systems for which it enters into agreements with the third party content service provider.

With the exception of the Intercontinental Exchange (''ICE'') feed,[17] the Exchange has no ownership interest in the Third Party Systems. Establishing a User's access to a Third Party System does not give the Exchange any right to use the Third Party Systems. Connectivity to a Third Party System does not provide access or order entry to the Exchange's execution system, and a User's connection to a Third Party System is not through the Exchange's execution system.[18]

The Exchange charges a monthly recurring fee for connectivity to a Third Party System. Specifically, when a User requests access to a Third Party System, it identifies the applicable third party market or other content service provider and what bandwidth connection it requires.

The monthly recurring fee the Exchange charges Users for unicast connectivity to each Third Party System varies by the bandwidth of the connection, as follows:

Bandwidth of connection to third party system	Monthly recurring fee per connection to third party system
1 Mb	$200
3 Mb	400
5 Mb	500
10 Mb	800
25 Mb	1,200
50 Mb	1,800
100 Mb	2,500
200 Mb	3,000
1 Gb	3,500

The Exchange provides connectivity to the following Third Party Systems:

Americas Trading Group (ATG)
BATS
Boston Options Exchange (BOX)
Chicago Board Options Exchange (CBOE)
Credit Suisse
International Securities Exchange (ISE)
Nasdaq
National Stock Exchange
NYFIX Marketplace

In addition to the connectivity fees, the Exchange proposes to add language to the Price List and Fee Schedule stating the following:

Pricing for access to the execution systems of third party markets and other service providers (Third Party Systems) is for connectivity only. Connectivity to Third Party Systems is subject to any technical

[12] The Exchange initially filed rule changes relating to its co-location services with the Commission in 2010. *See* Securities Exchange Act Release No. 62961 (September 21, 2010), 75 FR 59299 (September 27, 2010) (SR–NYSEAmex–2010–80) (the ''Original Co-location Filing''). The Exchange operates a data center in Mahwah, New Jersey (the ''data center'') from which it provides co-location services to Users.

[13] For purposes of the Exchange's co-location services, a ''User'' means any market participant that requests to receive co-location services directly from the Exchange. *See* Securities Exchange Act Release No. 76009 (September 29, 2015), 80 FR 60213 (October 5, 2015) (SR–NYSEMKT–2015–67). As specified in the Price List and Fee Schedule, a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange's affiliates New York Stock Exchange LLC (''NYSE LLC'') and NYSE Arca, Inc. (''NYSE Arca'' and, together with NYSE LLC, the ''Affiliate SROs''). *See* Securities Exchange Act Release No. 70176 (August 13, 2013), 78 FR 50471 (August 19, 2013) (SR–NYSEMKT–2013–67).

[14] Information flows over existing network connections in two formats: ''unicast'' format, which is a format that allows one-to-one communication, similar to a phone line, in which information is sent to and from the Exchange; and ''multicast'' format, which is a format in which information is sent one-way from the Exchange to multiple recipients at once, like a radio broadcast.

[15] *See* Original Co-location Filing, *supra* note 5, at 59299 and Securities Exchange Act Release No. 74220 (February 6, 2015), 80 FR 7894 (February 12, 2015) (SR–NYSEMKT–2015–08) (notice of filing and immediate effectiveness of proposed rule change to include IP network connections and fiber cross connects between a User's cabinet and non-User's equipment as co-location services) (the ''IP Network Release'').

[16] *See id.,* at 7894.

[17] ICE is owned by the Exchange's ultimate parent, Intercontinental Exchange, Inc., and so the Exchange has an indirect interest in the ICE feeds. The ICE feeds include both market data and trading and clearing services, but the Exchange includes it as a Third Party Data Feed. In order for a User to receive an ICE feed, ICE must provide authorization for the User to receive both data and trading and clearing services.

[18] The Exchange has a dedicated network connection to each of the Third Party Systems.

provisioning requirements and authorization from the provider of the data feed. Connectivity to Third Party Systems is over the IP network. Any applicable fees are charged independently by the relevant third party content service provider. The Exchange is not the exclusive method to connect to Third Party Systems.

Connectivity to Third Party Data Feeds

The Exchange proposes to revise the Price List and Fee Schedule to provide that Users may obtain connectivity to Third Party Data Feeds for a fee. The Exchange receives Third Party Data Feeds from multiple national securities exchanges and other content service providers at its data center. It then provides connectivity to that data to Users for a fee. With the exceptions of Global OTC and NYSE Global Index, Users connect to Third Party Data Feeds over the IP network.[19]

The Exchange notes that charging Users a monthly fee for connectivity to Third Party Data Feeds is consistent with the monthly fee Nasdaq charges its co-location customers for connectivity to third party data. For instance, Nasdaq charges its co-location customers monthly fees of $1,500 and $4,000 for connectivity to BATS Y and BATS, respectively, and of $2,500 for connectivity to EDGA or EDGX.[20]

In order to connect to a Third Party Data Feed, a User enters into a contract with the relevant third party market or other content service provider, pursuant to which the content service provider charges the User for the Third Party Data Feed. The Exchange receives the Third Party Data Feed over its fiber optic network and, after the data provider and User enter into the contract and the Exchange receives authorization from the data provider, the Exchange re-transmits the data to the User over the User's port. The Exchange charges the User for the connectivity to the Third Party Data Feed. A User only receives, and is only charged for, connectivity to the Third Party Data Feeds for which it enters into contracts.

With the exception of the ICE, Global OTC and NYSE Global Index feeds,[21] the Exchange has no affiliation with the sellers of the Third Party Data Feeds. It has no right to use the Third Party Data Feeds other than as a redistributor of the data. The Third Party Data Feeds do not provide access or order entry to the Exchange's execution system. With the exception of the ICE feeds, the Third Party Data Feeds do not provide access or order entry to the execution systems of the third party generating the feed.[22] The Exchange receives Third Party Data Feeds via arms-length agreements and it has no inherent advantage over any other distributor of such data.

The Exchange charges a monthly recurring fee for connectivity to each Third Party Data Feed. The monthly recurring fee is per Third Party Data Feed, with the exception that the monthly recurring feed for SuperFeed and MSCI varies by the bandwidth of the connection. Depending on its needs and bandwidth, a User may opt to receive all or some of the feeds or services included in a Third Party Data Feed.

The following table shows the feeds that connectivity to each Third Party Data Feed provides, together with the applicable monthly recurring fee.

Third party data feed	Monthly recurring connectivity fee per third party data feed
Bats BZX Exchange (BZX) and Bats BYX Exchange (BYX)	$2,000
Bats EDGX Exchange (EDGX) and Bats EDGA Exchange (EDGA)	2,000
Boston Options Exchange (BOX)	1,000
Chicago Board Options Exchange (CBOE)	2,000
Chicago Stock Exchange (CHX)	400
Euronext	600
Financial Industry Regulatory Authority (FINRA)	500
Global OTC	100
Intercontinental Exchange (ICE)	1,500
Montréal Exchange (MX)	1,000
MSCI 5 Mb	500
MSCI 25 Mb	1,200
NASDAQ Stock Market	2,000
NASDAQ OMX Global Index Data Service	100
NASDAQ OMDF	100
NASDAQ UQDF & UTDF	500
NYSE Global Index	100
OTC Markets Group	1,000
SR Labs—SuperFeed ≤500 Mb	250
SR Labs—SuperFeed >500 Mb to ≤1.25 Gb	800
SR Labs—SuperFeed >1.25 Gb	1,000
TMX Group	2,500

In addition to the above connectivity fees, the Exchange proposes to add the following language to the Price List and Fee Schedule:

Pricing for data feeds from third party markets and other content service providers (Third Party Data Feeds) is for connectivity only. Connectivity to Third Party Data Feeds is subject to any technical provisioning requirements and authorization from the provider of the data feed. Connectivity to Third Party Data Feeds is over the IP network, with the exception that Users can connect to Global OTC and NYSE Global Index over the IP network or LCN. Market data fees are charged independently by the relevant third party market or content service provider. The Exchange is not the exclusive method to connect to Third Party Data Feeds.

Third Party Data Feed providers may charge redistribution fees, such as Nasdaq's Extranet Access Fees and OTC Markets Group's Access Fees.[23] When the Exchange receives a redistribution fee, it passes through the charge to the User, without change to the fee. The fee is labeled as a pass-through of a redistribution fee on the User's invoice. The Exchange proposes to add language to the Price List and Fee Schedule accordingly.

The Exchange provides third party markets or content providers that are also Users connectivity to their own Third Party Data Feeds. The Exchange does not charge Users that are third party markets or content providers for connectivity to their own feeds, as in the Exchange's experience such parties generally receive their own feeds for purposes of diagnostics and testing. The Exchange proposes to add language to the Price List and Fee Schedule accordingly.

[19] *See* IP Network Release, *supra* note 8, at 7894 (''The IP network also provides Users with access to away market data products.''). Users can connect to Global OTC and NYSE Global Index over the IP network or the Liquidity Center Network (''LCN''), a local area network available in the data center.

[20] *See* Nasdaq Stock Market Rule 7034.

[21] ICE and the Global OTC alternative trading system are both owned by the Exchange's ultimate parent, Intercontinental Exchange, Inc., and so the Exchange has an indirect interest in the ICE and Global OTC feeds. The NYSE Global Index feed includes index and exchange traded product valuations data, with data drawn from the Exchange, the Affiliate SROs, and third party exchanges. Because it includes third party data, the NYSE Global Index feed is considered a Third Party Data Feed. As with all Third Party Data Feeds, the Exchange is not the exclusive method to connect to the ICE, Global OTC or NYSE Global Index feeds.

[22] Unlike other Third Party Data Feeds, the ICE feeds include both market data and trading and clearing services. In order to receive the ICE feeds, a User must receive authorization from ICE to receive both market data and trading and clearing services.

[23] *See* NASDAQ Stock Market LLC Rule 7025, ''Extranet Access Fee'', and OTC Markets Market Data Distribution Agreement Appendix B, ''Fees'' at *http://www.otcmarkets.com/content/doc/market-data-fees-2016.pdf. See also* Securities Exchange Act Release No. 74040 (January 13, 2015), 80 FR 2460 (January 16, 2015) (SR–NASDAQ–2015–003).

Connectivity to Third Party Testing and Certification Feeds

The Exchange offers Users connectivity to third party certification and testing feeds. Certification feeds are used to certify that a User conforms to any of the relevant content service provider's requirements for accessing Third Party Systems or receiving Third Party Data, while testing feeds provide Users an environment in which to conduct tests with non-live data.[24] Such feeds, which are solely used for certification and testing and do not carry live production data, are available over the IP network.

The Exchange proposes to revise the Price List and Fee Schedule to include connectivity to third party certification and testing feeds. The Exchange charges a connectivity fee of $100 per month per feed.

The Exchange proposes to add the following connectivity fees and language to the Price List and Fee Schedule:

Connectivity to third party certification and testing feeds.	$100 monthly recurring fee per feed.

The Exchange provides connectivity to third party testing and certification feeds provided by third party markets and other content service providers. Pricing for third party testing and certification feeds is for connectivity only. Connectivity to third party testing and certification feeds is subject to any technical provisioning requirements and authorization from the provider of the data feed. Connectivity to third party testing and certification feeds is over the IP network. Any applicable fees are charged independently by the relevant third party market or content service provider. The Exchange is not the exclusive method to connect to third party testing and certification feeds.

Connectivity to DTCC

The Exchange provides Users connectivity to DTCC for clearing, fund transfer, insurance, and settlement services.[25] The Exchange proposes to revise the Price List and Fee Schedule to include connectivity to DTCC. The Exchange charges a connectivity fee of $500 per month for connections to DTCC of 5 Mb and $2,500 for connections of 50 Mb. Connectivity to DTCC is available over the IP network.

In order to connect to DTCC, a User enters into a contract with DTCC, pursuant to which DTCC charges the User for the services provided. The Exchange receives the DTCC feed over its fiber optic network and, after DTCC and the User enter into the services contract and the Exchange receives authorization from DTCC, the Exchange provides connectivity to DTCC to the User over the User's IP network port. The Exchange charges the User for the connectivity to DTCC.

Connectivity to DTCC does not provide access or order entry to the Exchange's execution system, and a User's connection to DTCC is not through the Exchange's execution system.

The Exchange proposes to add the following connectivity fees and language to the Price List and Fee Schedule:

5 Mb connection to DTCC.	$500 monthly recurring fee.
50 Mb connection to DTCC.	2,500 monthly recurring fee.

Pricing for connectivity to DTCC feeds is for connectivity only. Connectivity to DTCC feeds is subject to any technical provisioning requirements and authorization from DTCC. Connectivity to DTCC feeds is over the IP network. Any applicable fees are charged independently by DTCC. The Exchange is not the exclusive method to connect to DTCC feeds.

Virtual Control Circuits

Finally, the Exchange proposes to revise the Price List and Fee Schedule to offer VCCs between two Users. VCCs are connections between two points over dedicated bandwidth using the IP network. A VCC (previously called a ''peer to peer'' connection) is a two-way connection which the two participants can use for any purpose.

The Exchange bills the User requesting the VCC, but will not set up a VCC until the other User confirms that it wishes to have the VCC set up.

The Exchange proposes to revise the Price List and Fee Schedule to include VCCs between two Users. The fee for VCCs is based on the bandwidth utilized, as follows:

Type of service	Description	Amount of charge
Virtual Control Circuit between two Users.	1 Mb	$200 monthly charge.
	3 Mb	400 monthly charge.
	5 Mb	500 monthly charge.
	10 Mb	800 monthly charge.
	25 Mb	1,200 monthly charge.
	50 Mb	1,800 monthly charge.
	100 Mb	2,500 monthly charge.

General

As is the case with all Exchange co-location arrangements, (i) neither a User nor any of the User's customers would be permitted to submit orders directly to the Exchange unless such User or customer is a member organization, a Sponsored Participant or an agent thereof (*e.g.,* a service bureau providing order entry services); (ii) use of the co-location services proposed herein would be completely voluntary and available to all Users on a non-discriminatory basis;[26] and (iii) a User would only incur one charge for the particular co-location service described herein, regardless of whether the User connects only to the Exchange or to the Exchange and one or both of the Affiliate SROs.[27]

The proposed change is not otherwise intended to address any other issues relating to co-location services and/or related fees, and the Exchange is not aware of any problems that Users would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[28] in general, and furthers the objectives of Sections

[24] For example, a User that trades on a third party exchange may wish to test the exchange's upcoming releases and product releases or may wish to test a new algorithm in a testing environment prior to making it live.

[25] Such connectivity to DTCC is distinct from the access to shared data services for clearing and settlement services that a User receives when it purchases access to the LCN or IP network. The shared data services allow Users and other entities with access to the Trading Systems to post files for settlement and clearing services to access.

[26] As is currently the case, Users that receive co-location services from the Exchange will not receive any means of access to the Exchange's trading and execution systems that is separate from, or superior to, that of other Users. In this regard, all orders sent to the Exchange enter the Exchange's trading and execution systems through the same order gateway, regardless of whether the sender is co-located in the data center or not. In addition, co-located Users do not receive any market data or data service product that is not available to all Users, although Users that receive co-location services normally would expect reduced latencies in sending orders to, and receiving market data from, the Exchange.

[27] *See* SR–NYSEMKT–2013–67, *supra* note 6, at 50471. The Affiliate SROs have also submitted substantially the same proposed rule change to propose the changes described herein. *See* SR–NYSE–2016–45 and SR–NYSEArca–2016–89.

[28] 15 U.S.C. 78f(b).

6(b)(5) of the Act,[29] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, to protect investors and the public interest and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed changes remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, protect investors and the public interest because, by offering Access and Connectivity, the Exchange gives each User additional options for addressing its access and connectivity needs, responding to User demand for access and connectivity options. Providing Access and Connectivity helps each User tailor its data center operations to the requirements of its business operations by allowing it to select the form and latency of access and connectivity that best suits its needs. The Exchange provides Access and Connectivity as conveniences to Users. Use of Access or Connectivity is completely voluntary, and each User has several other access and connectivity options available to it. As alternatives to using the Access and Connectivity provided by the Exchange, a User may access or connect to such services and products through another User or through a connection to an Exchange access center outside the data center, third party access center, or third party vendor. The User may make such connection through a third party telecommunication provider, third party wireless network, the SFTI network, or a combination thereof.

The Exchange believes that providing access to Third Party Systems and connectivity to Third Party Data Feeds, third party testing and certification feeds and DTCC, as well as revising the Price List and Fee Schedule to describe such services, would remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, protect investors and the public interest because the proposed changes would make the descriptions of market participants' access and connectivity options and the related fees more accessible and transparent, thereby providing market participants with clarity as to what options for connectivity are available to them and what the related costs are. Including a description of the access to Third Party Systems and connectivity to Third Party Data Feeds that Users receive is consistent with Nasdaq's Rule 7034, which includes similar information.[30]

In addition, the Exchange believes that providing connectivity to third party testing and certification feeds removes impediments to, and perfects the mechanisms of, a free and open market and a national market system and, in general, protects investors and the public interest because such feeds provide Users an environment in which to conduct tests with non-live data, including testing for upcoming releases and product enhancements or the User's own software development, and allow Users to certify conformance to any applicable technical requirements.

Similarly, the Exchange believes that providing connectivity to DTCC removes impediments to, and perfects the mechanisms of, a free and open market and a national market system and, in general, protects investors and the public interest because it provides efficient connection to clearing, fund transfer, insurance, and settlement services.

The Exchange believes that providing Users with VCCs removes impediments to, and perfects the mechanisms of, a free and open market and a national market system because VCCs provide each User with an additional option for connectivity to another User, helping it tailor its data center operations to the requirements of its business operations by allowing it to select the form of connectivity that best suits its needs. The Exchange provides VCCs as a convenience to Users. Use of a VCC is completely voluntary. As an alternative to an Exchange-provided VCC, a User may connect to another User through a cross connect.

The Exchange also believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,[31] 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 fees changes are consistent with Section 6(b)(4) of the Act for multiple reasons. The Exchange operates in a highly competitive market in which exchanges offer co-location services as a means to facilitate the trading and other market activities of those market participants who believe that co-location enhances the efficiency of their operations. Accordingly, fees charged for co-location services are constrained by the active competition for the order flow of, and other business from, such market participants. If a particular exchange charges excessive fees for co-location services, affected market participants will opt to terminate their co-location arrangements with that exchange, and adopt a possible range of alternative strategies, including placing their servers in a physically proximate location outside the exchange's data center (which could be a competing exchange), or pursuing strategies less dependent upon the lower exchange-to-participant latency associated with co-location. Accordingly, the exchange charging excessive fees would stand to lose not only co-location revenues but also the liquidity of the formerly co-located trading firms, which could have additional follow-on effects on the market share and revenue of the affected exchange.

The Exchange believes that the services and fees proposed herein are equitably allocated and not unfairly discriminatory because, in addition to the services being completely voluntary, they are available to all Users on an equal basis (*i.e.,* the same products and services are available to all Users). All Users that voluntarily select to receive access to Third Party Systems, connectivity to Third Party Data Feeds, third party testing and certification feeds and DTCC, or a VCC between Users, would be charged the same amount for the same services.

The Exchange believes that the services and fees proposed herein are reasonable, equitably allocated and not unfairly discriminatory because the Exchange provides Access and Connectivity as conveniences to Users. Use of Access or Connectivity is completely voluntary, and each User has several other access and connectivity options available to it. As alternatives to using the Access and Connectivity provided by the Exchange, a User may access or connect to such services and products through another User or through a connection to an Exchange access center outside the data

[29] 15 U.S.C. 78f(b)(5).

[30] *See* Nasdaq Stock Market Rule 7034—Market Data Connectivity (''Pricing is for connectivity only and is similar to connectivity fees imposed by other vendors. The fees are generally based on the amount of bandwidth needed to accommodate a particular feed and Nasdaq is not the exclusive method to get market data connectivity. Market data fees are charged independently by the Nasdaq Stock Market and other exchanges.'')

[31] 15 U.S.C. 78f(b)(4).

center, third party access center, or third party vendor. The User may make such connection through a third party telecommunication provider, third party wireless network, the SFTI network, or a combination thereof. Users that opt to use Access or Connectivity would not receive access or connectivity that is not available to all Users, as all market participants that contract with the relevant market or content provider may receive access or connectivity. Similarly, the Exchange provides VCCs between Users as a convenience to Users. Use of a VCC is completely voluntary. As an alternative to an Exchange-provided VCC, a User may connect to another User through a cross connect.

The Exchange believes that the proposed charges are reasonable, equitably allocated and not unfairly discriminatory because the Exchange offers Access, Connectivity, and VCCs as conveniences to Users, but in order to do so must provide, maintain and operate the data center facility hardware and technology infrastructure. The Exchange must handle the installation, administration, monitoring, support and maintenance of such services, including by responding to any production issues. Since the inception of co-location, the Exchange has made numerous improvements to the network hardware and technology infrastructure and has established additional administrative controls. The Exchange has expanded the network infrastructure to keep pace with the increased number of services available to Users, including the increasing bandwidth required for Access and Connectivity, including resilient and redundant feeds. In addition, in order to provide connectivity to Third Party Data Feeds, Third Party Systems, third party testing and certification feeds and DTCC, the Exchange must maintain multiple connections to each Third Party Data Feed, Third Party System, and DTCC, allowing the Exchange to provide resilient and redundant connections; adapt to any changes made by the relevant third party; and cover any applicable fees (other than redistribution fees) charged by the relevant third party, such as port fees.

The Exchange believes that charging separate connectivity fees for Third Party Data Feeds and access to Third Party Systems, third party testing and certification feeds and connectivity to DTCC is reasonable and not unfairly discriminatory because, in the Exchange's experience, not all Users connect to Third Party Data Feeds, Third Party Systems, third party testing and certification feeds or DTCC. By charging only those Users that receive such connectivity, only the Users that directly benefit from it support its cost. In addition, Users are not required to use any of their bandwidth to connect to Third Party Data Feeds, third party testing and certification feeds or DTCC, or to access Third Party Systems, unless they wish to do so.

The Exchange believes the fees for connectivity to Third Party Data Feeds are reasonable because they allow the Exchange to defray or cover the costs associated with offering Users connectivity to Third Party Data Feeds while providing Users the convenience of receiving such Third Party Data Feeds within co-location, helping them tailor their data center operations to the requirements of their business operations by allowing them to select the form and latency of connectivity that best suits their needs. The Exchange believes that its proposed charges for connectivity to Third Party Data Feeds are similar to the connectivity fees Nasdaq imposes on its co-location customers. For instance, Nasdaq charges its co-location customers monthly fees of $1,500 and $4,000 for connectivity to BATS Y and BATS, respectively, and of $2,500 for connectivity to EDGA or EDGX.[32]

The Exchange believes that its connectivity fees for access to Third Party Systems are reasonable because they allow the Exchange to defray or cover the costs associated with offering such access while providing Users the convenience of being able to access such Third Party Systems, helping them tailor their data center operations to the requirements of their business operations by allowing them to select the form and latency of connectivity that best suits their needs. Similarly, the Exchange believes that its fees for connectivity to DTCC are reasonable because they allow the Exchange to defray or cover the costs associated with offering such access while providing Users the benefit of an efficient connection to clearing, fund transfer, insurance, and settlement services.

The monthly recurring fees the Exchange charges Users for connectivity to Third Party Systems, the MSCI and SuperFeed Third Party Data Feeds, and DTCC, as well as for VCCs between Users, vary by the bandwidth of the connection. The Exchange also believes such fees are reasonable because the monthly recurring fee varies by the bandwidth of the connection, and so is generally proportional to the bandwidth required. The Exchange notes that some of the monthly recurring fees for connectivity to SuperFeed and DTCC differ from the fees for the other connections of the same bandwidth. The Exchange believes that such difference in pricing is reasonable, equitably allocated and not unfairly discriminatory because, although the bandwidth may be the same, the competitive considerations and the costs the Exchange incurs in providing such connections and VCCs may differ.

The Exchange also believes that its connectivity fees for access to third party testing and certification feeds are reasonable because they allow the Exchange to defray or cover the costs associated with offering such access while providing Users the benefit of having an environment in which to conduct tests with non-live data, including testing for upcoming releases and product enhancements or the User's own software development, and to certify conformance to any applicable technical requirements.

The Exchange believes it is reasonable that redistribution fees charged by providers of Third Party Data Feeds are passed through to the User, without change to the fee. If not passed through, the cost of the re-distribution fees would be factored into the proposed fees for connectivity to Third Party Data Feeds. The Exchange believes that passing through the fees makes them more transparent to the User, allowing the User to better assess the cost of the connectivity to a Third Party Data Feed by seeing the individual components of the cost, *i.e.* the Exchange's fee and the redistribution fee.

The Exchange believes that it is reasonable that it does not charge third party markets or content providers for connectivity to their own Third Party Data Feeds, as in the Exchange's experience such parties generally receive their own feeds for purposes of diagnostics and testing. The Exchange believes that it removes impediments to, and perfects the mechanisms of, a free and open market and a national market system and, in general, protects investors and the public interest to facilitate such diagnostics and testing.

Finally, the Exchange also believes that its fees for VCCs between two Users are reasonable because they allow the Exchange to defray or cover the costs associated with offering such VCCs while providing Users the benefit of an additional option for connectivity to another User, helping them tailor their data center operations to the requirements of their business operations by allowing them to select the form of connectivity that best suits their needs. As an alternative to an Exchange-provided VCC, a User may

[32] *See* Nasdaq Stock Market Rule 7034.

connect to another User through a cross connect.

For the reasons above, the proposed changes do not unfairly discriminate between or among market participants that are otherwise capable of satisfying any applicable co-location fees, requirements, terms and conditions established from time to time by the Exchange.

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,[33] the Exchange believes that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because, in addition to the proposed services being completely voluntary, they are available to all Users on an equal basis (*i.e.* the same products and services are available to all Users).

The Exchange believes that providing Users with access to Third Party Systems and connectivity to Third Party Data Feeds, third party testing and certification feeds, and DTCC does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because such Access and Connectivity satisfies User demand for access and connectivity options, and each User has several other access and connectivity options available to it. As alternatives to using the Access and Connectivity provided by the Exchange, a User may access or connect to such services and products through another User or through a connection to an Exchange access center outside the data center, third party access center, or third party vendor. The User may make such connection through a third party telecommunication provider, third party wireless network, the SFTI network, or a combination thereof. Users that opt to use Access or Connectivity would not receive access or connectivity that is not available to all Users, as all market participants that contract with the relevant market or content provider may receive access or connectivity. In this way, the proposed changes would enhance competition by helping Users tailor their Access and Connectivity to the needs of their business operations by allowing them to select the form and latency of access and connectivity that best suits their needs.

Similarly, the Exchange believes that providing VCCs between Users does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because providing VCCs satisfies User demand for an alternative to cross connects.

The Exchange believes that revising the Price List and Fee Schedule to provide a more detailed description of the Access and Connectivity available to Users would make such descriptions more accessible and transparent, thereby providing market participants with clarity as to what Access and Connectivity is available to them and what the related costs are, thereby enhancing competition by ensuring that all Users have access to the same information regarding Access and Connectivity.

Finally, the Exchange operates in a highly competitive market in which exchanges offer co-location services as a means to facilitate the trading and other market activities of those market participants who believe that co-location enhances the efficiency of their operations. Accordingly, fees charged for co-location services are constrained by the active competition for the order flow of, and other business from, such market participants. If a particular exchange charges excessive fees for co-location services, affected market participants will opt to terminate their co-location arrangements with that exchange, and adopt a possible range of alternative strategies, including placing their servers in a physically proximate location outside the exchange's data center (which could be a competing exchange), or pursuing strategies less dependent upon the lower exchange-to-participant latency associated with co-location. Accordingly, the exchange charging excessive fees would stand to lose not only co-location revenues but also the liquidity of the formerly co-located trading firms, which could have additional follow-on effects on the market share and revenue of the affected exchange. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as amended by Amendment Nos. 1, 2, and 3 is consistent with the Exchange 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–NYSEMKT–2016–63 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File No. SR–NYSEMKT–2016–63. 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 No. SR–NYSEMKT–2016–63, and should be submitted on or before January 19, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[34]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–31484 Filed 12–28–16; 8:45 am]

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[33] 15 U.S.C. 78f(b)(8).

[34] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79662; File No. SR–NASDAQ–2016–169]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1 Thereto, To Permit The Nasdaq Options Market LLC To Accept Inbound Options Orders Routed by Nasdaq Execution Services LLC

December 22, 2016.

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 December 9, 2016, The NASDAQ Stock Market LLC (''Nasdaq'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change. On December 20, 2016, the Exchange filed Amendment No. 1 to the proposed rule change, which amended and replaced the original filing in its entirety. The proposed rule change, as modified by Amendment No. 1, is 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, as modified by Amendment No. 1 thereto, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to permit The Nasdaq Options Market LLC (''NOM'') to accept inbound options orders routed by Nasdaq Execution Services LLC (''NES'') from the International Securities Exchange, LLC (''ISE'') ISE Gemini, LLC (''ISE Gemini'') and ISE Mercury, LLC (''ISE Mercury'') (collectively ''ISE Exchanges'').

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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

In conjunction with the ISE Exchanges seeking approval to provide outbound routing services to all options markets using an affiliated routing broker, NES,[3] NOM proposes that NES be permitted to route orders from the ISE Exchanges to NOM, subject to certain limitations and conditions, as described below.

NES is a broker-dealer and member of Nasdaq Phlx LLC (''Phlx''), Nasdaq BX, Inc. and NOM (collectively ''Nasdaq Exchanges''). NES provides all routing functions for the Nasdaq Exchanges. The Nasdaq Exchanges and NES are permitted affiliates.[4] Accordingly, the affiliate relationship between NOM and NES, its member, raises the issue of an exchange's affiliation with a member of such exchange. Specifically, in connection with prior filings, the Commission has expressed concern that the affiliation of an exchange with one of its members raises the potential for unfair competitive advantage and potential conflicts of interest between an exchange's self-regulatory obligations and its commercial interests.[5]

Specifically, in connection with prior filings, the Commission has expressed concern that the affiliation of an exchange with one of its members raises the potential for unfair competitive advantage and potential conflicts of interest between an exchange's self-regulatory obligations and its commercial interests.[6] The Nasdaq Exchanges received approval from the Commission to permit NES to become a member of these three markets subject to certain limitations and conditions in order to perform certain routing and other functions, respectively.[7] Also recognizing that the Commission has expressed concern regarding the potential for conflicts of interest in instances where a member firm is affiliated with an exchange to which it is routing orders, the Nasdaq Exchanges previously proposed, and the Commission approved,[8] NES's affiliation with the Nasdaq Exchanges to permit the Exchange to accept inbound orders that NES routes in its capacity as a facility from other Nasdaq Exchanges, subject to the certain limitations and conditions. Nasdaq now proposes to permit NOM to accept inbound options orders that NES routes in its capacity as a facility of the ISE Exchanges, subject to the following limitations and conditions: [9]

- First, the Exchange and FINRA maintain a Regulatory Services Agreement (''RSA''), as well as an agreement pursuant to Rule 17d–2 under the Act (''17d–2 Agreement'').[10] Pursuant to the RSA and the 17d–2 Agreement, FINRA is allocated regulatory responsibilities to review NES's compliance with certain

[3] *See* SR–ISE–2016–27, SR–ISEGemini–2016–16 and SR–ISE–Mercury–2016–22 (not yet published).

[4] *See* Phlx Rule 985, Nasdaq Rule 2160 and BX Rule 2140.

[5] *See* Securities Exchange Act Release Nos. 59153 (December 23, 2008), 73 FR 80485 (December 31, 2008) (SR–NASDAQ–2008–098); and 62736 (August 17, 2010), 75 FR 51861 (August 23, 2010) (SR–NASDAQ–2010–100). *See also* Securities Exchange Act Release No. 58135 (July 10, 2008), 73 FR 40898 (July 16, 2008) (SR–NASDAQ–2008–061) (Permitting NOS to be affiliated with Phlx).

[6] Securities Exchange Act Release Nos. 71416 (January 28, 2014), 79 FR 6244 (February 3, 2014) (SR–Phlx–2014–05); 71419 (January 28, 2014), 79 FR 6247 (February 3, 2014) (SR–NASDAQ–2014–007); and 714121 (January 28, 2014), 79 FR 6264 (February 3, 2014) (SR–BX–2014–003).

[7] *See* Securities Exchange Act Release Nos. 59721 (April 7, 2009), 74 FR 17245 (April 14, 2009) (SR–Phlx–2009–32); 59779 (April 16, 2009) 74 FR 18600 (April 23, 2009) (SR–Phlx–2009–32, Amendment No. 1) notice of filing of proposed rule change relating to enhanced electronic trading platform for options); 61667 (March 5, 2010), 75 FR 11964 (March 12, 2016) (SR–Phlx–2010–36) (notice of filing and immediate effectiveness of proposed rule changes to establish procedures to prevent information advantages resulting from the affiliation between Phlx and NES); and 71416 (January 28, 2014), 79 FR 6244 (February 3, 2014) (SR–Phlx–2014–05) (notice of filing and immediate effectiveness of proposed rule change to inbound routing of options orders). Nasdaq Options Services was the affiliated broker-dealer prior to a rule change to utilize NES, another affiliated broker-dealer of Nasdaq. *See also* Securities Exchange Act Release Nos. 63769 (January 25, 2011), 76 FR 5423 (January 31, 2011) (SR–BX–2011–003); 63859 (February 7, 2011), 76 FR 8391 (February 14, 2011) (SR–BX–2011–007) (notice of filing of proposed rule change relating to permanent approval of the BX and NES inbound routing relationship); 71420 (January 28, 2014), 79 FR 6256 (February 3, 2014) (SR–BX–2014–004) (notice of filing and immediate effectiveness of proposed rule change to inbound routing). *See also* Securities Exchange Act Release Nos. 65554 (October 13, 2011), 76 FR 65311 (October 20, 2011) (SR–NASDAQ–2011–142); 71418 (January 28, 2014), 79 FR 6262 (February 3, 2014) (SR–NASDAQ–2014–008) (notice of filing and immediate effectiveness of proposed rule change to inbound routing).

[8] *Id.*

[9] The Exchange notes that similar filings are proposed for the Phlx and BX markets. *See* SR–Phlx–2016–120 and SR–BX–2016–068 (not published).

[10] 17 CFR 240.17d–2. FINRA reviews NES' compliance for certain common rules. The RSA with FINRA specifies the types of business activities that NES may undertake and it also indicates the obligations to which NES is subject under the RSA. Among other things, NES must maintain a certain amount of net capital pursuant to SEC Rule 15c3–1(a)(1)(ii) and operate pursuant to SEC Rule 15c3–3(k)(2)(ii). NES is permitted to route orders in options to the appropriate market center for execution in accordance with member order and requirements.

Exchange rules.[11] Pursuant to the RSA, however, NOM retains ultimate responsibility for enforcing its rules with respect to NES.

• Second, FINRA monitors NES for compliance with the Exchange's trading rules, and collects and maintains certain related information.[12]

• Third, FINRA provides a report to the Exchange's chief regulatory officer (''CRO''), on a quarterly basis, that: (i) Quantifies all alerts (of which the Exchange or FINRA is aware) that identify NES as a participant that has potentially violated Commission or Exchange rules, and (ii) lists all investigations that identify NES as a participant that has potentially violated Commission or Exchange rules.

• Fourth, NOM has in place NOM Rule 2160(c), which requires Nasdaq, Inc., as the holding company owning both the Exchange and NES, to establish and maintain procedures and internal controls reasonably designed to ensure that NES does not develop or implement changes to its system, based on non-public information obtained regarding planned changes to the Exchange's systems as a result of its affiliation with the Exchange, until such information is available generally to similarly situated Exchange members, in connection with the provision of inbound order routing to the Exchange.[13]

The Exchange has met all the above-listed conditions in connection with NES routing in its capacity as a facility of BX and Phlx. By meeting the above conditions, the Exchange has set up mechanisms that protect the independence of the Exchange's regulatory responsibility with respect to NES, as well as demonstrate that NES cannot use any information advantage it may have because of its affiliation with the Exchange. Because the Exchange has met all the above-listed conditions, it now seeks to permit an inbound routing relationship with the ISE Exchanges pursuant to the same conditions. The Exchange will continue to comply with the four conditions stated above.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[14] in general, and with Sections 6(b)(5) of the Act,[15] in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, because the proposed rule change will allow the Exchange to continue to receive inbound orders from NES, acting in its capacity as a facility of Phlx and BX, in a manner consistent with prior approvals and established protections and will further be permitted to receive inbound orders from the ISE Exchanges, for which NES will also act in its capacity as a facility of those markets. The Exchange believes that the proposed conditions establish mechanisms that protect the independence of the Exchange's regulatory responsibility with respect to NES, as well as ensure that NES cannot use any information it may have because of its affiliation with the Exchange, or affiliation with other Nasdaq Exchanges or ISE Exchanges, to its advantage.

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. Permitting NOM to receive inbound orders from the ISE Exchanges does not create any issues of intra-market competition because it involves inbound routing from affiliated markets. Nor does it result in a burden on competition among exchanges, because there are many competing options exchanges that provide routing services, including through an affiliate.

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 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, as modified by Amendment No. 1, 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–2016–169 on the subject line.

Paper Comments

• Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2016–169. 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

[11] NES is also subject to independent oversight by FINRA, its designated examining authority, for compliance with financial responsibility requirements.

[12] Pursuant to the RSA, both FINRA and NOM collect and maintain all alerts, complaints, investigations and enforcement actions in which NES (in its capacity as a facility of Phlx and BX routing orders to NOM) is identified as a participant that has potentially violated applicable Commission or Exchange rules. The Exchange and FINRA retain these records in an easily accessible manner in order to facilitate any potential review conducted by the Commission's Office of Compliance Inspections and Examinations. Pursuant to the RSA, the Exchange and FINRA would be required to perform these activities with respect to NES acting in its capacity as a facility of each of the affiliated entities routing orders to NOM.

[13] *See* Securities Exchange Act Release Nos. 65554 (October 13, 2011), 76 FR 65311 (October 20, 2011) (SR–NASDAQ–2011–142); 71418 (January 28, 2014), 79 FR 6262 (February 3, 2014) (SR–NASDAQ–2014–008) (notice of filing and immediate effectiveness of proposed rule change to inbound routing).

[14] 15 U.S.C. 78f.

[15] 15 U.S.C. 78f(b)(5).

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–NASDAQ–2016–169, and should be submitted on or before January 19, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–31477 Filed 12–28–16; 8:45 am]

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[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79663; File No. SR–ISEMercury–2016–22]

Self-Regulatory Organizations; ISE Mercury, LLC; Notice of Filing of Proposed Rule Change, as Modified by Amendment Nos. 1 and 2, To Permit Nasdaq Execution Services, LLC To Become an Affiliated Member of the Exchange To Perform Certain Routing and Other Functions

December 22, 2016.

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 December 9, 2016, ISE Mercury, LLC (''ISE Mercury'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change. On December 20, 2016, the Exchange filed Amendment No. 1 to the proposed rule change, which amended and replaced the Form 19b–4, and Exhibit 1 thereto, in their entirety. On December 20, 2016, the Exchange filed Amendment No. 2 to the proposed rule change.[3] The proposed rule change, as modified by Amendment Nos. 1 and 2, is 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, as modified by Amendment Nos. 1 and 2, from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Amendment No. 2 amended the description of one of the inbound routing conditions that would apply. Specifically, the Exchange modified the third condition to specify that the report that FINRA will provided to the Exchange's chief regulatory officer on a quarterly basis will quantify all alerts, of which the Exchange or FINRA (rather than solely FINRA) are aware, that identify Nasdaq Execution Services, LLC as a participant that has potentially violated Commission or Exchange rules.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to (1) permit the Exchange to receive inbound orders in options routed through Nasdaq Execution Services, LLC (''NES'') from certain affiliated exchanges, as described in detail below, by establishing procedures designed to prevent potential informational advantages resulting from the affiliation with NES; and (2) grant the Exchange an exemption to permit NES, an affiliate of the Exchange, to become a Member of the Exchange in order to perform certain routing an [sic] other functions on behalf of the Exchange.

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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the filing is to permit ISE Mercury to receive inbound orders in options routed through Nasdaq Execution Services, LLC (''NES'') from certain affiliated exchanges, as described herein and establish procedures designed to prevent potential informational advantages resulting from the affiliation between ISE Mercury and NES. The Exchange requests approval to permit NES, an affiliate of the Exchange, to become a Member of the Exchange in order to perform inbound routing on behalf of the Exchange. The Exchange is also filing to permit ISE Gemini [sic] to route outbound orders through NES either directly or indirectly through a third party routing broker-dealer[4] to other market centers and perform other functions regarding the cancellation of orders and the maintenance of a NES error account.[5]

Restriction on Affiliation

NES is a broker-dealer owned and operated by Nasdaq, Inc. NES is affiliated with International Securities Exchange, LLC (''ISE''), ISE Gemini, ISE Mercury LLC,[6] NASDAQ PHLX LLC (''Phlx''), The NASDAQ Options Market LLC (''NOM'') and NASDAQ BX, Inc. (''BX''). For purposes of this filing the term ''Affiliated Entities'' shall refer to ISE, ISE Gemini, Phlx, NOM and BX (collectively ''Affiliated Entities''). Currently, NES is a member of Phlx, NOM and BX (collectively ''Nasdaq Exchanges'') and provides all options routing functions for Phlx, NOM and BX.[7]

Today, Phlx Rule 985 (Affiliation and Ownership Restrictions), The NASDAQ Stock Market LLC (''Nasdaq'') Rule 2160 (Restrictions on Affiliation)[8] and BX Rule 2140 (Restrictions on Affiliation) currently prohibit the Nasdaq Exchanges or any entity with which it is affiliated from, directly or indirectly, acquiring or maintaining an ownership interest in, or engaging in a business venture with, a Nasdaq Exchange member or an affiliate of a Nasdaq Exchange member in the absence of an effective filing under 19(b) of the Act. Specifically, in connection with prior filings, the Commission has expressed concern that the affiliation of an exchange with one of its members raises the potential for unfair competitive advantage and potential conflicts of interest between an exchange's self-regulatory obligations and its commercial interests.[9] NES performs

[4] The ability to route orders to other exchanges using either the Exchange's affiliated broker-dealer (NES) or a third party unaffiliated broker-dealer, which the Exchange may choose to use, is for efficiency and potential cost savings.

[5] The ability to route orders to other exchanges using either the Exchange's affiliated broker-dealer (NES) or a third party unaffiliated broker-dealer, which the Exchange may choose to use, is for efficiency and potential cost savings. *See* ISE–2016–27 (not published) which amends ISE Chapter 19, Rules 1901, 1903, 1904 and 1905. The ISE rule changes impact ISE Mercury because Chapter 19 is incorporated by reference into the ISE Mercury Rulebook.

[6] ISE, ISE Gemini and ISE Mercury are collectively referred to as ''ISE Exchanges.''

[7] *See* Phlx Rule 1080(m) and Nasdaq and BX Rules at Chapter VI, Section 11.

[8] NOM is a facility of Nasdaq.

[9] Securities Exchange Act Release Nos. 71416 (January 28, 2014), 79 FR 6244 (February 3, 2014) (SR–Phlx–2014–05); 71419 (January 28, 2014), 79

Continued

similar functions for the Nasdaq Exchanges and is a member of those three markets respectively.[10]

Similarly, NES would be prohibited from becoming an ISE Mercury member pursuant to ISE Mercury Rule 309, titled ''Limitation on Affiliation between the Exchange and Members,'' without Commission approval. Specifically, a Member may not become an affiliate of the Exchange, or any facility of the Exchange, or any entity with which the Exchange or any facility of the Exchange is affiliated such as the Affiliated Entities. This rule change requests permission from the Commission to allow NES, an affiliate of ISE Mercury to become a Member of ISE Mercury for the purpose of performing certain functions, including, but not limited to receiving inbound orders from one of the Affiliated Entities.

In order for NES to be a Member of ISE Mercury, the Exchange proposes to permit the acceptance of inbound orders that NES routes in its capacity as a facility of the Affiliated Exchanges [11] subject to certain limitations and conditions as follows:

- First, ISE Mercury shall maintain a Regulatory Services Agreement (''RSA'') with FINRA, as well as an agreement pursuant to Rule 17d–2 under the Act (''17d–2 Agreement'').[12] Pursuant to the RSA and the 17d–2 Agreement, FINRA will be allocated regulatory responsibilities to review NES's compliance with certain Exchange rules.[13] Pursuant to the RSA, however, ISE Mercury retains ultimate responsibility for enforcing its rules with respect to NES.
- Second, FINRA will monitor NES for compliance with the Exchange's trading rules, and will collect and maintain certain related information.[14]
- Third, FINRA will provide a report to the Exchange's chief regulatory officer (''CRO''), on a quarterly basis, that: (i) Quantifies all alerts (of which the Exchange or FINRA is aware) that identify NES as a participant that has potentially violated Commission or Exchange rules, and (ii) lists all investigations that identify NES as a participant that has potentially violated Commission or Exchange rules.
- Fourth, ISE Mercury has in place Rule 309. The Exchange proposes to adopt a new paragraph (b) to Rule 309 to state that Nasdaq, Inc., as the holding company owning ISE Mercury and NES, to [sic] establish and maintain procedures and internal controls reasonably designed to ensure that NES does not develop or implement changes to its system, based on non-public information obtained regarding planned changes to ISE Mercury's system, obtained as a result of its affiliation with the Exchange, until such information is available generally to similarly situated Exchange Members, in connection with the provision of inbound order routing to the Exchange.[15]

The Exchange also proposes to add the letter ''(a)'' in front of the existing paragraph in Rule 309.

Inbound Routing

ISE Mercury Rule 309 is being amended to add rule language similar to Phlx Rule 985(c)(2). This new rule text provides that Nasdaq, Inc. which owns NES and ISE Mercury, shall establish and maintain procedures and internal controls reasonably designed to ensure that NES does not develop or implement changes to its system on the basis of non-public information regarding planned changes to the Exchange's systems, obtained as a result of its affiliation with the Exchange, until such information is available generally to Exchange members in connection with the provision of inbound routing to the Exchange.

By meeting the conditions described above under Restrictions on Affiliation, ISE Mercury will have set up mechanisms that protect the independence of ISE Mercury's regulatory responsibilities, with respect to NES, as well as demonstrate that NES cannot use any information advantage it may have because of its affiliation with ISE Mercury.

The Exchange has approval from Financial Regulatory Authority (''FINRA'') [16] and The Options Clearing Corporation (''OCC'') [17] for NES to perform these functions.

The Exchange notes that the Nasdaq Exchanges are separately filing rule changes to permit NES to route orders inbound from ISE Mercury to the Nasdaq Exchanges.[18]

Outbound Routing

ISE has rules in place in Chapter 19 related to routing orders, which rules impact routing on ISE Mercury because those rules are incorporated by

FR 6247 (February 3, 2014) (SR–NASDAQ–2014–007); and 714121 (January 28, 2014), 79 FR 6264 (February 3, 2014) (SR–BX–2014–003).

[10] *See* Securities Exchange Act Release Nos. 59721 (April 7, 2009), 74 FR 17245 (April 14, 2009) (SR–Phlx–2009–32); 59779 (April 16, 2009) 74 FR 18600 (April 23, 2009) (SR–Phlx–2009–32, Amendment No. 1) notice of filing of proposed rule change relating to enhanced electronic trading platform for options); 61667 (March 5, 2010), 75 FR 11964 (March 12, 2016)(SR–Phlx–2010–36)(notice of filing and immediate effectiveness of proposed rule changes to establish procedures to prevent information advantages resulting from the affiliation between Phlx and NES); and 71416 (January 28, 2014), 79 FR 6244 (February 3, 2014) (SR–Phlx–2014–05)(notice of filing and immediate effectiveness of proposed rule change to inbound routing of options orders). Nasdaq Options Services was the affiliated broker-dealer prior to a rule change to utilize NES, another affiliated broker-dealer of Nasdaq. *See also* Securities Exchange Act Release Nos. 63769 (January 25, 2011), 76 FR 5423 (January 31, 2011) (SR–BX–2011–003); 63859 (February 7, 2011), 76 FR 8391 (February 14, 2011) (SR–BX–2011–007) (notice of filing of proposed rule change relating to permanent approval of the BX and NES inbound routing relationship); 71420 (January 28, 2014), 79 FR 6256 (February 3, 2014)(SR–BX–2014–004)(notice of filing and immediate effectiveness of proposed rule change to inbound routing). *See also* Securities Exchange Act Release Nos. 65554 (October 13, 2011), 76 FR 65311 (October 20, 2011)(SR–NASDAQ–2011–142); 71418 (January 28, 2014), 79 FR 6262 (February 3, 2014)(SR–NASDAQ–2014–008)(notice of filing and immediate effectiveness of proposed rule change to inbound routing).

[11] The Exchange notes that ISE and ISE Gemini are separately filing rule changes to permit NES to be a Member of ISE and ISE Mercury [sic] for the purpose of performing certain routing and other functions, including, but not limited to receiving inbound orders from other entities that are affiliated with NES such as the Affiliated Entities. *See* SR–ISE–2016–27 and SR–ISEMercury–2016–22 [sic] (both not published).

[12] 17 CFR 240.17d–2. FINRA will review NES' compliance for certain common rules. The RSA with FINRA specifies the types of business activities that NES may undertake and it also indicates the obligations to which NES is subject under the RSA. Among other things, NES must maintain a certain amount of net capital pursuant to SEC Rule 15c3–1(a)(1)(ii) and operate pursuant to SEC Rule 15c3–3(k)(2)(ii). NES is permitted to route orders in options to the appropriate market center for execution in accordance with member order and requirements.

[13] NES is also subject to independent oversight by FINRA, its designated examining authority, for compliance with financial responsibility requirements.

[14] Pursuant to the RSA, both FINRA and ISE Mercury shall collect and maintain all alerts, complaints, investigations and enforcement actions in which NES (in its capacity as a facility of the Affiliated Entities) is identified as a participant that has potentially violated applicable Commission or Exchange rules. The Exchange and FINRA shall retain these records in an easily accessible manner in order to facilitate any potential review conducted by the Commission's Office of Compliance Inspections and Examinations.

[15] Similarly, Phlx Rule 985 also prohibits a Phlx member from being or becoming an affiliate of Phlx, or an affiliate of an entity affiliated with Phlx, in the absence of an effective filing under Section 19(b). *See* Phlx Rule 985(b)(1)(B). Phlx filed a rule proposal and received approval based on meeting the four conditions specified above to protect the independence of the Exchange's regulatory responsibility with respect to NES, and has demonstrated that NES cannot use any information advantage it may have because of its affiliation with the Exchange.

[16] The Membership Agreement as between NES and FINRA, dated January 15, 2014, provides that NES may ''[e]ngage in the following types of business: Route orders in equities and options to the appropriate market center for execution in accordance with member order and requirements.''

[17] On December 5, 2013 OCC provided NES membership approval.

[18] *See* SR–NASDAQ–2016–169, SR–Phlx–2016–120 and SR–BX–2016–068 (not published).

reference. Today, ISE Mercury utilizes Linkage Handlers [19] to route orders. These Linkage Handlers are unaffiliated with ISE Mercury. The Exchange proposes to have NES route, either directly to other options exchanges or indirectly through third-party routing brokers on behalf of ISE Mercury.[20] With the proposal, regardless of whether a third-party routing broker is utilized, all options routing will go through NES, however the Exchange could determine to direct NES to route orders to certain exchanges through a routing broker rather than routing an order directly. In those cases, orders are submitted to the third-party routing broker through NES, and the third-party routing broker routes the orders to the routing destination in its name.[21] Specifically, within that proposal ISE proposes to amend Rule 1903 to adopt new language similar to Phlx Rule 1080(m).[22]

ISE also proposed to amend Rule 1904 to replace the rule text with rule text similar to Phlx Rule 1080(m)(v) to provide general authority for ISE or NES to cancel orders in order to maintain fair and orderly markets when technical system issues are occurring, and set forth the manner in which error positions may be handled by the ISE or NES.[23]

Rule 1901 is being amended to remove references to Linkage Handlers along with other references in Rules 1903.[24] Finally Rule 1905 concerning error accounts is being deleted within that proposal.[25]

The Exchange is proposing that NES be permitted to perform the same functions pursuant to the same conditions with respect to the outbound routing of orders, cancellation or orders, and the handling of error positions as set forth in the ISE proposal.

The Exchange also proposes to amend Rule 705 to remove the rule text in Rule 705(d)(4) which provided an exception to the limits on compensation for Linkage Handlers. NES is replacing the Linkage Handlers for purposes of routing options orders from the ISE Exchanges. Today, Phlx does not have a similar provision and ISE is removing it from this rule.

Implementation

The Exchange notes that with respect to the Rules in Chapter 19, Rules 1901, 1903, 1904 and 1905, these rules impact not only the ISE market but also ISE Mercury because Chapter 19 is incorporated by reference into the ISE Mercury Rulebook. ISE Mercury will be implemented in Q3 2017 on a symbol by symbol basis. The Exchange will add notations in the ISE Mercury Rulebook to cross reference the amended rule text and make clear the implementation date.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[26] in general, and furthers the objectives of Section 6(b)(5) of the Act,[27] 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, because the proposed rule change will allow the Exchange to receive inbound orders from each Affiliated Entity through NES, acting in its capacity as a facility of the respective Affiliated Entity, in a manner consistent with prior approvals and established protections. The Exchange believes that these conditions establish mechanisms that protect the independence of the Exchange's regulatory responsibility with respect to NES, as well as ensure that NES cannot use any information it may have because of its affiliation with the Exchange to its advantage.

Further, the Exchange notes that its proposal 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 because ISE Mercury will have set up mechanisms that protect the independence of ISE Mercury's regulatory responsibilities, with respect to NES, as well as demonstrate that NES cannot use any information advantage it may have because of its affiliation with ISE Mercury. The Exchange will not be granting any preferential access to information from the Exchange's Order Book to NES. As an affiliated routing broker, NES would not be treated differently than any other unaffiliated routing broker.

The proposal should remove impediments to and perfect the mechanism of a free and open market and a national market system by providing customer order protection and by facilitating trading at away exchanges so customer orders trade at the best market price. The proposal should also protect investors and the public interest by fostering compliance with the Options Order Protection and Locked/Crossed Market Plan. In addition, the Exchange believes that the proposal is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, because of the specific protections pertaining to the routing broker, in light of the potential conflict of interest where the member routing broker could have access to information regarding other members' orders or the routing of those orders. These protections include the Exchange's control over all routing logic as well as the confidentiality of routing information.[28]

The Exchange believes that its proposal related to the cancellation of orders and error account is consistent with the Act because NES's or the Exchange's ability to cancel orders during a technical or systems issue and to maintain an error account facilitates the smooth and efficient operations of the market.[29] Specifically, the Exchange believes that allowing NES or the Exchange to cancel orders during a technical or systems issue would allow the Exchange to maintain fair and orderly markets.[30] Moreover, the Exchange believes that allowing NES to assume error positions in an error account and to liquidate those positions, subject to the conditions set forth in the proposed amendments to Rule 1904 would be the least disruptive means to correct these errors, except in cases where NES can assign all such error positions to all affected members of the Exchange.[31] Overall, the proposed amendments are designed to ensure full trade certainty for market participants and to avoid disrupting the clearance and settlement process.[32] The proposed amendments are also designed to provide a consistent methodology for handling error positions in a manner that does not discriminate among members.[33] The proposed amendments are also consistent with Section 6 of the

[19] A Linkage Handler is a broker that is unaffiliated with the Exchange with which the Exchange has contracted to provide Routing Services, as that term is defined in Rule 1903, by routing ISO(s) to other exchange(s) as agent on behalf of Public Customer and Non-Customer Orders according to the requirements of Rule 1901 (prohibition on trade-throughs) and Rule 1902 (prohibition on locked and crossed markets). *See* Supplementary Material .03 to ISE Rule 1901.

[20] *See* SR–ISE–2016–27 (not published). This proposed rule change proposes to replace Linkage Handlers with NES for the purpose of outbound routing and to establish rules for the cancellation or [sic] orders and maintenance of an error account.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] 15 U.S.C. 78f(b).

[27] 15 U.S.C. 78f(b)(5).

[28] *See* proposed Rule 1903(e).

[29] *See* SR–ISE–2016–27 (not published).

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

Act insofar as they would require NES to establish controls to restrict the flow of any confidential information between the third-party broker and NES/the Exchange associated with the liquidation of error positions.[34]

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. Receiving orders through NES does not raise any issues of intra-market competition because it involves inbound routing from an affiliated exchange. This proposal provides that Nasdaq, which owns NES and the Exchange, shall establish and maintain procedures and internal controls reasonably designed to ensure that NES does not develop or implement changes to its system on the basis of non-public information regarding planned changes to the Exchange's systems, obtained as a result of its affiliation with the Exchange, until such information is available generally to similarly situated Exchange members and member organizations in connection with the provision of inbound routing to the Exchange. Utilizing NES as the routing broker does not create any undue burden on inter-market competition because NES cannot use any information advantage it may have because of its affiliation with ISE Mercury. The Exchange will not be granting any preferential access to information from the Exchange's Order Book to NES. As an affiliated routing broker, NES would not be treated differently than any other unaffiliated routing broker.

The proposal does not result in a burden on competition among exchanges, because there are many competing options exchanges that provide routing services, including through an affiliate. Further, the proposal does not raise issues of intra-market competition, because the Exchange's decision to route through a particular routing broker would impact all participants equally.

With respect to the proposal to establish error accounts, the Exchange's proposal does not result in a burden on competition among exchanges because NES' or the Exchange's ability to cancel orders during a technical or systems issue and to maintain an error account facilitates the smooth and efficient operations of the market for all impacted members. The proposals regarding assumption of error positions and [sic] to liquidation of those positions ensures certainty for all impacted market participants. The proposal does not discriminate among Members.[35]

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 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, as modified by Amendment Nos. 1 and 2, 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–ISEMercury–2016–22 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISEMercury-2016–22. 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–ISEMercury-2016–22, and should be submitted on or before January 19, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[36]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–31478 Filed 12–28–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79665; File No. SR–ISE–2016–27]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1 Thereto, To Amend the Exchange's Rules Regarding Routing of Orders, Cancellation of Orders, and Handling of Error Positions, and Permit Nasdaq Execution Services, LLC To Become an Affiliated Member of the Exchange To Perform Certain Routing and Other Functions

December 22, 2016.

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 December 9, 2016, the International Securities Exchange, LLC (''ISE'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change. On December 20, 2016, the Exchange filed Amendment No. 1 to the proposed rule

[34] *Id.*

[35] *See* SR–ISE–2016–27 (not published).

[36] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

change, which amended and replaced the original filing in its entirety. The proposed rule change, as modified by Amendment No. 1, is 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, as modified by Amendment No. 1, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to (1) permit the Exchange to receive inbound orders in options routed through Nasdaq Execution Services, LLC (''NES'') from certain affiliated exchanges, as described in detail below, by establishing procedures designed to prevent potential informational advantages resulting from the affiliation with NES; (2) route outbound orders through NES either directly or through a third party routing broker-dealer; (3) grant the Exchange an exemption to permit NES, an affiliate of the Exchange, to become a Member of the Exchange in order to perform certain routing an [sic] other functions on behalf of the Exchange; and (4) adopt a rule regarding the cancellation of orders and the maintenance of a NES error account.

The text of the proposed rule change is available on the Exchange's Web site at *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 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 the filing is to permit ISE to receive inbound orders in options routed through Nasdaq Execution Services, LLC (''NES'') from certain affiliated exchanges, as described herein and establish procedures designed to prevent potential informational advantages resulting from the affiliation between ISE and NES. The Exchange requests approval to permit NES, an affiliate of the Exchange, to become a Member of the Exchange in order to perform certain routing and other functions on behalf of the Exchange. First, the Exchange requests that NES be permitted to route orders inbound to the Exchange in its capacity as a facility of the Affiliated Entities as defined below. Also, this proposal is to permit ISE to route outbound orders through NES either directly or indirectly through a third party routing broker-dealer [3] to other market centers. Additionally, the Exchange proposes to add a rule regarding the cancellation of orders and the maintenance of a NES error account.[4]

Restriction on Affiliation

NES is a broker-dealer owned and operated by Nasdaq, Inc. NES is affiliated with ISE, ISE Gemini LLC (''ISE Gemini''), ISE Mercury LLC (''ISE Mercury''),[5] Nasdaq PHLX LLC (''Phlx''), The Nasdaq Options Market LLC (''NOM'') and Nasdaq BX, Inc. (''BX''). For purposes of this filing the term ''Affiliated Entities'' shall refer to ISE Gemini, ISE Mercury, Phlx, NOM and BX. Currently, NES is a member of Phlx, NOM and BX (collectively ''Nasdaq Exchanges'') and provides all options routing functions for Phlx, NOM and BX.[6]

Today, Phlx Rule 985 (Affiliation and Ownership Restrictions), The NASDAQ Stock Market LLC (''Nasdaq'') Rule 2160 (Restrictions on Affiliation) [7] and BX Rule 2140 (Restrictions on Affiliation) currently prohibit the Nasdaq Exchanges [sic] or any entity with which it is affiliated from, directly or indirectly, acquiring or maintaining an ownership interest in, or engaging in a business venture with, a Nasdaq Exchange member or an affiliate of a Nasdaq Exchange member in the absence of an effective filing under 19(b) of the Act. Specifically, in connection with prior filings, the Commission has expressed concern that the affiliation of an exchange with one of its members raises the potential for unfair competitive advantage and potential conflicts of interest between an exchange's self-regulatory obligations and its commercial interests.[8] NES performs similar functions for the Nasdaq Exchanges and is a member of those three markets respectively.[9]

Similarly, NES would be prohibited from becoming an ISE member pursuant to ISE Rule 312, titled ''Limitation on Affiliation between the Exchange and Members,'' without Commission approval. Specifically, a Member or non-member owner may not become an affiliate of the Exchange, or any facility of the Exchange, or any entity with which the Exchange or any facility of the Exchange is affiliated such as the Affiliated Entities. This rule change requests permission from the Commission to allow NES, an affiliate of ISE, to become a Member of ISE for the purpose of performing certain functions, including receiving inbound orders from one of the Affiliated Entities. The Exchange proposes adopting language at proposed ISE Rule 312(c), adding references to paragraphs ''a'' and ''b'' within Rule 312. Proposed paragraph 312(c) is similar to Phlx Rule 985(c)(2).

In order for NES to be a Member of ISE, the Exchange proposes to permit the acceptance of inbound orders that NES routes in its capacity as a facility

[3] The ability to route orders to other exchanges using either the Exchange's affiliated broker-dealer (NES) or a third party unaffiliated broker-dealer, which the Exchange may choose to use, is for efficiency and potential cost savings.

[4] The Exchange notes that the amendments to the Chapter 19 rules noted herein will also impact ISE Gemini an ISE Mercury rules which are cross-referenced to Chapter 19 in the ISE Rulebook.

[5] ISE, ISE Gemini and ISE Mercury are collectively referred to as ''ISE Exchanges.''

[6] *See* Phlx Rule 1080(m) and Nasdaq and BX Rules at Chapter VI, Section 11.

[7] NOM is a facility of Nasdaq.

[8] Securities Exchange Act Release Nos. 71416 (January 28, 2014), 79 FR 6244 (February 3, 2014) (SR–Phlx–2014–05); 71419 (January 28, 2014), 79 FR 6247 (February 3, 2014) (SR–NASDAQ–2014–007); and 714121 (January 28, 2014), 79 FR 6264 (February 3, 2014) (SR–BX–2014–003).

[9] *See* Securities Exchange Act Release Nos. 59721 (April 7, 2009), 74 FR 17245 (April 14, 2009) (SR–Phlx–2009–32); 59779 (April 16, 2009) 74 FR 18600 (April 23, 2009) (SR–Phlx–2009–32, Amendment No. 1) notice of filing of proposed rule change relating to enhanced electronic trading platform for options); 61667 (March 5, 2010), 75 FR 11964 (March 12, 2016)(SR–Phlx–2010–36)(notice of filing and immediate effectiveness of proposed rule changes to establish procedures to prevent information advantages resulting from the affiliation between Phlx and NES); and 71416 (January 28, 2014), 79 FR 6244 (February 3, 2014) (SR–Phlx–2014–05)(notice of filing and immediate effectiveness of proposed rule change to inbound routing of options orders). Nasdaq Options Services was the affiliated broker-dealer prior to a rule change to utilize NES, another affiliated broker-dealer of Nasdaq. *See also* Securities Exchange Act Release Nos. 63769 (January 25, 2011), 76 FR 5423 (January 31, 2011) (SR–BX–2011–003); 63859 (February 7, 2011), 76 FR 8391 (February 14, 2011) (SR–BX–2011–007) (notice of filing of proposed rule change relating to permanent approval of the BX and NES inbound routing relationship); 71420 (January 28, 2014), 79 FR 6256 (February 3, 2014)(SR–BX–2014–004)(notice of filing and immediate effectiveness of proposed rule change to inbound routing). *See also* Securities Exchange Act Release Nos. 65554 (October 13, 2011), 76 FR 65311 (October 20, 2011)(SR–NASDAQ–2011–142); 71418 (January 28, 2014), 79 FR 6262 (February 3, 2014)(SR–NASDAQ–2014–008)(notice of filing and immediate effectiveness of proposed rule change to inbound routing).

of the Affiliated Exchanges [10] subject to certain limitations and conditions as follows:

- First, ISE shall maintain a Regulatory Services Agreement (''RSA'') with FINRA, as well as an agreement pursuant to Rule 17d–2 under the Act (''17d–2 Agreement'').[11] Pursuant to the RSA and the 17d–2 Agreement, FINRA will be allocated regulatory responsibilities to review NES's compliance with certain Exchange rules.[12] Pursuant to the RSA, however, ISE retains ultimate responsibility for enforcing its rules with respect to NES.
- Second, FINRA will monitor NES for compliance with the Exchange's trading rules, and will collect and maintain certain related information.[13]
- Third, FINRA will provide a report to the Exchange's chief regulatory officer (''CRO''), on a quarterly basis, that: (i) Quantifies all alerts (of which the Exchange or FINRA is aware) that identify NES as a participant that has potentially violated Commission or Exchange rules, and (ii) lists all investigations that identify NES as a participant that has potentially violated Commission or Exchange rules.
- Fourth, ISE has in place Rule 312, which the Exchange proposes to amend into paragraphs (a) and (b) and adopt a new paragraph (c) which states that Nasdaq, Inc., as the holding company owning ISE and NES, shall establish and maintain procedures and internal controls reasonably designed to ensure that NES does not develop or implement changes to its system, based on non-public information obtained regarding planned changes to ISE's system, obtained as a result of its affiliation with the Exchange, until such information is available generally to similarly situated Exchange Members, in connection with the provision of inbound order routing to the Exchange.[14]

Inbound Routing

This new rule text provides that Nasdaq, Inc. which owns NES and ISE, shall establish and maintain procedures and internal controls reasonably designed to ensure that NES does not develop or implement changes to its system on the basis of non-public information regarding planned changes to the Exchange's systems, obtained as a result of its affiliation with the Exchange, until such information is available generally to similarly situated Exchange members in connection with the provision of inbound routing to the Exchange.

By meeting the conditions above under Restriction on Affiliation, ISE will have set up mechanisms that protect the independence of ISE's regulatory responsibilities, with respect to NES, as well as demonstrate that NES cannot use any information advantage it may have because of its affiliation with ISE.

The Exchange has approval from Financial Regulatory Authority (''FINRA'') [15] and The Options Clearing Corporation (''OCC'') [16] for NES to perform these inbound routing functions.

The Exchange notes that each of the Nasdaq Exchanges are also separately filing rule changes to permit NES to route orders inbound from ISE to the Nasdaq Exchanges.[17]

Outbound Routing

Today, ISE utilizes Linkage Handlers [18] to route orders. These Linkage Handlers are unaffiliated with ISE. The Exchange proposes to have NES route, either directly to other options exchanges or indirectly through third-party routing brokers on behalf of ISE. Regardless of whether a third-party routing broker is utilized, all options routing will go through NES, however the Exchange could determine to direct NES to route orders to certain exchanges through a routing broker rather than routing an order directly. In those cases, orders are submitted to the third-party routing broker through NES, and the third-party routing broker would route the orders to the routing destination in its name. These rules are similar to Phlx Rule 1080(m). As part of this proposal, the Exchange will remove references to Linkage Handlers in Rule 705, the Supplementary Material to Rule 1901 and Rule 1903, including the Supplementary Material to Rule 1903. Rule 1904, which includes references to Linkage Handlers is being replaced in its entirety and Rule 1905, which contains references to Linkage Handlers is being reserved.

The Exchange proposes to amend the current Rule 1903 to adopt new language similar to Phlx Rule 1080(m). The Exchange proposes to maintain the first part of this rule which specifies that the Exchange may automatically route ISOs to other exchanges under certain circumstances, including pursuant to Supplementary Material .02 to Rule 1901 which describes trade throughs. This provision, although not specified directly within Phlx Rule 1080(m) is also true today for Phlx orders. The Exchange believes this language adds more context to the Rule.

Proposed Rule 1903(a), which is similar to Phlx Rule 1080(m)(iii)(A) would provide that the Exchange shall route orders in options via NES, a broker-dealer that is a member of an unaffiliated SRO which is the designated examining authority for the broker-dealer. NES would serve as the Routing Facility of the Exchange (the ''Routing Facility''). The sole use of the Routing Facility by the system would route orders in options listed and open for trading on the system to away markets either directly or through one or more third-party unaffiliated routing broker-dealers pursuant to Exchange rules on behalf of the Exchange. The Routing Facility would be subject to regulation as a facility of the Exchange, including the requirement to file proposed rule changes under Section 19 of the Securities Exchange Act of 1934,

[10] The Exchange notes that ISE, [sic] ISE Gemini and ISE Mercury are each separately filing rule changes to permit NES to be a Member of ISE Gemini and ISE Mercury for the purpose of performing certain routing and other functions, including, but not limited to receiving inbound orders from other entities that are affiliated with NES such as the Affiliated Entities. *See* SR–ISEGemini–2016–16 and SR–ISEMercury–2016–22 (both not published).

[11] 17 CFR 240.17d–2. FINRA will review NES' compliance for certain common rules. The RSA with FINRA specifies the types of business activities that NES may undertake and it also indicates the obligations to which NES is subject under the RSA. Among other things, NES must maintain a certain amount of net capital pursuant to SEC Rule 15c3–1(a)(1)(ii) and operate pursuant to SEC Rule 15c3–3(k)(2)(ii). NES is permitted to route orders in options to the appropriate market center for execution in accordance with member order and requirements.

[12] NES is also subject to independent oversight by FINRA, its designated examining authority, for compliance with financial responsibility requirements.

[13] Pursuant to the RSA, both FINRA and ISE shall collect and maintain all alerts, complaints, investigations and enforcement actions in which NES (in its capacity as a facility of the Affiliated Entities) is identified as a participant that has potentially violated applicable Commission or Exchange rules. The Exchange and FINRA shall retain these records in an easily accessible manner in order to facilitate any potential review conducted by the Commission's Office of Compliance Inspections and Examinations.

[14] Similarly, Phlx Rule 985 also prohibits a Phlx member from being or becoming an affiliate of Phlx, or an affiliate of an entity affiliated with Phlx, in the absence of an effective filing under Section 19(b). *See* Phlx Rule 985(b)(1)(B) [sic]. Phlx filed a rule proposal and received approval based on meeting the four conditions specified above to protect the independence of the Exchange's regulatory responsibility with respect to NES, and has demonstrated that NES cannot use any information advantage it may have because of its affiliation with the Exchange.

[15] The Membership Agreement as between NES and FINRA, dated January 15, 2014, provides that NES may ''[e]ngage in the following types of business: Route orders in equities and options to the appropriate market center for execution in accordance with member order and requirements.''

[16] On December 5, 2013, OCC provided NES membership approval.

[17] *See* SR–NASDAQ–2016–169, SR–Phlx–2016–120 and SR–BX–2016–068 (not published).

[18] A Linkage Handler is a broker that is unaffiliated with the Exchange with which the Exchange has contracted to provide Routing Services, as that term is defined in Rule 1903, by routing ISO(s) to other exchange(s) as agent on behalf of Public Customer and Non-Customer Orders according to the requirements of Rule 1901 (prohibition on trade-throughs) and Rule 1902 (prohibition on locked and crossed markets). *See* Supplementary Material .03 to ISE Rule 1901.

as amended. Similar to Phlx, this rule describes the affiliation to NES and indicates the sole use for NES to route orders either directly or indirectly. This is the current practice on Phlx today.

Proposed Rule 1903(b), which is similar to Phlx Rule 1080(m)(iii)(B), describes that routing is optional. Parties that do not desire to use NES must designate orders as Do-Not-Route-Orders as described in Rule 715(m).

Proposed Rule 1903(c), similar to Phlx Rule 1080(m)(iii)(C) states that the Exchange shall establish and maintain procedures and internal controls reasonably designed to adequately restrict the flow of confidential and proprietary information between the Exchange and the Routing Facility, and any other entity, including any affiliate of the Routing Facility; or, where there is a routing broker, the Exchange, the Routing Facility and any routing broker, and any other entity, including any affiliate of the routing broker (and if the routing broker or any of its affiliates engages in any other business activities other than providing routing services to the Exchange, between the segment of the routing broker or affiliate that provides the other business activities and the segment of the routing broker that provides the routing services). Thus this provision would extend to the routing broker, if one is used. This is the current practice on Phlx today.

The Exchange proposes to state at Rule 1903(c)(1), the books, records, premises, officers, directors, agents, and employees of the Routing Facility, as a facility of the Exchange, shall be deemed to be the books, records, premises, officers, directors, agents, and employees of the Exchange for purposes of and subject to oversight pursuant to the Act. The books and records of the Routing Facility, as a facility of the Exchange, shall be subject at all times to inspection and copying by the Exchange and the Commission. This provision is similar to Phlx Rule 1080(m)(iii)(D).

The Exchange proposes to add language at Rule 1903(c)(2), similar to Phlx Rule 1080(m)(iii)(F) that states that the Exchange and NES may not use a routing broker for which the Exchange or any affiliate of the Exchange is the designated examining authority. This provision is intended to prevent any conflicts of interest which may arise wherein a regulatory oversight entity is privy to trades conducted on ISE.

The Exchange proposes to add language in Rule 1903(d), similar to Phlx Rule 1080(m)(iii)(E) to provide language related to Market Access. Specifically, the rule text addresses NES' obligations pursuant to Rule 15c3–5 under the Act to implement certain tests designed to mitigate risks associated with providing the Exchange's Members with access to away trading centers. Pursuant to the policies and procedures developed by NES to comply with Rule 15c3–5, if an order or series of orders are deemed to be violative of applicable pre-trade requirements of Rule 15c3–5, the order will be rejected prior to routing and/or NES will seek to cancel any orders that have been routed.

The Exchange also proposes to expressly state in Rule 1903(e), similar to Phlx Rule 1080(m)(iii)(G), that the Exchange will determine the logic that provides when, how, and where orders are routed away to other exchanges. In addition, the routing broker(s) cannot change the terms of an order or the routing instructions, nor does the routing broker have any discretion about where to route an order. The Exchange may determine to use a different routing broker by destination exchange, depending upon the costs and technological efficiencies involved by indirectly routing to that broker through NES. The proposal is intended to allow the Exchange to structure its routing arrangements accordingly. At a minimum, the Exchange anticipates using a routing broker to access certain markets where the Exchange finds that the costs of maintaining a membership, for NES, and/or the costs of connectivity and execution do not make sense in light of the number or types of orders the Exchange typically routes to that particular market. These costs necessarily determine the ultimate costs to the Exchange of routing to a market, and, in turn, affect how the Exchange chooses to recoup those costs through its own transaction fees.[19] Sometimes, it will not make economic sense for NES to access an exchange directly. Accordingly, the Exchange would route the order through NES to another routing broker where the Exchange determines that it is appropriate. In addition to costs, the Exchange will also consider ease of connectivity and execution as well as general reliability in selecting a routing broker.

The Exchange proposes to replace Rule 1903(f) with a provision similar to Phlx Rule 1080(m)(ii), which provides that entering Members whose orders are routed to away markets shall be obligated to honor such trades that are executed on away markets to the same extent they would be obligated to honor a trade executed on the Exchange. This is the case today for all orders entered on ISE today pursuant to current ISE Rule 1903(f).[20] The Exchange is simply conforming the rule text to Phlx's rule.

Finally, the Exchange is amending the Supplementary Material to Rule 1903 to address citations to a ''Linkage Handler.'' In Supplementary Material .01 to Rule 1903 the Exchange is replacing the term Linkage Handler with references to NES or third-party unaffiliated routing broker dealers used by NES. In Supplementary Material .02 to Rule 1903 the Exchange is replacing the term Linkage Handler with NES in describing the case where routing services cannot be provided by the today (Linkage Handler) and now proposed NES. The Exchange is amending Supplementary Material .03 to Rule 1903 the Exchange is replacing the term ''Linkage Handler'' with ''NES.''

Other Corresponding Changes

The Exchange proposes to amend ISE Rule 705 to remove the rule text in Rule 705(d)(4) which provides an exception to the limits on compensation in Rule 705(d) for Members to the extent that such Members are acting as Linkage Handlers, as defined in Supplementary .03 to Rule 1901. NES is replacing the Linkage Handlers for purposes of routing options orders from the ISE Exchanges. Today, Phlx does not have a similar provision and ISE is removing it from this rule. Unlike NES, Linkage Handlers are not affiliated with ISE and therefore the Exchange does not believe that this provision is necessary.

The Exchange proposes to amend the Supplementary Material to Rule 1901 to replace the term ''Linkage Handler'' with ''NES'' and amend the cross-reference to define NES. Supplementary Material .02(d) has a reference to ''Linkage Handler'' which is being changed to ''NES'' and a cross-reference to the Linkage Handler definition in Supplementary Material .03 to Rule 1901, which is being deleted, is proposed to be replaced with a reference to proposed Rule 1903. Finally, the reference to ''Linkage Handler'' in Supplementary Material .05 is being replaced with ''NES.''

Cancellation of Orders and Error Accounts

The Exchange is amending Rule 1904 entitled ''Order Cancelation/Release'' to retitle the rule ''Cancellation of Orders and Error Account.'' The Exchange is replacing the current rule text with rule

[19] For these reasons, today, transaction fees for orders vary depending on the market where an order is ultimately executed.

[20] ISE Rule 1903(f) currently states, ''Any bid or offer entered on the Exchange routed to another exchange via a Linkage Handler that results in an execution shall be binding on the Member that entered such bid/offer.''

text similar to Phlx Rule 1080(m)(v). The Exchange is also removing and reserving Rule 1905, entitled ''Routing Service Error Accounts.''

Today ISE Rule 1904 provides the Exchange may cancel orders as it deems to be necessary to maintain fair and orderly markets if a technical or systems issue occurs at the Exchange, a Linkage Handler in connection with the Routing Service provided under Rule 1903, or another exchange to which an Exchange order has been routed. A Linkage Handler may only cancel orders being routed to another exchange based on the Exchange's standing or specific instructions or as otherwise provided in the Exchange Rules. The Exchange shall provide notice of the cancelation of the Members' original order to affected Members as soon as practicable.[21] Further, the Exchange may release orders being held on the Exchange awaiting an away exchange execution as it deems necessary to maintain fair and orderly markets if a technical or systems issue occurs at the Exchange, a Linkage Handler, or another exchange to which an Exchange order has been routed.[22]

Today, ISE Rule 1905 permits each Linkage Handler to maintain, in the name of the Linkage Handler, one or more accounts for the purpose of liquidating unmatched trade positions that may occur in connection with the Routing Service provided under Rule 1903 (''error positions''). Errors to which this Rule applies include any action or omission by the Exchange, a Linkage Handler, or another exchange to which an Exchange order has been routed, that results in an unmatched trade position due to the execution of an order that is subject to the away market Routing Service and for which there is no corresponding order to pair with the execution (each a ''routing error''). Such routing errors would include, without limitation, positions resulting from determinations by the Exchange to cancel or release an order pursuant to Rule 1904. An error position will be liquidated in a Linkage Handler's error account.

A Linkage Handler utilizing its own account to liquidate error positions, shall liquidate the error positions as soon as practicable. The Linkage Handler shall: (i) Establish and enforce policies and procedures reasonable [sic] designed to (1) adequately restrict the flow of confidential and proprietary information associated with the liquidation of the error positions in accordance with Rule 1903, and (2) prevent the use of information associated with other orders subject to the Routing Services when making determinations regarding the liquidation of error positions; and (ii) make and keep records associated with the liquidation of such Linkage Hander error positions and shall maintain such records in accordance with Rule 17a–4 under the Exchange Act. Finally, the Exchange shall make and keep records to document all determinations to treat positions as error positions under this Rule and shall maintain such records in accordance with Rule 17a–1 under the Exchange Act

The Exchange proposes to adopt language similar to Phlx Rule 1080(m)(v). This rule provides general authority for Phlx or NES to cancel orders in order to maintain fair and orderly markets when technical and systems issues are occurring, and Rule 1080(m)(v) also sets forth the manner in which error positions may be handled by the Exchange or NES.[23] NES, as the proposed routing broker of the Exchange, would be subject to the conditions listed in this proposed Rule 1903. The Exchange, pursuant to this proposal, would rely on NES to provide outbound routing services from itself to routing destinations of NES (''routing destinations''). When NES routes orders to a routing destination, it would do so by sending a corresponding order in its own name to the routing destination. In the normal course, routed orders that are executed at routing destinations are submitted for clearance and settlement in the name of NES, and NES arranges for any resulting securities positions to be delivered to the member that submitted the corresponding order to the Exchange. From time to time, however, the Exchange and NES encounter situations in which it becomes necessary to cancel orders and resolve error positions.[24]

Examples of Circumstances That May Lead to Canceled Orders

A technical or systems issue may arise at NES, a routing destination, or the Exchange that may cause the Exchange or NES to take steps to cancel orders if the Exchange or NES determines that such action is necessary to maintain a fair and orderly market. The examples set forth below describe some of the circumstances in which the Exchange or NES may decide to cancel orders.

Example 1. If NES or a routing destination experiences a technical or systems issue that results in NES not receiving responses to immediate or cancel (''IOC'') orders that it sent to the routing destination, and that issue is not resolved in a timely manner, NES or the Exchange would seek to cancel the routed orders affected by the issue.[25] For instance, if NES experiences a connectivity issue affecting the manner in which it sends or receives order messages to or from routing destinations, it may be unable to receive timely execution or cancellation reports from the routing destinations, and NES or the Exchange may consequently seek to cancel the affected routed orders. Once the decision is made to cancel those routed orders, any cancellation that a member submitted to the

[21] *See* Rule 1904(a).

[22] *See* Rule 1904(b).

[23] *See* Securities Exchange Act Release No. 68393 (December 10, 2012), 77 FR 74520 (December 14, 2012) (SR–Phlx–2012–134). Accordingly, pursuant to proposed ISE Rule 1904, the Exchange is responsible for filing with the Commission rule changes and fees relating to NES's functions. In addition, the Exchange is using the phrase ''NES or the Exchange'' in this rule filing to reflect the fact that a decision to take action with respect to orders affected by a technical or systems issue may be made in the capacity of NES or the Exchange depending on where those orders are located at the time of that decision. From time to time, the Exchange may use non-affiliate third-party broker-dealers to provide outbound routing services (*i.e.,* third-party Routing Brokers). In those cases, orders are submitted to the third-party Routing Broker through NES, the third-party Routing Broker routes the orders to the routing destination in its name, and any executions are submitted for clearance and settlement in the name of NES so that any resulting positions are delivered to NES upon settlement. As described above, NES normally would arrange for any resulting securities positions to be delivered to the member that submitted the corresponding order to the Exchange. If error positions (as defined in proposed ISE Rule 1904(b)) result in connection with the Exchange's use of a third-party Routing Broker for outbound routing, and those positions are delivered to NES through the clearance and settlement process, NES would be permitted to resolve those positions in accordance with proposed ISE Rule 1904. If the third-party Routing Broker received error positions in connection with its role as a routing broker for the Exchange, and the error positions were not delivered to NES through the clearance and settlement process, then the third-party Routing Broker would resolve the error positions itself, and NES would not be permitted to accept the error positions, as set forth in proposed ISE Rule 1904(b)(2).

[24] The examples described in this filing are not intended to be exclusive. Proposed Rule 1904 would provide general authority for the Exchange or NES to cancel orders in order to maintain fair and orderly markets when technical and systems issues are occurring, and Rule 1904 also would set forth the manner in which error positions may be handled by the Exchange or NES. The proposed rule change is not limited to addressing order cancellation or error positions resulting only from the specific examples described in this filing.

[25] In a normal situation (*i.e.,* one in which a technical or systems issue does not exist), NES should receive an immediate response to an IOC order from a routing destination, and would pass the resulting fill or cancellation on to the Exchange member. After submitting an order that is routed to a routing destination, if a member sends an instruction to cancel that order, the cancellation is held by the Exchange until a response is received from the routing destination. For instance, if the routing destination executes that order, the execution would be passed on to the member and the cancellation instruction would be disregarded.

Exchange on its initial order during such a situation would be honored.[26]

Example 2. If the Exchange experiences a systems issue, the Exchange may take steps to cancel all outstanding orders affected by that issue and notify affected members of the cancellations. In those cases, the Exchange would seek to cancel any routed orders related to the members' initial orders.

Examples of Circumstances That May Lead to Error Positions

In some instances, the technical or systems issue at NES, a routing destination, the Exchange, or a non-affiliate third party Routing Broker may also result in NES acquiring an error position that it must resolve. The examples set forth below describe some of the circumstances in which error positions may arise.

Example A. Error positions may result from routed orders that the Exchange or NES attempts to cancel but that are executed before the routing destination receives the cancellation message or that are executed because the routing destination is unable to process the cancellation message. Using the situation described in Example 1 above, assume that the Exchange seeks to cancel orders routed to a routing destination because it is not receiving timely execution or cancellation reports from the routing destination. In such a situation, NES may still receive executions from the routing destination after connectivity is restored, which it would not then allocate to members because of the earlier decision to cancel the affected routed orders. Instead, NES would post those positions into its error account and resolve the positions in the manner described below.

Example B. Error positions may result from an order processing issue at a routing destination. For instance, if a routing destination experienced a systems problem that affects its order processing, it may transmit back a message purporting to cancel a routed order, but then subsequently submit an execution of that same order (*i.e.,* a locked-in trade) to OCC for clearance and settlement. In such a situation, the Exchange would not then allocate the execution to the member because of the earlier cancellation message from the routing destination. Instead, NES would post those positions into its error account and resolve the positions in the manner described below.

Example C. Error positions may result if NES receives an execution report from a routing destination but does not receive clearing instructions for the execution from the routing destination. For instance, assume that a member sends the Exchange an order to buy 100 contracts overlying ABC stock, which causes NES to send an order to a routing destination that is subsequently executed, cleared, and closed out by that routing destination, and the execution is ultimately communicated back to that member. On the next trading day (T+1), if the routing destination does not provide clearing instructions for that execution, NES would still be responsible for settling that member's purchase, but would be left with a short position in its error account.[27] NES would resolve the position in the manner described below.

Example D. Error positions may result from a technical or systems issue that causes orders to be executed in the name of NES that are not related to NES's function as the Exchange's routing broker and are not related to any corresponding orders of members. As a result, NES would not be able to assign any positions resulting from such an issue to members. Instead, NES would post those positions into its error account and resolve the positions in the manner described below.

Example E. Error positions may result from a technical or systems issue through which the Exchange does not receive sufficient notice that a member that has executed trades on the Exchange has lost the ability to clear trades through OCC. In such a situation, the Exchange would not have valid clearing information, which would prevent the trade from being automatically processed for clearance and settlement on a locked-in basis. Accordingly, NES would assume that member's side of the trades so that the counterparties can settle the trades. NES would post those positions into its error account and resolve the positions in the manner described below.

Example F. Error positions may result from a technical or systems issue at the Exchange that does not involve routing of orders through NES. For example, a situation may arise in which a posted quote/order was validly cancelled but the system erroneously matched that quote/order with an order that was seeking to access it. In such a situation, NES would have to assume the side of the trade opposite the order seeking to access the cancelled quote/order. NES would post the position in its error account and resolve the position in the manner described below.

In the circumstances described above, neither the Exchange nor NES may learn about an error position until T+1, either: (1) During the clearing process when a routing destination has submitted to OCC a transaction for clearance and settlement for which NES never received an execution confirmation; or (2) when a routing destination does not recognize a transaction submitted to OCC for clearance and settlement. Moreover, the affected members' trade may not be nullified absent express authority under Exchange rules.[28] As noted, the Exchange or NES would be expressly authorized to cancel orders as may be necessary to maintain fair and orderly markets if a technical or systems issue occurred at the Exchange, NES, or a routing destination.[29] The Exchange or NES would be required to provide notice of the cancellation to affected members as soon as practicable.

NES would be required to maintain an error account for the purpose of addressing positions that result from a technical or systems issue at NES, the Exchange, a routing destination, or a non-affiliate third-party Routing Broker that affects one or more orders (''error positions''). For purposes of this Rule 1904 an error position shall not include any position that results from an order submitted by a Member to the Exchange that is executed on the Exchange and automatically processed for clearance and settlement on a locked-in basis. Except as provided in Rule 1904(b)(3), NES shall not (i) accept any positions in its error account from an account of a Member, or (ii) permit any Member to transfer any positions from the Member's account to NES' error account.[30] If a technical or systems issue

[26] If a member did not submit a cancellation to the Exchange, however, that initial order would remain ''live'' and thus be eligible for execution or posting on the Exchange, and neither the Exchange nor NES would treat any execution of that initial order or any subsequent routed order related to that initial order as an error.

[27] To the extent that NES incurred a loss in covering its short position, it would submit a reimbursement claim to that routing destination.

[28] *See, e.g.,* ISE Rule 720.

[29] Such a situation may not cause the Exchange to declare self-help against the routing destination pursuant to Rule 1901(b)(1)(i). If the Exchange or NES determines to cancel orders routed to a routing destination under proposed Rule 1904, but does not declare self-help against that routing destination, the Exchange would continue to be subject to the trade-through requirements in the Options Order Protection and Locked/Crossed Markets Plan and Rule 1901 with respect to that routing destination.

[30] The purpose of this provision is to clarify that NES may address error positions under the proposed rule that are caused by a technical or systems issue, but that NES may not accept from a member positions that are delivered to the member through the clearance and settlement process, even if those positions may have been related to a technical or systems issue at NES, the Exchange, a routing destination of NES, or a non-affiliate third-party Routing Broker. This provision would not apply, however, to situations like the one described

Continued

results in the Exchange not having valid clearing instructions for a Member to a trade, NES may assume that Member's side of the trade so that the trade can be automatically processed for clearance and settlement on a locked-in basis.[31]

In connection with a particular technical or systems issue, NES or the Exchange shall either (i) assign all resulting error positions to Members, or (ii) have all resulting error positions liquidated. Any determination to assign or liquidate error positions, as well as any resulting assignments, shall be made in a nondiscriminatory fashion. NES or the Exchange shall assign all error positions resulting from a particular technical or systems issue to the Members affected by that technical or systems issue if NES or the Exchange:

(i) Determines that it has accurate and sufficient information (including valid clearing information) to assign the positions to all of the Members affected by that technical or systems issue;

(ii) determines that it has sufficient time pursuant to normal clearance and settlement deadlines to evaluate the information necessary to assign the positions to all of the Members affected by that technical or systems issue; and

(iii) has not determined to cancel all orders affected by that technical or systems issue in accordance with Rule 1904(a).[32]

For example, a technical or systems issue of limited scope or duration may occur at a routing destination, and the resulting trades may be submitted for clearance and settlement by such routing destination to OCC. If there were a small number of trades, there may be sufficient time to match positions with member orders and avoid using the error account.

If NES or the Exchange is unable to assign all error positions resulting from a particular technical or systems issue to all of the affected Members, or if NES or the Exchange determines to cancel all orders affected by the technical or systems issue in accordance with Rule 1904(a), then NES shall liquidate the error positions as soon as practicable. NES shall: (i) Provide complete time and price discretion for the trading to liquidate the error positions to a third-party broker-dealer and shall not attempt to exercise any influence or control over the timing or methods of such trading;[33] and (ii) establish and enforce policies and procedures that are reasonably designed to restrict the flow of confidential and proprietary information between the third-party broker-dealer and NES/the Exchange associated with the liquidation of the error positions.[34]

For example, in some cases, the volume of questionable executions and positions resulting from a technical or systems issue might be such that the research necessary to determine which members to assign those executions to could be expected to extend past the normal settlement cycle for such executions. Furthermore, if a routing destination experiences a technical or systems issue after NES has transmitted IOC orders to it that prevents NES from receiving responses to those orders, NES or the Exchange may determine to cancel all routed orders affected by that issue. In such a situation, NES or the Exchange would not pass on to the members any executions on the routed orders received from the routing destination.[35]

NES and the Exchange would be required to make and keep records to document all determinations to treat positions as error positions and all determinations for the assignment of error positions to Members or the liquidation of error positions, as well as records associated with the liquidation of error positions through the third-party broker-dealer.[36]

Implementation

The Exchange intends to begin implementation of the proposed rule changes in Q2 2017 in tandem with a technology migration to Nasdaq INET architecture. The migration will be on a symbol by symbol basis, and the Exchange will issue an alert to members to provide notification of the symbols that will migrate and the relevant dates.

The Exchange notes that with respect to the Rules in Chapter 19, Rules 1901, 1903, 1904 and 1905, these rules impact not only the ISE market but also ISE Gemini and ISE Mercury because Chapter 19 is incorporated by reference into those rulebooks. As noted above, ISE Gemini and ISE Mercury have filed to propose that NES may be an affiliated Member of those exchanges to similarly perform the specified functions pursuant to the specified conditions. ISE rule changes, if approved, will be implemented in Q2 2017 on a symbol by symbol basis, as noted above. ISE Gemini rule changes, if approved, will be implemented in Q1 2017 on a symbol by symbol basis. ISE Mercury rule changes, if approved, will be implemented in Q3 2017 on a symbol by symbol basis.

The Exchange will add notations in the rulebook to cross reference the amended rule text and make clear the implementation date in each rulebook.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[37] in general, and furthers the objectives of Section 6(b)(5) of the Act,[38] 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, because the proposed rule change will allow the Exchange to receive inbound orders from each Affiliated Entity through NES, acting in its capacity as a facility of the respective Affiliated Entity, in a manner consistent with prior approvals and established protections. The Exchange believes that these conditions establish mechanisms that protect the independence of the Exchange's regulatory responsibility with respect to NES, as well as ensure that NES cannot use any information it may have because of its affiliation with the Exchange to its advantage.

Further, the Exchange notes that its proposal 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 because ISE will have set up mechanisms that protect the independence of ISE's regulatory responsibilities, with respect to NES, as well as demonstrate that NES cannot use any information advantage it

in Example C in which NES incurred a short position to settle a member's purchase, as the member did not yet have a position in its account as a result of the purchase at the time of NES's action (*i.e.,* NES's action was necessary for the purchase to settle into the member's account). Similarly, the provision would not apply to situations like the one described in Example F, where a system issue caused one member to receive an execution for which there was not an available contra-party, in which case action by NES would be necessary for the position to settle into that member's account.

[31] *See* proposed Rule 1904(b).

[32] *See* proposed Rule 1904(c).

[33] This provision is not intended to preclude NES from providing the third-party broker with standing instructions with respect to the manner in which it should handle all error account transactions. For example, NES might instruct the broker to treat all orders as ''not held'' and to attempt to minimize any market impact on the price of the stock being traded.

[34] *See* proposed Rule 1904(c)(B).

[35] If NES determines in connection with a particular technical or systems issue that some error positions can be assigned to some affected members but other error positions cannot be assigned, NES would be required under the proposed rule to liquidate all such error positions (including those positions that could be assigned to the affected members).

[36] *See* proposed Rule 1904(d).

[37] 15 U.S.C. 78f(b).

[38] 15 U.S.C. 78f(b)(5).

may have because of its affiliation with ISE. The Exchange will not be granting any preferential access to information from the Exchange's Order Book to NES. As an affiliated routing broker, NES would not be treated differently than any other unaffiliated routing broker.

The proposal should remove impediments to and perfect the mechanism of a free and open market and a national market system by providing customer order protection and by facilitating trading at away exchanges so customer orders trade at the best market price. The proposal should also protect investors and the public interest by fostering compliance with the Options Order Protection and Locked/Crossed Market Plan. In addition, the Exchange believes that the proposal is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, because of the specific protections pertaining to the routing broker, in light of the potential conflict of interest where the member routing broker could have access to information regarding other members' orders or the routing of those orders. These protections include the Exchange's control over all routing logic as well as the confidentiality of routing information.[39]

The Exchange believes that its proposal related to the cancellation of orders and error account is consistent with the Act because NES's or the Exchange's ability to cancel orders during a technical or systems issue and to maintain an error account facilitates the smooth and efficient operations of the market. Specifically, the Exchange believes that allowing NES or the Exchange to cancel orders during a technical or systems issue would allow the Exchange to maintain fair and orderly markets. Moreover, the Exchange believes that allowing NES to assume error positions in an error account and to liquidate those positions, subject to the conditions set forth in the proposed amendments to Rule 1904 would be the least disruptive means to correct these errors, except in cases where NES can assign all such error positions to all affected members of the Exchange. Overall, the proposed amendments are designed to ensure full trade certainty for market participants and to avoid disrupting the clearance and settlement process. The proposed amendments are also designed to provide a consistent methodology for handling error positions in a manner that does not discriminate among members. The proposed amendments are also consistent with Section 6 of the Act insofar as they would require NES to establish controls to restrict the flow of any confidential information between the third-party broker and NES/the Exchange associated with the liquidation of error positions.

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. Receiving orders through NES does not raise any issues of intra-market competition because it involves inbound routing from an affiliated exchange. This proposal provides that Nasdaq, which owns NES and the Exchange, shall establish and maintain procedures and internal controls reasonably designed to ensure that NES does not develop or implement changes to its system on the basis of non-public information regarding planned changes to the Exchange's systems, obtained as a result of its affiliation with the Exchange, until such information is available generally to similarly situated Exchange members and member organizations in connection with the provision of inbound routing to the Exchange. Utilizing NES as the routing broker does not create any undue burden on inter-market competition because NES cannot use any information advantage it may have because of its affiliation with ISE. The Exchange will not be granting any preferential access to information from the Exchange's Order Book to NES. As an affiliated routing broker, NES would not be treated differently than any other unaffiliated routing broker.

The proposal does not result in a burden on competition among exchanges, because there are many competing options exchanges that provide routing services, including through an affiliate. Further, the proposal does not raise issues of intra-market competition, because the Exchange's decision to route through a particular routing broker would impact all participants equally.

With respect to the proposal to establish error accounts, the Exchange's proposal does not result in a burden on competition among exchanges because NES' or the Exchange's ability to cancel orders during a technical or systems issue and to maintain an error account facilitates the smooth and efficient operations of the market for all impacted members. The proposals regarding assumption of error positions and [sic] to liquidation of those positions ensures certainty for all impacted market participants. The proposal does not discriminate among Members.

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 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, as modified by Amendment No. 1, 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–2016–27 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISE–2016–27. 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

[39] *See* proposed Rule 1903(e).

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–ISE–2016–27, and should be submitted on or before January 19, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[40]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–31480 Filed 12–28–16; 8:45 am]

BILLING CODE 8011–01–P

[40] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79661; File No. SR–BX–2016–068]

Self-Regulatory Organizations; NASDAQ BX, Inc.; Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1 Thereto, To Permit BX To Accept Inbound Options Orders Routed by Nasdaq Execution Services LLC

December 22, 2016.

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 December 9, 2016, NASDAQ BX, Inc. (''BX'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change. On December 20, 2016, the Exchange filed Amendment No. 1 to the proposed rule change, which amended and replaced the original filing in its entirety. The proposed rule change, as modified by Amendment No. 1, is 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, as modified by Amendment No. 1 thereto, 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 Substance of the Proposed Rule Change

The Exchange proposes to permit BX to accept inbound options orders routed by Nasdaq Execution Services LLC (''NES'') from the International Securities Exchange, LLC (''ISE'') ISE Gemini, LLC (''ISE Gemini'') and ISE Mercury, LLC (''ISE Mercury'') (collectively ''ISE Exchanges'').

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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

In conjunction with the ISE Exchanges seeking approval to provide outbound routing services to all options markets using an affiliated routing broker, NES,[3] BX proposes that NES be permitted to route orders from the ISE Exchanges to BX, subject to certain limitations and conditions, as described below.

NES is a broker-dealer and member of The Nasdaq Options Market LLC (''NOM''), Nasdaq Phlx LLC (''Phlx'') and BX (collectively ''Nasdaq Exchanges''). NES provides all routing functions for the Nasdaq Exchanges. The Nasdaq Exchanges and NES are permitted affiliates.[4] Accordingly, the affiliate relationship between BX and NES, its member, raises the issue of an exchange's affiliation with a member of such exchange. Specifically, in connection with prior filings, the Commission has expressed concern that the affiliation of an exchange with one of its members raises the potential for unfair competitive advantage and potential conflicts of interest between an exchange's self-regulatory obligations and its commercial interests.[5]

Specifically, in connection with prior filings, the Commission has expressed concern that the affiliation of an exchange with one of its members raises the potential for unfair competitive advantage and potential conflicts of interest between an exchange's self-regulatory obligations and its commercial interests.[6] The Nasdaq Exchanges received approval from the Commission to permit NES to become a member of these three markets subject to certain limitations and conditions in order to perform certain routing and other functions, respectively.[7] Also recognizing that the Commission has expressed concern regarding the potential for conflicts of interest in instances where a member firm is affiliated with an exchange to which it is routing orders, the Nasdaq Exchanges previously proposed, and the Commission approved,[8] NES's affiliation with the Nasdaq Exchanges to permit the Exchange to accept inbound

[3] *See* SR–ISE–2016–27, SR–ISE–Gemini–2016–16 and SR–ISE–Mercury–2016–22 (not yet published).

[4] *See* Phlx Rule 985, Nasdaq Rule 2160 and BX Rule 2140.

[5] *See* Securities Exchange Act Release Nos. 59153 (December 23, 2008), 73 FR 80485 (December 31, 2008) (SR–NASDAQ–2008–098); and 62736 (August 17, 2010), 75 FR 51861 (August 23, 2010) (SR–NASDAQ–2010–100). *See also* Securities Exchange Act Release No. 58135 (July 10, 2008), 73 FR 40898 (July 16, 2008) (SR–NASDAQ–2008–061) (Permitting NOS to be affiliated with Phlx).

[6] Securities Exchange Act Release Nos. 71416 (January 28, 2014), 79 FR 6244 (February 3, 2014) (SR–Phlx–2014–05); 71419 (January 28, 2014), 79 FR 6247 (February 3, 2014) (SR–NASDAQ–2014–007); and 714121 (January 28, 2014), 79 FR 6264 (February 3, 2014) (SR–BX–2014–003).

[7] *See* Securities Exchange Act Release Nos. 59721 (April 7, 2009), 74 FR 17245 (April 14, 2009) (SR–Phlx–2009–32); 59779 (April 16, 2009) 74 FR 18600 (April 23, 2009) (SR–Phlx–2009–32, Amendment No. 1) notice of filing of proposed rule change relating to enhanced electronic trading platform for options); 61667 (March 5, 2010), 75 FR 11964 (March 12, 2016) (SR–Phlx–2010–36) (notice of filing and immediate effectiveness of proposed rule changes to establish procedures to prevent information advantages resulting from the affiliation between Phlx and NES); and 71416 (January 28, 2014), 79 FR 6244 (February 3, 2014) (SR–Phlx–2014–05) (notice of filing and immediate effectiveness of proposed rule change to inbound routing of options orders). Nasdaq Options Services was the affiliated broker-dealer prior to a rule change to utilize NES, another affiliated broker-dealer of Nasdaq. *See also* Securities Exchange Act Release Nos. 63769 (January 25, 2011), 76 FR 5423 (January 31, 2011) (SR–BX–2011–003); 63859 (February 7, 2011), 76 FR 8391 (February 14, 2011) (SR–BX–2011–007) (notice of filing of proposed rule change relating to permanent approval of the BX and NES inbound routing relationship); 71420 (January 28, 2014), 79 FR 6256 (February 3, 2014) (SR–BX–2014–004) (notice of filing and immediate effectiveness of proposed rule change to inbound routing). *See also* Securities Exchange Act Release Nos. 65554 (October 13, 2011), 76 FR 65311 (October 20, 2011) (SR–NASDAQ–2011–142); 71418 (January 28, 2014), 79 FR 6262 (February 3, 2014) (SR–NASDAQ–2014–008)(notice of filing and immediate effectiveness of proposed rule change to inbound routing).

[8] *Id.*

orders that NES routes in its capacity as a facility from other Nasdaq Exchanges, subject to the certain limitations and conditions. BX now proposes to permit BX to accept inbound options orders that NES routes in its capacity as a facility of the ISE Exchanges, subject to the following limitations and conditions:[9]

- First, the Exchange and FINRA maintain a Regulatory Services Agreement (''RSA''), as well as an agreement pursuant to Rule 17d–2 under the Act (''17d–2 Agreement'').[10] Pursuant to the RSA and the 17d–2 Agreement, FINRA is allocated regulatory responsibilities to review NES's compliance with certain Exchange rules.[11] Pursuant to the RSA, however, BX retains ultimate responsibility for enforcing its rules with respect to NES.
- Second, FINRA monitors NES for compliance with the Exchange's trading rules, and collects and maintains certain related information.[12]
- Third, FINRA provides a report to the Exchange's chief regulatory officer (''CRO''), on a quarterly basis, that: (i) Quantifies all alerts (of which the Exchange or FINRA is aware) that identify NES as a participant that has potentially violated Commission or Exchange rules, and (ii) lists all investigations that identify NES as a participant that has potentially violated Commission or Exchange rules.
- Fourth, BX has in place BX Rule 2140(c), which requires Nasdaq, Inc., as the holding company owning both the Exchange and NES, to establish and maintain procedures and internal controls reasonably designed to ensure that NES does not develop or implement changes to its system, based on non-public information obtained regarding planned changes to the Exchange's systems as a result of its affiliation with the Exchange, until such information is available generally to similarly situated Exchange members, in connection with the provision of inbound order routing to the Exchange.[13]

The Exchange has met all the above-listed conditions in connection with NES routing in its capacity as a facility of NOM and Phlx. By meeting the above conditions, the Exchange has set up mechanisms that protect the independence of the Exchange's regulatory responsibility with respect to NES, as well as demonstrate that NES cannot use any information advantage it may have because of its affiliation with the Exchange. Because the Exchange has met all the above-listed conditions, it now seeks to permit an inbound routing relationship with the ISE Exchanges pursuant to the same conditions. The Exchange will continue to comply with the four conditions stated above.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[14] in general, and with Sections 6(b)(5) of the Act,[15] in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, because the proposed rule change will allow the Exchange to continue to receive inbound orders from NES, acting in its capacity as a facility of Phlx and NOM, in a manner consistent with prior approvals and established protections and will further be permitted to receive inbound orders from the ISE Exchanges, for which NES will also act in its capacity as a facility of those markets. The Exchange believes that the proposed conditions establish mechanisms that protect the independence of the Exchange's regulatory responsibility with respect to NES, as well as ensure that NES cannot use any information it may have because of its affiliation with the Exchange, or affiliation with other Nasdaq Exchanges or ISE Exchanges, to its advantage.

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. Permitting BX to receive inbound orders from the ISE Exchanges does not create any issues of intra-market competition because it involves inbound routing from affiliated markets. Nor does it result in a burden on competition among exchanges, because there are many competing options exchanges that provide routing services, including through an affiliate.

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 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, as modified by Amendment No. 1, is consistent with the Act. Comments may be submitted by any of the following methods:

[9] The Exchange notes that similar filings are proposed for the Nasdaq and Phlx markets. See SR–Nasdaq–2016–169 and SR–Phlx–2016–120 (not published).

[10] 17 CFR 240.17d–2. FINRA reviews NES' compliance for certain common rules. The RSA with FINRA specifies the types of business activities that NES may undertake and it also indicates the obligations to which NES is subject under the RSA. Among other things, NES must maintain a certain amount of net capital pursuant to SEC Rule 15c3–1(a)(1)(ii) and operate pursuant to SEC Rule 15c3–3(k)(2)(ii). NES is permitted to route orders in options to the appropriate market center for execution in accordance with member order and requirements.

[11] NES is also subject to independent oversight by FINRA, its designated examining authority, for compliance with financial responsibility requirements.

[12] Pursuant to the RSA, both FINRA and BX collect and maintain all alerts, complaints, investigations and enforcement actions in which NES (in its capacity as a facility of Phlx and NOM routing orders to BX) is identified as a participant that has potentially violated applicable Commission or Exchange rules. The Exchange and FINRA retain these records in an easily accessible manner in order to facilitate any potential review conducted by the Commission's Office of Compliance Inspections and Examinations. Pursuant to the RSA, the Exchange and FINRA would be required to perform these activities with respect to NES acting in its capacity as a facility of each of the affiliated entities routing orders to BX.

[13] *See* Securities Exchange Act Release Nos. 63769 (January 25, 2011), 76 FR 5423 (January 31, 2011) (SR–BX–2011–003); 63859 (February 7, 2011), 76 FR 8391 (February 14, 2011) (SR–BX–2011–007) (notice of filing of proposed rule change relating to permanent approval of the BX and NES inbound routing relationship); 71420 (January 28, 2014), 79 FR 6256 (February 3, 2014)(SR–BX–2014–004)(notice of filing and immediate effectiveness of proposed rule change to inbound routing).

[14] 15 U.S.C. 78f.

[15] 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–BX–2016–068 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BX–2016–068. 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–BX–2016–068, and should be submitted on or before January 19, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–31476 Filed 12–28–16; 8:45 am]

BILLING CODE 8011–01–P

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79678; File No. SR–NYSEArca–2016–167]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change in Connection With the Proposed Acquisition of National Stock Exchange, Inc. by the Exchange's Parent the NYSE Group, Inc. To Amend Certain Organizational Documents of NYSE Group, NYSE Holdings LLC, Intercontinental Exchange Holdings, Inc., and Intercontinental Exchange, Inc.

December 22, 2016.

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 December 16, 2016, 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 Substance of the Proposed Rule Change

The Exchange proposes in connection with the proposed acquisition of National Stock Exchange, Inc. (''NSX'') by the Exchange's parent the NYSE Group, Inc. (''NYSE Group''), to amend certain organizational documents of NYSE Group, NYSE Holdings LLC (''NYSE Holdings''), Intercontinental Exchange Holdings, Inc. (''ICE Holdings''), and Intercontinental Exchange, Inc. (''ICE''). 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

Background

On December 14, 2016, ICE entered into an agreement with the NSX pursuant to which its wholly-owned subsidiary NYSE Group would acquire all of the outstanding capital stock of the NSX (the ''Acquisition''). As a result of the Acquisition, the NSX would be renamed NYSE National, Inc. (''NYSE National'') and would be operated as a wholly-owned subsidiary of NYSE Group. NYSE Group is a wholly-owned subsidiary of NYSE Holdings, which is in turn 100% owned by ICE Holdings. ICE, a public company listed on the New York Stock Exchange LLC (the ''NYSE''), owns 100% of ICE Holdings.

Following the Acquisition, NYSE National would continue to be registered as a national securities exchange and as a separate self-regulatory organization (''SRO''). As such, NYSE National would continue to have separate rules, membership rosters, and listings that would be distinct from the rules, membership rosters, and listings of the three other registered national securities exchanges and SROs owned by NYSE Group, namely, the NYSE, NYSE MKT and the Exchange (together, the ''NYSE Exchanges'').[4]

In connection with the Acquisition and as discussed more fully below, the following organizational documents of NYSE Group and its intermediary and ultimate parent entities would be amended:

- ICE bylaws and director independence policy,
- ICE Holdings bylaws and certificate of incorporation,
- NYSE Holdings operating agreement, and
- NYSE Group bylaws and certificate of incorporation.

These proposed changes would consist of technical and conforming amendments to reflect the proposed new ownership of NYSE National by the NYSE Group, and, indirectly, ICE.[5]

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The NYSE Exchanges are referred to as the U.S. Regulated Subsidiaries in the corporate documents proposed to be amended in this rule filing.

[5] The proposed revisions are also discussed in the NYSE and NYSE MKT companion rule filings related to the Acquisition. *See* SR–NYSE–2016–90 & SR–NYSEMKT–2016–122.

The proposed rule changes would be effected following approval of this rule filing no later than February 28, 2017, on a date determined by its Board.

Proposed Rule Change

The Exchange proposes that, in connection with the Acquisition, the Commission approve the organizational documents of ICE and its wholly-owned subsidiaries ICE Holdings and NYSE Group and the Independence Policy of the Board of Directors of Intercontinental Exchange, Inc. (''ICE Independence Policy''), all of which are to be amended concurrently with the Acquisition to reflect ownership of NYSE National.

The current organizational documents of ICE and its wholly-owned subsidiaries provide certain protections to the NYSE Exchanges that are designed to protect and facilitate their self-regulatory functions, including certain restrictions on the ability to vote and own shares of ICE.[6] In general, the organizational documents of ICE and its wholly-owned subsidiaries are being amended to provide similar protections to the NYSE National as are currently provided to the NYSE Exchanges under those documents.

In addition, obsolete references to NYSE Market (DE), Inc. (formerly NYSE Market, Inc.) (''NYSE Market (DE)''), and NYSE Regulation, Inc. (''NYSE Regulation'') found in various documents are proposed to be deleted.[7]

Proposed Seventh Amended and Restated Bylaws of Intercontinental Exchange, Inc. (''ICE Bylaws'')

The ICE Bylaws would be amended to reflect the Acquisition and incorporate NYSE National in the ICE Bylaws' existing voting and ownership restrictions, provisions relating to the qualifications of directors and officers and their submission to jurisdiction, compliance with the federal securities laws, access to books and records, and other matters related to its control of the U.S. Regulated Subsidiaries.

Specifically, the ICE Bylaws would be amended as follows:

- The definition of ''U.S. Regulated Subsidiaries'' in Article III, Section 3.15, which currently includes the NYSE, NYSE Market (DE), NYSE Regulation, NYSE Arca, LLC, the Exchange, NYSE Arca Equities, and NYSE MKT, would be amended to include NYSE National. The obsolete references to NYSE Market (DE) and NYSE Regulation would also be deleted.
- Article VIII (Confidential Information), Section 8.1, would be amended to extend to NYSE National the same protection regarding confidential information provided to the NYSE Exchanges and NYSE Arca Equities, and to remove the obsolete references to NYSE Market (DE) and NYSE Regulation.
- Article XI, Section 11.3, provides that, for so long as ICE controls any of the U.S. Regulated Subsidiaries, any amendment to or repeal of the ICE Bylaws must either be (i) filed with or filed with and approved by the Commission under Section 19 of the Exchange Act and the rules promulgated thereunder, or (ii) submitted to the boards of directors of the U.S. Regulated Subsidiaries or the boards of directors of their successors, in each case only to the extent that such entity continues to be controlled directly or indirectly by ICE. Section 11.3 would be amended to include the NYSE National, and to delete the obsolete references to NYSE Market (DE) and NYSE Regulation.

The ICE Bylaws would be further amended to add a new Article XII (Voting and Ownership Limitations). New Section 12.1.a of Article XII would provide that, subject to its fiduciary obligations under applicable law, for so long as ICE directly or indirectly controls NYSE National (or its successor), the board of directors of ICE shall not adopt any resolution pursuant to clause (b) of Section A.2 of Article V of the certificate of incorporation of ICE (which relates to ICE board of directors approval of ownership of ICE capital stock by a person together with its related persons in excess of 20%), unless the board of directors of ICE shall have determined that:

- In the case of a resolution to approve the exercise of voting rights in excess of 20% of the then outstanding votes entitled to be cast on such matter, neither such person nor any of its related persons is an ETP Holder of NYSE National;
- in the case of a resolution to approve the entering into of an agreement, plan or other arrangement under circumstances that would result in shares of stock of ICE that would be subject to such agreement, plan or other arrangement not being voted on any matter, or the withholding of any proxy relating thereto, where the effect of such agreement, plan or other arrangement would be to enable any person, but for Article V of the Certificate of Incorporation of ICE, either alone or together with its related persons, to vote, possess the right to vote or cause the voting of shares of stock of ICE that would exceed 20% of the then outstanding votes entitled to be cast on such matter neither such person nor any of its related persons is, with respect to NYSE National, an ETP Holder.

New Section 12.1.b would provide that, subject to its fiduciary obligations under applicable law, for so long as ICE directly or indirectly controls NYSE National (or its successor), the Board of Directors of ICE shall not adopt any resolution pursuant to clause (b) of Section B(2) of Article V of ICE's Certificate of Incorporation, unless the Board of Directors shall have determined that neither such person nor any of its related persons is an ETP Holder.

New Section 12.2 would provide that, for so long as ICE shall control, directly or indirectly, NYSE National (or its successor), the ICE board of directors shall not adopt any resolution to repeal or amend any provision of the certificate of incorporation of ICE unless such amendment or repeal shall either be (a) filed with or filed with and approved by the SEC under Section 19 of the Exchange Act and the rules promulgated thereunder or (b) submitted to the board of directors of NYSE National (or the board of directors of its successor), and if such board of directors determines that such amendment or repeal must be filed with or filed with and approved by the Commission under Section 19 of the Exchange Act and the rules promulgated thereunder before such amendment or repeal may be effectuated, then such amendment or repeal shall not be effectuated until filed with or filed with and approved by the Commission, as the case may be.

Proposed Eighth Amended and Restated Certificate of Incorporation of Intercontinental Exchange Holdings, Inc. (''ICE Holdings Certificate of Incorporation'')

The ICE Holdings Certificate of Incorporation is being amended as follows:

- On the first page, add ''Eighth'' and delete ''Seventh'' before ''Amended and Restated Certificate of Incorporation'' in the heading and update items (2)–(5) accordingly to reflect that this would be the eighth amendment and restatement

[6] *See* Securities Exchange Release No. 70210 (August 15, 2013), 78 FR 51758 (August 21, 2013) (approving rule changes related to NYSE Euronext becoming a wholly owned subsidiary of ICE (then called IntercontinentalExchange Group, Inc.)).

[7] NYSE Market (DE) and NYSE Regulation were previously parties to a Delegation Agreement whereby the NYSE delegated certain regulatory functions to NYSE Regulation and certain market functions to NYSE Market (DE). The Delegation Agreement was terminated when the NYSE re-integrated its regulatory and market functions. As a result, the two entities ceased being regulated subsidiaries. *See* Securities Exchange Act Release No. 75991 (September 28, 2015), 80 FR 59837 (October 2, 2015). NYSE Regulation has since been merged out of existence.

including replacing an incorrect reference to ''Sixth'' before ''Amended'' in item (3). The date would also be updated in the preamble on the first page.

• To distinguish between the ETP Holders of NYSE Arca Equities and those of NYSE National, subsection A.3.c.ii of Article V (Limitations on Voting and Ownership) would be amended to define an ETP Holder of NYSE Arca Equities as an ''NYSE Arca Equities ETP Holder.'' Obsolete references to NYSE Market (DE) and NYSE Regulation, would also be deleted.[8]

Subsection A.3.c of Article V would be amended to add a new subsection (v), similar to those in place for the other NYSE Exchanges, which would provide that, for so long as the ICE Holdings directly or indirectly controls NYSE National (or its successor), no person nor any of its related persons (as those terms are defined therein) is an ETP Holder (as proposed to be defined in the bylaws of NYSE National, discussed above) of NYSE National.

• Subsection A.3.d of Article V would be amended to add ''NYSE Arca'' before ''ETP Holder'' in one place to distinguish between the NYSE Arca Equities ETP Holders of and those of NYSE National.

Subsection (A)(3)(d) would be further amended to add a new subsection (v) similar to those in place for the other NYSE Exchanges. The new subsection would incorporate NYSE National into the existing restriction, such that the ICE Holdings Board of Directors would be restricted from adopting a resolution to approve the exercise of voting rights that would exceed 20% of the then outstanding votes entitled to be cast on such matter, where neither such person nor any of its related persons is, with respect to NYSE National, an NYSE National ETP Holder.

• Subsection B.3 of Article V would be amended to add a new subsection (g) similar to those in place for the other NYSE Exchanges, incorporating NYSE National into the restriction on the ICE Holdings board of directors adopting any resolution pursuant to clause (b) of Section B.2 of Article V of the ICE Holdings Certificate of Incorporation (which relates to ICE board of directors approval of ownership of ICE capital stock by a person together with its related persons in excess of 20%) unless the NYSE Holdings board of directors determines that, for so long as ICE Holdings controls NYSE National, neither such person nor any of its related persons is an NYSE National ETP Holder.

Proposed Fifth Amended and Restated Bylaws of Intercontinental Exchange Holdings, Inc. (''ICE Holdings Bylaws'')

The ICE Holdings Bylaws are being amended as follows:

• The cover page and heading on the first page would be amended to add ''Fifth'' and delete ''Fourth'' before ''Amended and Restated Bylaws'' to reflect that this would be the fifth amendment and restatement. The effective date on the cover page would also be updated.

• Similar to the ICE Bylaws discussed above, the ICE Holdings Bylaws would be amended to include ''NYSE National, Inc.'' in:

○ The definition of ''U.S. Regulated Subsidiaries'' in Article III, Section 3.15, which currently includes the NYSE, NYSE Market (DE), NYSE Regulation, NYSE Arca, LLC, NYSE Arca, NYSE Arca Equities, and the Exchange, and to provide that the term ''U.S. Regulated Subsidiaries'' includes those entities listed or their successors, but only so long as they continue to be controlled, directly or indirectly, by ICE Holdings. Obsolete references to NYSE Market (DE) and NYSE Regulation in that section would also be deleted;[9]

○ Article VIII (Confidential Information), Section 8.1, which would be amended to extend the same protection to confidential information relating to the self-regulatory function of NYSE National or its successor;[10] and

○ Article XI (Amendment to the Bylaws), Section 11.3, which provides that, for so long as ICE controls any of the U.S. Regulated Subsidiaries, any amendment to or repeal of the ICE Bylaws must either be (i) filed with or filed with and approved by the Commission under section 19 of the Exchange Act and the rules promulgated thereunder, or (ii) submitted to the boards of directors of the U.S. Regulated Subsidiaries or the boards of directors of their successors, in each case only to the extent that such entity continues to be controlled directly or indirectly by ICE Holdings. Obsolete references to NYSE Market (DE) and NYSE Regulation would also be deleted from Article VXI, Section 11.3.[11]

Proposed Independence Policy of the Board of Directors of Intercontinental Exchange, Inc. (''ICE Director Independence Policy'')

The ICE Director Independence Policy would be amended to add NYSE National to the section describing ''Independence Qualifications.'' In particular, NYSE National would be added to categories (1)(b) and (c) that refer to ''members,'' as defined in section 3(a)(3)(A)(i), 3(a)(3)(A)(ii), 3(a)(3)(A)(iii) and 3(a)(3)(A)(iv) of the Exchange Act.[12] The clause ''and 'Person Associated with an ETP Holder' (as defined in Rule 1.5 of NYSE National, Inc.)'' would also be added to category (1)(b) in reference to ''allied persons.'' NYSE National would also be added to subsections (4) and (5) of the ''Independence Qualifications'' section.[13] Obsolete references to NYSE Market (DE) and NYSE Regulation would also be deleted.[14]

Proposed Eighth Amended and Restated Limited Liability Company Agreement of NYSE Holdings LLC (''NYSE Holdings LLC Operating Agreement'')

The NYSE Holdings LLC Operating Agreement would be amended as follows:

• The heading and preamble would be amended to add ''Eighth'' and delete ''Seventh'' before ''Amended and Restated Limited Liability Agreement'' to reflect that this would be the eighth amendment and restatement. The effective date would also be updated. After ''This Agreement amends and restates in its entirety that'' in the second full sentence would be added the clause ''certain Seventh Amended and Restated Limited Liability Company Agreement, dated as of May 22, 2015, which amended and restated in its entirety that.''

• The current penultimate whereas clause would be amended by adding ''in May 2015'' before ''the Company'' and ''now desires to amend and restate'' immediately following would be replaced with ''amended and restated.'' ''Had'' and ''are'' would be changed to the past tense ''had'' [sic] and ''were'' in the final sentence.

• The following new whereas clause would be added immediately above the current last whereas clause: ''WHEREAS, the Company now desires to amend and restate the Seventh Amended and Restated Agreement to

[8] *See* note 7, *supra.*

[9] *See* note 7, *supra.*

[10] Article VIII, Section 8.1 would also be amended to delete obsolete references to NYSE Market (DE) and NYSE Regulation.

[11] *See* note 7, *supra.* Conforming changes to delete and replace connectors would also be made throughout.

[12] *See* 15 U.S.C. 78c(a)(3)(a).

[13] Conforming changes would also be made to delete and replace connectors. The link in footnote 2 to the NYSE Listed Company Manual and commentary would also be updated.

[14] *See* note 7, *supra.*

reflect the acquisition of NYSE National, Inc. by the Company's wholly-owned subsidiary NYSE Group, Inc.;''.

• The definition of ETP Holder in Article I (Interpretation), Section 1.1 would be deleted and new definitions of an NYSE Arca ETP Holder and NYSE National ETP Holder would be added. The obsolete definition of NYSE Market (DE) would be deleted.[15]

• Article IX (Voting and Ownership Limitations), Section 9.1(a)(3)(C) would be amended to add ''NYSE Arca'' before ''ETP Holder'' and the defined term ''NYSE Arca ETP Holder'' to distinguish between the ETP Holders of NYSE Arca Equities and those of NYSE National. An obsolete reference to NYSE Market (DE) would also be deleted from Section 9.1(a)(3)(C).[16]

Section 9.1(a)(3)(C) would be amended to add a new subsection (v) similar to those in place for the other NYSE Exchanges. The new subsection (v) would incorporate NYSE National into the existing restriction, such that the ICE Holdings board of directors would be restricted from adopting a resolution pursuant to clause (b) of Section 9.1(a)(2) unless the NYSE Holdings board of directors determines that, for so long as NYSE Holdings directly or indirectly controls NYSE National, Inc. (or its successor), neither such person nor any of its related persons is an ETP Holder (as defined in the bylaws of NYSE National, as such bylaws may be in effect from time to time) of NYSE National (''NYSE National ETP Holder''). The clause would also provide that any such person that is a related person of an ETP Holder shall hereinafter also be deemed to be an ''NYSE National ETP Holder'' for purposes of the agreement, as the context may require.

• Article IX, Section 9.1(a)(3)(D) would be amended to add ''NYSE Arca'' before ''ETP Holder.'' An outdated reference to NYSE Market (DE) would also be deleted.

Further, a new clause (v) would be added to Section 9.1(a)(3)(D) to incorporate NYSE National into the existing restriction on the NYSE Holdings Board of Directors, such that it would be restricted from adopting a resolution to approve the exercise of voting rights that would exceed 20% of the then outstanding votes entitled to be cast on such matter for so long as NYSE Holdings controls NYSE National. The clause would provide that ''for so long as the Corporation directly or indirectly controls NYSE National, neither such person nor any of its Related Persons is an NYSE National ETP Holder.''

• Article IX, Section 9.1(b)(3) of Article IX [sic] would be amended to add a new subpart (G) to incorporate NYSE National into the existing restriction on the NYSE Holdings Board of Directors, so that it would provide that, subject to its fiduciary obligations under applicable law, for so long as NYSE Holdings directly or indirectly controls NYSE National (or its successor), the board of directors of NYSE Holdings shall not adopt any resolution pursuant to (b) of Section 9.1(b)(2) of the NYSE Holdings LLC Operating Agreement, unless the board of directors of NYSE Holdings shall have determined that neither such person nor any of its related persons is an NYSE National ETP Holder.

Proposed Fifth Amended and Restated Certificate of Incorporation of NYSE Group, Inc. (''NYSE Group Certificate of Incorporation'')

The NYSE Group Certificate of Incorporation is being amended as follows:

• On the first page, add ''Fifth'' and delete ''Fourth'' before ''Amended and Restated Certificate of Incorporation'' in the heading. The Recitations would be amended to reflect that this would be the fifth amendment and restatement. First, the Fifth Recitation would be updated to reflect that a Fourth Amended and Restated Certificate of Incorporation was filed with the Secretary of State of the State of Delaware on December 29, 2014. A new Sixth Recitation would be updated to reflect that the Fifth Amended and Restated Certificate of Incorporation has been duly adopted. The current Sixth Recitation would become the Seventh and would reflect that the Fourth Amended and Restated Certificate of Incorporation is amended and restated in its entirety.

• NYSE National would be added to the list of ''Regulated Subsidiaries'' in Article 4 (Stock), Section 4(b)(1), which currently includes the NYSE, NYSE Market (DE), NYSE Regulation, NYSE Arca, LLC, NYSE Arca Equities, and NYSE MKT, and the obsolete references to NYSE Market (DE) and NYSE Regulation would be deleted.

• To distinguish between the ETP Holders of NYSE Arca Equities and those of NYSE National, Section 4(b)(1)(y) of Article IV would be amended to define an ETP Holder of NYSE Arca Equities as an ''NYSE Arca Equities ETP Holder.'' An outdated reference to NYSE Market (DE) would also be deleted.

Section 4(b)(1)(y) would also be amended to add a provision to [sic] similar to those in place for the other NYSE Exchanges providing that, for so long as NYSE Group directly or indirectly controls NYSE National (or its successor), neither such person nor any of its related persons is an ETP Holder (as defined in the rules of NYSE National, as such rules may be in effect from time to time) of NYSE National (defined as an ''NYSE National ETP Holder'') and that any such person that is a related person of an NYSE National ETP Holder shall hereinafter also be deemed to be an ''NYSE National ETP Holder'' for purposes of the certificate of incorporation, as the context may require.

• Further, subsection 4(b)(1)(z) of Article IV would be amended to define an ETP Holder of NYSE Arca Equities as an ''NYSE Arca Equities ETP Holder'' and delete an outdated reference to NYSE Market (DE). Subsection 4(b)(1)(z) would also be amended to incorporate NYSE National into the existing restriction on the ICE Holdings Board of Directors, such that it would be restricted from adopting a resolution to approve the exercise of voting rights that would exceed 20% of the then outstanding votes entitled to be cast on such matter, where neither such person nor any of its related persons is, with respect to NYSE National, an NYSE National ETP Holder.

• A new subpart (vii) would be added to subsection 4(b)(2)(C) of Article IV to incorporate NYSE National into the existing restriction on the NYSE Group Board of Directors, such that it would be restricted from adopting a resolution to approve the exercise of voting rights that would exceed 20% of the then outstanding votes entitled to be cast on such matter, where neither such person nor any of its related persons is, with respect to NYSE National, an NYSE National ETP Holder.[17]

• Article X (Confidential Information) would be amended to extend the same protection to confidential information relating to the self-regulatory function of NYSE National or its successor and delete obsolete references to NYSE Market (DE) and NYSE Regulation.

• Article XII (Amendments to Certificate of Incorporation) provides that, for so long as NYSE Group controls the Regulated Subsidiaries, before any amendment or repeal of any provision of the Certificate of Incorporation shall be effective, such amendment or repeal shall either (a) be filed with or filed with and approved by the SEC under

[15] *See* note 7, *supra*.

[16] *See* note 7, *supra*. Conforming changes to delete and replace connectors would also be made throughout.

[17] An obsolete reference to NYSE Market (DE) would also be deleted from Article IV, 4(b)(2)(C)(v).

Section 19 of the Exchange Act and the rules promulgated thereunder or (b) be submitted to the boards of directors of NYSE, NYSE Market (DE), NYSE Regulation, NYSE Arca, NYSE Arca Equities, and NYSE MKT or the boards of directors of their successors. Article XII would be amended to add NYSE National to subsection (b) and delete references to NYSE Market (DE) and NYSE Regulation.

Proposed Third Amended and Restated Bylaws of NYSE Group, Inc. (''NYSE Group Bylaws'')

The NYSE Group Bylaws are being amended as follows:

- Add ''Third'' and delete ''Second'' before ''Amended and Restated Bylaws'' in the heading to reflect that this would be the third amendment and restatement.
- Article VII (Miscellaneous), Section 7.9(A)(b) currently provides that, for so long as NYSE Group controls any of the NYSE Exchanges, any amendment to or repeal of the ICE Bylaws must either be (i) filed with or filed with and approved by the Commission under section 19 of the Exchange Act and the rules promulgated thereunder, or (ii) submitted to the boards of directors of the NYSE, NYSE Market (DE), NYSE Regulation, NYSE Arca, NYSE Arca Equities, and NYSE Alternext US LLC or the boards of directors of their successors, in each case only to the extent that such entity continues to be controlled directly or indirectly by ICE. Section 7.9(A)(b) would be amended to delete obsolete references to NYSE Market (DE) and NYSE Regulation, replace the outdated reference to ''NYSE Alternext US LLC'' with ''NYSE MKT LLC,'' and add NYSE National.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Exchange Act [18] in general, and with Section 6(b)(1) [19] in particular, in that it enables the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and to enforce compliance by its exchange members and persons associated with its exchange members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange. The Exchange believes that the proposed changes to the corporate documents of the NYSE Group and its intermediary and ultimate parent entities, including the ICE bylaws and director independence policy, ICE Holdings bylaws and certificate of incorporation, NYSE Holdings operating agreement, and the NYSE Group bylaws and certificate of incorporation, to reflect the Acquisition, including updating corporate names, would contribute to the orderly operation of the Exchange by adding clarity and transparency to the Exchange's rules and would enable the Exchange to continue to be so organized as to have the capacity to carry out the purposes of the Exchange Act and comply and enforce compliance with the provisions of the Exchange Act by its members and persons associated with its members. The Exchange therefore believes that approval of the amendment to the Bylaws is consistent with Section 6(b)(1).

For similar reasons, the Exchange also believes that this filing furthers the objectives of Section 6(b)(5) of the Exchange Act [20] because the proposed rule change would be consistent with and facilitate would create [sic] a governance and regulatory structure that is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. As discussed above, the proposed updates to the corporate documents and replacement of outdated or obsolete references removes impediments to and perfects the mechanism of a free and open market by removing confusion that may result from having these references in the governing documents following the Acquisition. The Exchange further believes that the proposal removes impediments to and perfects the mechanism of a free and open market by ensuring that persons subject to the Exchange's jurisdiction, regulators, and the investing public can more easily navigate and understand the governing documents. The Exchange further believes that eliminating an obsolete reference would not be inconsistent with the public interest and the protection of investors because investors will not be harmed and in fact would benefit from increased transparency, thereby reducing potential confusion. Removing such obsolete references will also further the goal of transparency and add clarity to the Exchange's rules.

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 Exchange Act. The proposed rule change is not intended to address competitive issues but rather is concerned solely with updating the Exchange's rules to reflect the Acquisition and to remove obsolete references.

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 (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–NYSEArca–2016–167 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2016–167. This file number should be included on the

[18] 15 U.S.C. 78f(b).

[19] 15 U.S.C. 78f(b)(1).

[20] 15 U.S.C. 78f(b)(5).

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–2016–167 and should be submitted on or before January 19, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–31490 Filed 12–28–16; 8:45 am]

BILLING CODE 8011–01–P

[21] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79673; File No. SR–NYSEArca–2016–89]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Amendment Nos. 2 and 3 to Proposed Rule Change Amending the Co-Location Services Offered by the Exchange To Add Certain Access and Connectivity Fees

December 22, 2016.

On August 16, 2016, NYSE Arca, Inc. (''NYSE Arca'' or the ''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 amend the co-location services offered by the Exchange to: (1) Provide additional information regarding the access to various trading and execution services; connectivity to market data feeds and testing and certification feeds; connectivity to Third Party Systems; and connectivity to DTCC provided to Users using data center local area networks; and (2) establish fees relating to a User's access to various trading and execution services; connectivity to market data feeds and testing and certification feeds; connectivity to DTCC; and other services. The proposed rule change was published for comment in the **Federal Register** on August 26, 2016.[3] The Commission received no comments in response to the proposed rule change.[4] On October 4, 2016, the Commission extended the time period within which to 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 November 24, 2016.[5]

On November 2, 2016, the Exchange filed Amendment No. 1 to the proposed rule change.[6] On November 29, 2016, the Commission instituted proceedings to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.[7] In response to the Order Instituting Proceedings, the Commission received additional comment letters regarding the proposed rule change.[8]

On December 9, 2016, the Exchange filed Amendment No. 2 to the proposed rule change as described in Items I and II below, which Items have been prepared by Exchange. On December 13, 2016 the Exchange filed Amendment No. 3 to the proposed rule change.[9] The Commission is publishing this notice to solicit comments on Amendment Nos. 2 and 3 to the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Amendments

The Exchange proposes to amend the co-location services offered by the Exchange to establish fees relating to Users' access to third party trading and execution services; connectivity to third party data feeds and testing and certification feeds; access to clearing; and other services. In addition, this proposed rule change reflects changes to the NYSE Arca Options Fee Schedule (the ''Options Fee Schedule'') and, through its wholly owned subsidiary NYSE Arca Equities, Inc. (''NYSE Arca Equities''), the NYSE Arca Equities Schedule of Fees and Charges for Exchange Services (the ''Equities Fee Schedule'' and, together with the Options Fee Schedule, the ''Fee Schedules'') related to these co-location services. This Amendment No. 2 [10] supersedes the original filing and Amendment 1 in their entirety.[11] The

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 34–78628 (August 22, 2016), 81 FR 59004 (''Notice'').

[4] The Commission notes that it did receive one comment letter on a related filing, NYSE–2016–45 (the ''NYSE Companion Filing''), which is equally relevant to this filing. *See* letter to Brent J. Fields, Secretary, Commission, from John Ramsay, Chief Market Policy Officer, Investors Exchange LLC (IEX), dated September 9, 2016.

On September 23, 2016, the NYSE submitted a response to the IEX letter.

[5] *See* Securities Exchange Act Release No. 34–78967 (September 28, 2016), 81 FR 68480.

[6] Amendment No. 1 is available on the Commission's Web site at *https://www.sec.gov/comments/sr-nysearca-2016-89/nysearca201689-1.pdf.*

[7] *See* Securities Exchange Act Release 34–79379 (November 22, 2016), 81 FR 86036.

[8] *See* letter to Brent J. Fields, Commission, from Melissa MacGregor, Managing Director and Associate General Counsel, SIFMA, dated December 12, 2016; letter to Brent J. Fields, Commission, from Joe Wald, Chief Executive Officer, Clearpool Group, dated December 16, 2016; letter to Brent J. Fields, Secretary, Commission, from John Ramsay, Chief Market Policy Officer, Investors Exchange LLC (IEX), dated December 21, 2016. All comments received by the Commission on the proposed rule change are available on the Commission's Web site at: *https://www.sec.gov/comments/sr-nysearca-2016-89/nysearca201689.shtml.*

The Commission notes that it received an additional letter on the NYSE Companion Filing. *See* letter to Brent J. Fields, Commission, from Adam C. Cooper, Senior Managing Director and Chief Legal Officer, Citadel Securities, dated December 12, 2016. All comments received by the Commission on the NYSE Companion Filing are available on the Commission's Web site at: *https://www.sec.gov/comments/sr-nyse-2016-45/nyse201645.shtml.*

[9] The Commission notes that the Exhibit 5 filed with Amendment No. 2 contained erroneous rule text and therefore was corrected in Amendment No. 3. Amendment Nos. 2 and 3 are available at *https://www.sec.gov/comments/sr-nysearca-2016-89/nysearca201689-3.pdf.*

[10] *See* supra note 9, noting that Amendment No. 2 was modified in part by Amendment No. 3. Accordingly, the Commission notes that Amendment Nos. 2 and 3 together supersede the original filing, as modified by Amendment No. 1, in its entirety.

[11] The Securities and Exchange Commission (''Commission'') has issued an order instituting proceedings to determine whether to approve or disapprove the proposed rule change, as modified by amendments 1 and 2. See Securities Exchange Act Release No. 79379 (November 22, 2016), 81 FR 86036 (November 29, 2016) (SR–NYSEArca–2016–89) (the ''November 22 Order''). In its filing, as amended by amendment 1, the Exchange proposed adding to the Fee Schedules (a) a more detailed description of the connectivity to certain market data products (the ''Included Data Products'') that Users receive with connections to the local area networks available in the data center; and (b) connectivity fees for connecting to other market

Continued

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 the co-location [12] services offered by the Exchange to establish fees relating to Users' [13] access to third party trading and execution services; connectivity to third party data feeds and testing and certification feeds; access to clearing; and other services.

More specifically, the Exchange proposes to revise the Fee Schedules to include:

a. Fees for connectivity to:

- The execution systems of third party markets and other content service providers (''Third Party Systems'');
- data feeds from third party markets and other content service providers (the ''Third Party Data Feeds'');
- third party testing and certification feeds;
- Depository Trust & Clearing Corporation (''DTCC'') services; and

b. fees for virtual control circuits (''VCCs'') between two Users. VCCs are unicast connections between two participants over dedicated bandwidth.[14]

The Exchange provides access to Third Party Systems (''Access'') and connectivity to Third Party Data Feeds, third party testing and certification feeds, and DTCC (collectively, ''Connectivity'') as conveniences to Users. Use of Access or Connectivity is completely voluntary, and several other access and connectivity options are available to a User. As alternatives to using the Access and Connectivity provided by the Exchange, a User may access or connect to such services and products through another User or through a connection to an Exchange access center outside the data center, third party access center, or third party vendor. The User may make such connection through a third party telecommunication provider, third party wireless network, the Exchange's Secure Financial Transaction Infrastructure (''SFTI'') network, or a combination thereof.

Similarly, the Exchange provides VCCs as a convenience to Users. Use of a VCC is completely voluntary. As an alternative to an Exchange-provided VCC, a User may connect to another User through a fiber connection (''cross connect'').[15]

Connectivity

Connectivity to Third Party Systems

The Exchange proposes to revise the Fee Schedules to provide that Users may obtain connectivity to Third Party Systems of multiple third party markets and other content service providers for a fee. Users connect to Third Party Systems over the internet protocol (''IP'') network, a local area network available in the data center.[16] The Exchange selects what connectivity to Third Party Systems to offer in the data center based on User demand.

In order to obtain access to a Third Party System, a User enters into an agreement with the relevant third party content service provider, pursuant to which the third party content service provider charges the User for access to the Third Party System. The Exchange then establishes a unicast connection between the User and the relevant third party content service provider over the IP network. The Exchange charges the User for the connectivity to the Third Party System. A User only receives, and is only charged for, access to Third Party Systems for which it enters into agreements with the third party content service provider.

With the exception of the Intercontinental Exchange (''ICE'') feed,[17] the Exchange has no ownership interest in the Third Party Systems. Establishing a User's access to a Third Party System does not give the Exchange any right to use the Third Party Systems. Connectivity to a Third Party System does not provide access or order entry to the Exchange's execution system, and a User's connection to a Third Party System is not through the Exchange's execution system.[18]

The Exchange charges a monthly recurring fee for connectivity to a Third Party System. Specifically, when a User

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data products of the Exchange and its affiliates, New York Stock Exchange LLC and NYSE MKT LLC (the ''Premium NYSE Data Products''). In the November 22 Order, the Commission cites language from the proposed rule change:

the Exchange also stated that the expectation of co-location was that normally Users would expect reduced latencies in . . . receiving market data from the Exchange by being colocated. Therefore, as the Exchange states in Amendment No. 2, both Included Data Products and Premium NYSE Data Products are 'directly related to the purpose of co-location.'

Id., at 86040. It goes on to say that, if Included Data Products and Premium NYSE Data Products are ''integral to co-located Users for trading on the Exchange,'' it was questionable whether obtaining the information from another source is a viable alternative. Id. The Exchange disagrees with the Commission's description of Included Data Products and Premium NYSE Data Products as ''integral'' to Users for trading on the Exchange. Being related to the purpose of co-location is not the same as being integral for trading. A User is not required to receive either Included Data Products or Premium NYSE Data Products in order to trade on the Exchange.

[12] The Exchange initially filed rule changes relating to its co-location services with the Commission in 2010. *See* Securities Exchange Act Release No. 63275 (November 8, 2010), 75 FR 70048 (November 16, 2010) (SR–NYSEArca–2010–100) (the ''Original Co-location Filing''). The Exchange operates a data center in Mahwah, New Jersey (the ''data center'') from which it provides co-location services to Users.

[13] For purposes of the Exchange's co-location services, a ''User'' means any market participant that requests to receive co-location services directly from the Exchange. *See* Securities Exchange Act Release No. 76010 (September 29, 2015), 80 FR 60197 (October 5, 2015) (SR–NYSEArca–2015–82). As specified in the Fee Schedules, a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange's affiliates New York Stock Exchange LLC (''NYSE LLC'') and NYSE MKT LLC (''NYSE MKT and, together with NYSE LLC, the ''Affiliate SROs''). *See* Securities Exchange Act Release No. 70173 (August 13, 2013), 78 FR 50459 (August 19, 2013) (SR–NYSEArca–2013–80).

[14] Information flows over existing network connections in two formats: ''unicast'' format, which is a format that allows one-to-one communication, similar to a phone line, in which information is sent to and from the Exchange; and ''multicast'' format, which is a format in which information is sent one-way from the Exchange to multiple recipients at once, like a radio broadcast.

[15] *See* Original Co-location Filing, *supra* note 5, at 70049 and Securities Exchange Act Release No. 74219 (February 6, 2015), 80 FR 7899 (February 12, 2015) (SR–NYSEArca–2015–03) (notice of filing and immediate effectiveness of proposed rule change to include IP network connections and fiber cross connects between a User's cabinet and non-User's equipment as co-location services) (the ''IP Network Release'').

[16] *See id.,* at 7899.

[17] ICE is owned by the Exchange's ultimate parent, Intercontinental Exchange, Inc., and so the Exchange has an indirect interest in the ICE feeds. The ICE feeds include both market data and trading and clearing services, but the Exchange includes it as a Third Party Data Feed. In order for a User to receive an ICE feed, ICE must provide authorization for the User to receive both data and trading and clearing services.

[18] The Exchange has a dedicated network connection to each of the Third Party Systems.

requests access to a Third Party System, it identifies the applicable third party market or other content service provider and what bandwidth connection it requires.

The monthly recurring fee the Exchange charges Users for unicast connectivity to each Third Party System varies by the bandwidth of the connection, as follows:

Bandwidth of connection to third party system	Monthly recurring fee per connection to third party system
1 Mb	$200
3 Mb	$400
5 Mb	$500
10 Mb	$800
25 Mb	$1,200
50 Mb	$1,800
100 Mb	$2,500
200 Mb	$3,000
1 Gb	$3,500

The Exchange provides connectivity to the following Third Party Systems:

Americas Trading Group (ATG)
BATS
Boston Options Exchange (BOX)
Chicago Board Options Exchange (CBOE)
Credit Suisse
International Securities Exchange (ISE)
Nasdaq
National Stock Exchange
NYFIX Marketplace

In addition to the connectivity fees, the Exchange proposes to add language to the Fee Schedules stating the following:

Pricing for access to the execution systems of third party markets and other service providers (Third Party Systems) is for connectivity only. Connectivity to Third Party Systems is subject to any technical provisioning requirements and authorization from the provider of the data feed. Connectivity to Third Party Systems is over the IP network. Any applicable fees are charged independently by the relevant third party content service provider. The Exchange is not the exclusive method to connect to Third Party Systems.

Connectivity to Third Party Data Feeds

The Exchange proposes to revise the Fee Schedules to provide that Users may obtain connectivity to Third Party Data Feeds for a fee. The Exchange receives Third Party Data Feeds from multiple national securities exchanges and other content service providers at its data center. It then provides connectivity to that data to Users for a fee. With the exceptions of Global OTC and NYSE Global Index, Users connect to Third Party Data Feeds over the IP network.[19]

The Exchange notes that charging Users a monthly fee for connectivity to Third Party Data Feeds is consistent with the monthly fee Nasdaq charges its co-location customers for connectivity to third party data. For instance, Nasdaq charges its co-location customers monthly fees of $1,500 and $4,000 for connectivity to BATS Y and BATS, respectively, and of $2,500 for connectivity to EDGA or EDGX.[20]

In order to connect to a Third Party Data Feed, a User enters into a contract with the relevant third party market or other content service provider, pursuant to which the content service provider charges the User for the Third Party Data Feed. The Exchange receives the Third Party Data Feed over its fiber optic network and, after the data provider and User enter into the contract and the Exchange receives authorization from the data provider, the Exchange re-transmits the data to the User over the User's port. The Exchange charges the User for the connectivity to the Third Party Data Feed. A User only receives, and is only charged for, connectivity to the Third Party Data Feeds for which it enters into contracts.

With the exception of the ICE, Global OTC and NYSE Global Index feeds,[21] the Exchange has no affiliation with the sellers of the Third Party Data Feeds. It has no right to use the Third Party Data Feeds other than as a redistributor of the data. The Third Party Data Feeds do not provide access or order entry to the Exchange's execution system. With the exception of the ICE feeds, the Third Party Data Feeds do not provide access or order entry to the execution systems of the third party generating the feed.[22] The Exchange receives Third Party Data Feeds via arms-length agreements and it

[19] *See* IP Network Release, *supra* note 8, at 7899 (''The IP network also provides Users with access to away market data products.''). Users can connect to Global OTC and NYSE Global Index over the IP network or the Liquidity Center Network (''LCN''), a local area network available in the data center.

[20] *See* Nasdaq Stock Market Rule 7034.

[21] ICE and the Global OTC alternative trading system are both owned by the Exchange's ultimate parent, Intercontinental Exchange, Inc., and so the Exchange has an indirect interest in the ICE and Global OTC feeds. The NYSE Global Index feed includes index and exchange traded product valuations data, with data drawn from the Exchange, the Affiliate SROs, and third party exchanges. Because it includes third party data, the NYSE Global Index feed is considered a Third Party Data Feed. As with all Third Party Data Feeds, the Exchange is not the exclusive method to connect to the ICE, Global OTC or NYSE Global Index feeds.

[22] Unlike other Third Party Data Feeds, the ICE feeds include both market data and trading and clearing services. In order to receive the ICE feeds, a User must receive authorization from ICE to receive both market data and trading and clearing services.

has no inherent advantage over any other distributor of such data.

The Exchange charges a monthly recurring fee for connectivity to each Third Party Data Feed. The monthly recurring fee is per Third Party Data Feed, with the exception that the monthly recurring feed for SuperFeed and MSCI varies by the bandwidth of the connection. Depending on its needs and bandwidth, a User may opt to receive all or some of the feeds or services included in a Third Party Data Feed.

The following table shows the feeds that connectivity to each Third Party Data Feed provides, together with the applicable monthly recurring fee.

Third Party Data Feed	Monthly recurring connectivity fee per Third Party Data Feed
Bats BZX Exchange (BZX) and Bats BYX Exchange (BYX)	$2,000
Bats EDGX Exchange (EDGX) and Bats EDGA Exchange (EDGA)	2,000
Boston Options Exchange (BOX)	1,000
Chicago Board Options Exchange (CBOE)	2,000
Chicago Stock Exchange (CHX)	400
Euronext	600
Financial Industry Regulatory Authority (FINRA)	500
Global OTC	100
Intercontinental Exchange (ICE)	1,500
Montréal Exchange (MX)	1,000
MSCI 5 Mb	500
MSCI 25 Mb	1,200
NASDAQ Stock Market	2,000
NASDAQ OMX Global Index Data Service	100
NASDAQ OMDF	100
NASDAQ UQDF& UTDF	500
NYSE Global Index	100
OTC Markets Group	1,000
SR Labs—SuperFeed 500 Mb	250
SR Labs—SuperFeed >500 Mb to 1.25 Gb	800
SR Labs—SuperFeed >1.25 Gb	1,000
TMX Group	2,500

In addition to the above connectivity fees, the Exchange proposes to add the following language to the Fee Schedules:

Pricing for data feeds from third party markets and other content service providers (Third Party Data Feeds) is for connectivity only. Connectivity to Third Party Data Feeds is subject to any technical provisioning requirements and authorization from the provider of the data feed. Connectivity to Third Party Data Feeds is over the IP network, with the exception that Users can connect to Global OTC and NYSE Global Index over the IP network or LCN. Market data fees are charged independently by the relevant third party market or content service provider. The Exchange is not the exclusive method to connect to Third Party Data Feeds.

Third Party Data Feed providers may charge redistribution fees, such as Nasdaq's Extranet Access Fees and OTC Markets Group's Access Fees.[23] When the Exchange receives a redistribution fee, it passes through the charge to the User, without change to the fee. The fee is labeled as a pass-through of a redistribution fee on the User's invoice. The Exchange proposes to add language to the Fee Schedules accordingly.

The Exchange provides third party markets or content providers that are also Users connectivity to their own Third Party Data Feeds. The Exchange does not charge Users that are third party markets or content providers for connectivity to their own feeds, as in the Exchange's experience such parties generally receive their own feeds for purposes of diagnostics and testing. The Exchange proposes to add language to the Fee Schedules accordingly.

Connectivity to Third Party Testing and Certification Feeds

The Exchange offers Users connectivity to third party certification and testing feeds. Certification feeds are used to certify that a User conforms to any of the relevant content service provider's requirements for accessing Third Party Systems or receiving Third Party Data, while testing feeds provide Users an environment in which to conduct tests with non-live data.[24] Such feeds, which are solely used for certification and testing and do not carry live production data, are available over the IP network.

The Exchange proposes to revise the Fee Schedules to include connectivity to third party certification and testing feeds. The Exchange charges a connectivity fee of $100 per month per feed.

The Exchange proposes to add the following connectivity fees and language to the Fee Schedules:

Connectivity to third party certification and testing feeds.	$100 monthly recurring fee per feed.

The Exchange provides connectivity to third party testing and certification feeds provided by third party markets and other content service providers. Pricing for third party testing and certification feeds is for connectivity only. Connectivity to third party testing and certification feeds is subject to any technical provisioning requirements and authorization from the provider of the data feed. Connectivity to third party testing and certification feeds is over the IP network. Any applicable fees are charged independently by the relevant third party market or content service provider. The Exchange is not the exclusive method to connect to third party testing and certification feeds.

Connectivity to DTCC

The Exchange provides Users connectivity to DTCC for clearing, fund

[23] *See* NASDAQ Stock Market LLC Rule 7025, ''Extranet Access Fee'', and OTC Markets Market Data Distribution Agreement Appendix B, ''Fees'' at *http://www.otcmarkets.com/content/doc/market-data-fees-2016.pdf. See also* Securities Exchange Act Release No. 74040 (January 13, 2015), 80 FR 2460 (January 16, 2015) (SR–NASDAQ–2015–003).

[24] For example, a User that trades on a third party exchange may wish to test the exchange's upcoming releases and product releases or may wish to test a new algorithm in a testing environment prior to making it live.

transfer, insurance, and settlement services.[25] The Exchange proposes to revise the Fee Schedules to include connectivity to DTCC. The Exchange charges a connectivity fee of $500 per month for connections to DTCC of 5 Mb and $2,500 for connections of 50 Mb. Connectivity to DTCC is available over the IP network.

In order to connect to DTCC, a User enters into a contract with DTCC, pursuant to which DTCC charges the User for the services provided. The Exchange receives the DTCC feed over its fiber optic network and, after DTCC and the User enter into the services contract and the Exchange receives authorization from DTCC, the Exchange provides connectivity to DTCC to the User over the User's IP network port. The Exchange charges the User for the connectivity to DTCC.

Connectivity to DTCC does not provide access or order entry to the Exchange's execution system, and a User's connection to DTCC is not through the Exchange's execution system.

The Exchange proposes to add the following connectivity fees and language to the Fee Schedules:

5 Mb connection to DTCC.	$500 monthly recurring fee.
50 Mb connection to DTCC—.	$2,500 monthly recurring fee.

Pricing for connectivity to DTCC feeds is for connectivity only. Connectivity to DTCC feeds is subject to any technical provisioning requirements and authorization from DTCC. Connectivity to DTCC feeds is over the IP network. Any applicable fees are charged independently by DTCC. The Exchange is not the exclusive method to connect to DTCC feeds.

Virtual Control Circuits

Finally, the Exchange proposes to revise the Fee Schedules to offer VCCs between two Users. VCCs are connections between two points over dedicated bandwidth using the IP network. A VCC (previously called a ''peer to peer'' connection) is a two-way connection which the two participants can use for any purpose.

The Exchange bills the User requesting the VCC, but will not set up a VCC until the other User confirms that it wishes to have the VCC set up.

The Exchange proposes to revise the Fee Schedules to include VCCs between two Users. The fee for VCCs is based on the bandwidth utilized, as follows:

Type of service	Description	Amount of charge
Virtual Control Circuit between two Users.	1 Mb	$200 monthly charge.
	3 Mb	$400 monthly charge.
	5 Mb	$500 monthly charge.
	10 Mb	$800 monthly charge.
	25 Mb	$1,200 monthly charge.
	50 Mb	$1,800 monthly charge.
	100 Mb	$2,500 monthly charge.

General

As is the case with all Exchange co-location arrangements, (i) neither a User nor any of the User's customers would be permitted to submit orders directly to the Exchange unless such User or customer is a member organization, a Sponsored Participant or an agent thereof (*e.g.,* a service bureau providing order entry services); (ii) use of the co-location services proposed herein would be completely voluntary and available to all Users on a non-discriminatory basis;[26] and (iii) a User would only incur one charge for the particular co-location service described herein, regardless of whether the User connects only to the Exchange or to the Exchange and one or both of the Affiliate SROs.[27]

The proposed change is not otherwise intended to address any other issues relating to co-location services and/or related fees, and the Exchange is not aware of any problems that Users would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[28] in general, and furthers the objectives of Sections 6(b)(5) of the Act,[29] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, to protect investors and the public interest and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed changes remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, protect investors and the public interest because, by offering Access and Connectivity, the Exchange gives each User additional options for addressing its access and connectivity needs, responding to User demand for access and connectivity options. Providing Access and Connectivity helps each User tailor its data center operations to the requirements of its business operations by allowing it to select the form and latency of access and connectivity that best suits its needs. The Exchange provides Access and Connectivity as conveniences to Users. Use of Access or Connectivity is completely voluntary, and each User has several other access and connectivity options available to it. As alternatives to using the Access and Connectivity provided by the Exchange, a User may access or connect to such services and products through another User or through a connection to an Exchange access center outside the data center, third party access center, or third party vendor. The User may make such connection through a third party telecommunication provider, third party wireless network, the SFTI network, or a combination thereof.

The Exchange believes that providing access to Third Party Systems and connectivity to Third Party Data Feeds, third party testing and certification feeds and DTCC, as well as revising the Fee Schedules to describe such services, would remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, protect investors and the public interest because the proposed changes would make the

[25] Such connectivity to DTCC is distinct from the access to shared data services for clearing and settlement services that a User receives when it purchases access to the LCN or IP network. The shared data services allow Users and other entities with access to the Trading Systems to post files for settlement and clearing services to access.

[26] As is currently the case, Users that receive co-location services from the Exchange will not receive any means of access to the Exchange's trading and execution systems that is separate from, or superior to, that of other Users. In this regard, all orders sent to the Exchange enter the Exchange's trading and execution systems through the same order gateway, regardless of whether the sender is co-located in the data center or not. In addition, co-located Users do not receive any market data or data service product that is not available to all Users, although Users that receive co-location services normally would expect reduced latencies in sending orders to, and receiving market data from, the Exchange.

[27] *See* SR–NYSEArca–2013–80, *supra* note 6, at 50459. The Affiliate SROs have also submitted substantially the same proposed rule change to propose the changes described herein. *See* SR–NYSE–2016–45 and SR–NYSEArca–2016–89.

[28] 15 U.S.C. 78f(b).

[29] 15 U.S.C. 78f(b)(5).

descriptions of market participants' access and connectivity options and the related fees more accessible and transparent, thereby providing market participants with clarity as to what options for connectivity are available to them and what the related costs are. Including a description of the access to Third Party Systems and connectivity to Third Party Data Feeds that Users receive is consistent with Nasdaq's Rule 7034, which includes similar information.[30]

In addition, the Exchange believes that providing connectivity to third party testing and certification feeds removes impediments to, and perfects the mechanisms of, a free and open market and a national market system and, in general, protects investors and the public interest because such feeds provide Users an environment in which to conduct tests with non-live data, including testing for upcoming releases and product enhancements or the User's own software development, and allow Users to certify conformance to any applicable technical requirements.

Similarly, the Exchange believes that providing connectivity to DTCC removes impediments to, and perfects the mechanisms of, a free and open market and a national market system and, in general, protects investors and the public interest because it provides efficient connection to clearing, fund transfer, insurance, and settlement services.

The Exchange believes that providing Users with VCCs removes impediments to, and perfects the mechanisms of, a free and open market and a national market system because VCCs provide each User with an additional option for connectivity to another User, helping it tailor its data center operations to the requirements of its business operations by allowing it to select the form of connectivity that best suits its needs. The Exchange provides VCCs as a convenience to Users. Use of a VCC is completely voluntary. As an alternative to an Exchange-provided VCC, a User may connect to another User through a cross connect.

The Exchange also believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,[31] 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 fees changes are consistent with Section 6(b)(4) of the Act for multiple reasons. The Exchange operates in a highly competitive market in which exchanges offer co-location services as a means to facilitate the trading and other market activities of those market participants who believe that co-location enhances the efficiency of their operations. Accordingly, fees charged for co-location services are constrained by the active competition for the order flow of, and other business from, such market participants. If a particular exchange charges excessive fees for co-location services, affected market participants will opt to terminate their co-location arrangements with that exchange, and adopt a possible range of alternative strategies, including placing their servers in a physically proximate location outside the exchange's data center (which could be a competing exchange), or pursuing strategies less dependent upon the lower exchange-to-participant latency associated with co-location. Accordingly, the exchange charging excessive fees would stand to lose not only co-location revenues but also the liquidity of the formerly co-located trading firms, which could have additional follow-on effects on the market share and revenue of the affected exchange.

The Exchange believes that the services and fees proposed herein are equitably allocated and not unfairly discriminatory because, in addition to the services being completely voluntary, they are available to all Users on an equal basis (*i.e.,* the same products and services are available to all Users). All Users that voluntarily select to receive access to Third Party Systems, connectivity to Third Party Data Feeds, third party testing and certification feeds and DTCC, or a VCC between Users would be charged the same amount for the same services.

The Exchange believes that the services and fees proposed herein are reasonable, equitably allocated and not unfairly discriminatory because the Exchange provides Access and Connectivity as conveniences to Users. Use of Access or Connectivity is completely voluntary, and each User has several other access and connectivity options available to it. As alternatives to using the Access and Connectivity provided by the Exchange, a User may access or connect to such services and products through another User or through a connection to an Exchange access center outside the data center, third party access center, or third party vendor. The User may make such connection through a third party telecommunication provider, third party wireless network, the SFTI network, or a combination thereof. Users that opt to use Access or Connectivity would not receive access or connectivity that is not available to all Users, as all market participants that contract with the relevant market or content provider may receive access or connectivity. Similarly, the Exchange provides VCCs between Users as a convenience to Users. Use of a VCC is completely voluntary. As an alternative to an Exchange-provided VCC, a User may connect to another User through a cross connect.

The Exchange believes that the proposed charges are reasonable, equitably allocated and not unfairly discriminatory because the Exchange offers Access, Connectivity, and VCCs as conveniences to Users, but in order to do so must provide, maintain and operate the data center facility hardware and technology infrastructure. The Exchange must handle the installation, administration, monitoring, support and maintenance of such services, including by responding to any production issues. Since the inception of co-location, the Exchange has made numerous improvements to the network hardware and technology infrastructure and has established additional administrative controls. The Exchange has expanded the network infrastructure to keep pace with the increased number of services available to Users, including the increasing bandwidth required for Access and Connectivity, including resilient and redundant feeds. In addition, in order to provide connectivity to Third Party Data Feeds, Third Party Systems, third party testing and certification feeds and DTCC, the Exchange must maintain multiple connections to each Third Party Data Feed, Third Party System, and DTCC, allowing the Exchange to provide resilient and redundant connections; adapt to any changes made by the relevant third party; and cover any applicable fees (other than redistribution fees) charged by the relevant third party, such as port fees.

The Exchange believes that charging separate connectivity fees for Third Party Data Feeds and access to Third Party Systems, third party testing and certification feeds and connectivity to DTCC is reasonable and not unfairly discriminatory because, in the Exchange's experience, not all Users

[30] *See* Nasdaq Stock Market Rule 7034—Market Data Connectivity (''Pricing is for connectivity only and is similar to connectivity fees imposed by other vendors. The fees are generally based on the amount of bandwidth needed to accommodate a particular feed and Nasdaq is not the exclusive method to get market data connectivity. Market data fees are charged independently by the Nasdaq Stock Market and other exchanges.'').

[31] 15 U.S.C. 78f(b)(4).

connect to Third Party Data Feeds, Third Party Systems, third party testing and certification feeds or DTCC. By charging only those Users that receive such connectivity, only the Users that directly benefit from it support its cost. In addition, Users are not required to use any of their bandwidth to connect to Third Party Data Feeds, third party testing and certification feeds or DTCC, or to access Third Party Systems, unless they wish to do so.

The Exchange believes the fees for connectivity to Third Party Data Feeds are reasonable because they allow the Exchange to defray or cover the costs associated with offering Users connectivity to Third Party Data Feeds while providing Users the convenience of receiving such Third Party Data Feeds within co-location, helping them tailor their data center operations to the requirements of their business operations by allowing them to select the form and latency of connectivity that best suits their needs. The Exchange believes that its proposed charges for connectivity to Third Party Data Feeds are similar to the connectivity fees Nasdaq imposes on its co-location customers. For instance, Nasdaq charges its co-location customers monthly fees of $1,500 and $4,000 for connectivity to BATS Y and BATS, respectively, and of $2,500 for connectivity to EDGA or EDGX.[32]

The Exchange believes that its connectivity fees for access to Third Party Systems are reasonable because they allow the Exchange to defray or cover the costs associated with offering such access while providing Users the convenience of being able to access such Third Party Systems, helping them tailor their data center operations to the requirements of their business operations by allowing them to select the form and latency of connectivity that best suits their needs. Similarly, the Exchange believes that its fees for connectivity to DTCC are reasonable because they allow the Exchange to defray or cover the costs associated with offering such access while providing Users the benefit of an efficient connection to clearing, fund transfer, insurance, and settlement services.

The monthly recurring fees the Exchange charges Users for connectivity to Third Party Systems, the MSCI and SuperFeed Third Party Data Feeds, and DTCC, as well as for VCCs between Users, vary by the bandwidth of the connection. The Exchange also believes such fees are reasonable because the monthly recurring fee varies by the bandwidth of the connection, and so is generally proportional to the bandwidth required. The Exchange notes that some of the monthly recurring fees for connectivity to SuperFeed and DTCC differ from the fees for the other connections of the same bandwidth. The Exchange believes that such difference in pricing is reasonable, equitably allocated and not unfairly discriminatory because, although the bandwidth may be the same, the competitive considerations and the costs the Exchange incurs in providing such connections and VCCs may differ.

The Exchange also believes that its connectivity fees for access to third party testing and certification feeds are reasonable because they allow the Exchange to defray or cover the costs associated with offering such access while providing Users the benefit of having an environment in which to conduct tests with non-live data, including testing for upcoming releases and product enhancements or the User's own software development, and to certify conformance to any applicable technical requirements.

The Exchange believes it is reasonable that redistribution fees charged by providers of Third Party Data Feeds are passed through to the User, without change to the fee. If not passed through, the cost of the re-distribution fees would be factored into the proposed fees for connectivity to Third Party Data Feeds. The Exchange believes that passing through the fees makes them more transparent to the User, allowing the User to better assess the cost of the connectivity to a Third Party Data Feed by seeing the individual components of the cost, *i.e.* the Exchange's fee and the redistribution fee.

The Exchange believes that it is reasonable that it does not charge third party markets or content providers for connectivity to their own Third Party Data Feeds, as in the Exchange's experience such parties generally receive their own feeds for purposes of diagnostics and testing. The Exchange believes that it removes impediments to, and perfects the mechanisms of, a free and open market and a national market system and, in general, protects investors and the public interest to facilitate such diagnostics and testing.

Finally, the Exchange also believes that its fees for VCCs between two Users are reasonable because they allow the Exchange to defray or cover the costs associated with offering such VCCs while providing Users the benefit of an additional option for connectivity to another User, helping them tailor their data center operations to the requirements of their business operations by allowing them to select the form of connectivity that best suits their needs. As an alternative to an Exchange-provided VCC, a User may connect to another User through a cross connect.

For the reasons above, the proposed changes do not unfairly discriminate between or among market participants that are otherwise capable of satisfying any applicable co-location fees, requirements, terms and conditions established from time to time by the Exchange.

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,[33] the Exchange believes that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because, in addition to the proposed services being completely voluntary, they are available to all Users on an equal basis (*i.e.* the same products and services are available to all Users).

The Exchange believes that providing Users with access to Third Party Systems and connectivity to Third Party Data Feeds, third party testing and certification feeds, and DTCC does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because such Access and Connectivity satisfies User demand for access and connectivity options, and each User has several other access and connectivity options available to it. As alternatives to using the Access and Connectivity provided by the Exchange, a User may access or connect to such services and products through another User or through a connection to an Exchange access center outside the data center, third party access center, or third party vendor. The User may make such connection through a third party telecommunication provider, third party wireless network, the SFTI network, or a combination thereof. Users that opt to use Access or Connectivity would not receive access or connectivity that is not available to all Users, as all market participants that contract with the relevant market or content provider may receive access or connectivity. In this way, the proposed changes would enhance competition by helping Users tailor their Access and Connectivity to the needs of their business operations by allowing them to select the form and

[32] *See* Nasdaq Stock Market Rule 7034.

[33] 15 U.S.C. 78f(b)(8).

latency of access and connectivity that best suits their needs.

Similarly, the Exchange believes that providing VCCs between Users does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because providing VCCs satisfies User demand for an alternative to cross connects.

The Exchange believes that revising the Fee Schedules to provide a more detailed description of the Access and Connectivity available to Users would make such descriptions more accessible and transparent, thereby providing market participants with clarity as to what Access and Connectivity is available to them and what the related costs are, thereby enhancing competition by ensuring that all Users have access to the same information regarding Access and Connectivity.

Finally, the Exchange operates in a highly competitive market in which exchanges offer co-location services as a means to facilitate the trading and other market activities of those market participants who believe that co-location enhances the efficiency of their operations. Accordingly, fees charged for co-location services are constrained by the active competition for the order flow of, and other business from, such market participants. If a particular exchange charges excessive fees for co-location services, affected market participants will opt to terminate their co-location arrangements with that exchange, and adopt a possible range of alternative strategies, including placing their servers in a physically proximate location outside the exchange's data center (which could be a competing exchange), or pursuing strategies less dependent upon the lower exchange-to-participant latency associated with co-location. Accordingly, the exchange charging excessive fees would stand to lose not only co-location revenues but also the liquidity of the formerly co-located trading firms, which could have additional follow-on effects on the market share and revenue of the affected exchange. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as amended by Amendment Nos. 1, 2, and 3 is consistent with the Exchange 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–NYSEArca–2016–89 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File No. SR–NYSEArca–2016–89. 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 No. SR–NYSEArca–2016–89, and should be submitted on or before January 19, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[34]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–31485 Filed 12–28–16; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79677; File No. SR–ISEGemini–2016–17]

Self-Regulatory Organizations; ISE Gemini, LLC; Notice of Filing of Proposed Rule Change To Amend Various Rules in Connection With a System Migration to Nasdaq INET Technology

December 22, 2016.

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 December 16, 2016, ISE Gemini, LLC (''ISE Gemini'' 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 amend various rules in connection with a system migration to Nasdaq INET technology.

The text of the proposed rule change is available on the Exchange's Web site at *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 Exchange has prepared summaries, set forth in sections A, B, and C below, of

[34] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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 rule change is to amend certain rules to reflect the ISE Gemini technology migration to a Nasdaq, Inc. (''Nasdaq'') supported architecture. INET is the proprietary core technology utilized across Nasdaq's global markets and utilized on The NASDAQ Options Market LLC (''NOM''), NASDAQ PHLX LLC (''Phlx'') and NASDAQ BX, Inc. (''BX'') (collectively, ''Nasdaq Exchanges''). The migration of ISE Gemini to the Nasdaq INET architecture would result in higher performance, scalability, and more robust architecture. With this system migration, the Exchange intends to adopt certain trading functionality currently utilized at Nasdaq Exchanges. The functionality being adopted is described in this filing.

The Exchange is also separately filing [3] a rule change to amend the Exchange's Opening Process. ISE Gemini will replace its current opening process at Rule 701 with Phlx's Opening Process.[4]

The Exchange intends to begin implementation of the proposed rule changes in Q1 2017. The migration will be on a symbol by symbol basis, and the Exchange will issue an alert to members in the form of an Options Trader Alert to provide notification of the symbols that will migrate and the relevant dates.

Generally

With the re-platform, the Exchange will now be built on the Nasdaq INET architecture, which allows certain trading system functionality to be performed in parallel. The Exchange believes that this architecture change will improve the member experience by reducing overall latency compared to the current ISE Gemini system because of the manner in which the system is segregated into component parts to handle processing.

Trading Halts

Cancellation of Quotes

The Exchange proposes to amend ISE Gemini Rule 702 entitled ''Trading Halts.'' Specifically, the Exchange proposes to amend Rule 702(a)(2) to note that during a halt, the Exchange will maintain existing orders on the book, but not existing quotes prior to the halt, accept orders and quotes, and process cancels and modifications for quotes and orders, except that existing quotes are cancelled. Today, ISE Gemini maintains existing orders and quotes during a trading halt. With respect to cancels and modifications, this behavior will not change. ISE Gemini does not have a quote purge today, so this functionality will be changed with the adoption of this trading rule. The Exchange believes that purging quotes upon a halt will remove uncertainty for market participants.

The Exchange proposes to conform the treatment of quotes and orders on ISE Gemini to Phlx Rule 1047(f) in conjunction with the replatform of ISE Gemini. The Exchange desires to handle halts in a similar manner as Phlx.

Limit Up-Limit Down

The Exchange also proposes to add new ISE Gemini Rule 702(d) to replace rule text currently contained in ISE Gemini Rule 703A entitled ''Trading During Limit Up-Limit Down States in Underlying Securities.'' Proposed ISE Gemini Rule 702(d) is similar to language currently in Phlx Rule 1047(d), which provides for Exchange handling due to extraordinary market volatility. Currently ISE Gemini Rule 703A(a) and (b) provides modified order handling procedures when a security underlying an options class traded on the Exchange enters a Limit State or Straddle State under the Plan to Address Extraordinary Market Volatility (the ''Plan'').[5] Specifically, during a Limit State or Straddle State: (1) Incoming Market Orders are automatically rejected, and all unexecuted Market Orders pending in the System are cancelled, and (2) incoming Stop Orders (which become Market Orders if elected) are automatically rejected, and unexecuted Stop Orders pending in the System cannot be elected and will be held until the end of the Limit State or Straddle State. In addition, ISE Gemini Rule 703A(c) provides that when the security underlying an option class is in a Limit State or Straddle State, the maximum quotation spread requirements for market maker quotes contained in ISE Gemini Rule 803(b)(5) and the continuous quotation requirements contained in ISE Gemini Rule 804(e) shall be suspended.[6]

With the re-platform, the Exchange will adopt opening limitation, Market Order and Stop Order handling consistent with handling today on Phlx.[7] Specifically, proposed ISE Gemini Rule 702(d) will provide that during a Limit State and Straddle State in the Underlying NMS stock: (i) The Exchange will not open an affected option, (ii) provided the Exchange has

[3] *See* SR–ISEGemini–2016–18 (not yet published).

[4] *See* Phlx Rule 1017. *See also* Securities Exchange Act Release No. 79274 (November 9, 2016), 81 FR 80694 (November 16, 2016) (SR–Phlx–2017–79) (notice of Filing of Partial Amendment No. 2 and Order Granting Approval of a Proposed Rule Change, as Modified by Partial Amendment No. 2, to Amend PHLX Rule 1017, Openings in Options).

[5] Unless otherwise specified, capitalized terms used in this rule filing are based on the defined terms of the Plan. As set forth in more detail in the Plan, Price Bands consisting of a Lower Price Band and an Upper Price Band for each NMS Stock are calculated by the Processors (Section V(A) of the Plan). When the National Best Bid (Offer) is below (above) the Lower (Upper) Price Band, the Processors shall disseminate such National Best Bid (Offer) with an appropriate flag identifying it as unexecutable. When the National Best Bid (Offer) is equal to the Upper (Lower) Price Band, the Processors shall distribute such National Best Bid (Offer) with an appropriate flag identifying it as a Limit State Quotation (Section VI(A) of the Plan). All trading centers in NMS stocks must maintain written policies and procedures that are reasonably designed to prevent the display of offers below the Lower Price Band and bids above the Upper Price Band for NMS stocks. Notwithstanding this requirement, the Processor shall display an offer below the Lower Price Band or a bid above the Upper Price Band, but with a flag that it is non-executable. Such bids or offers shall not be included in the National Best Bid or National Best Offer calculations (Section VI(A)(3) of the Plan). Trading in an NMS stock immediately enters a Limit State if the National Best Offer (Bid) equals but does not cross the Lower (Upper) Price Band (Section VI(B)(1) of the Plan. Trading for an NMS stock exits a Limit State if, within 15 seconds of entering the Limit State, all Limit State Quotations were executed or canceled in their entirety. If the market does not exit a Limit State within 15 seconds, then the Primary Listing Exchange would declare a five-minute trading pause pursuant to Section VII of the Plan, which would be applicable to all markets trading the security. The primary listing market would declare a Trading Pause in an NMS stock; upon notification by the primary listing market, the Processor would disseminate this information to the public. No trades in that NMS stock could occur during the trading pause, but all bids and offers may be displayed (Section VII(A) of the Plan). In addition, the Plan defines a Straddle State as when the National Best Bid (Offer) is below (above) the Lower (Upper) Price Band and the NMS stock is not in a Limit State. For example, assume the Lower Price Band for an NMS Stock is $ 9.50 and the Upper Price Band is $ 10.50, such NMS stock would be in a Straddle State if the National Best Bid were below $ 9.50, and therefore unexecutable, and the National Best Offer were above $ 9.50 (including a National Best Offer that could be above $ 10.50). If an NMS stock is in a Straddle State and trading in that stock deviates from normal trading characteristics, the Primary Listing Exchange may declare a trading pause for that NMS stock if such Trading Pause would support the Plan's goal to address extraordinary market volatility.

[6] The time periods associated with Limit States and Straddle States are not considered by the Exchange when evaluating whether a market maker complied with the continuous quotation requirements contained in Rule 804(e).

[7] *See* proposed ISE Gemini Rule 702(d)(ii) and (iii) [sic].

opened an affected option for trading, the Exchange shall reject Market Orders, as defined in ISE Gemini Rule 715(a), and shall notify Members of the reason for such rejection, and (iii) provided the Exchange has opened an affected option for trading, the Exchange will elect Stop Orders if the condition is met, and, because they become Market Orders, shall cancel them back and notify Members of the reason for such rejection. The language in proposed ISE Gemini Rule 703(d)(iv) concerning the maximum quotation spread requirements for market maker quotes and the continuous quotation requirements suspensions are the same language currently contained in ISE Gemini Rule 703A(c).

These amendments differ in certain respects from the manner in which ISE Gemini operates today during a Limit State or Straddle State. The current ISE Gemini rule does not address the opening. The Exchange proposes to adopt rule text to provide for how the Exchange shall treat the opening rotation.[8] The opening in an option will not commence in the event that the underlying NMS stock is open, but has entered into a Limit State or Straddle State. If this occurs, the opening will only commence and complete if the underlying NMS stock stays out of a Limit or Straddle State. Accordingly, proposed ISE Gemini Rule 702(d)(i) [sic] will provide that the Exchange will not open an affected option. As a result, if an opening process is occurring, it will cease and then start the opening process from the beginning once the Limit State or Straddle State is no longer occurring.

In addition, ISE Gemini currently cancels Market Orders pending in the System upon initiation of a Limit or Straddle State. Under the proposal to adopt the Phlx rule and implementation of the Limit Up-Limit Down procedures, Market Orders pending in the System will continue to be processed regardless of the Limit or Straddle State. The Exchange believes this is a reasonable handling of Market Orders in the system since these orders are only pending in the System if they are exposed at the NBBO pursuant to Supplementary Material .02 to Rule 1901. If at the end of the exposure period the affected underlying is in a Limit or Straddle State, the Market Order will be cancelled with no execution occurring. If at the end of the exposure period the underlying is no longer in a Limit or Straddle State, the Market Order will be handled under the normal operation of the rules.

Lastly, ISE Gemini does not currently elect Stop Orders that are pending in the System during a Limit or Straddle State. Under the proposal, and in-line with the Phlx implementation, Stop Orders that are pending in the System during a Limit or Straddle State will be elected, if conditions for such election are met, however because they become Market Orders will be cancelled back to the Member with a reason for such rejection.

While the implementation of Market and Stop Order handling varies from ISE Gemini today, both the current and proposed Rule provide for protections from erroneous executions in a highly volatile period.[9] The Exchange believes consistency across the six options markets operated by Nasdaq, Inc. provides clarity for Members as to how their orders, as well as the opening process, will be handled in a Limit or Straddle State.

Auction Handling During a Trading Halt

The Exchange proposes to amend various rules to add detail to ISE Gemini rules to account for the impact of a trading halt on the Exchange's auction mechanisms. The Exchange proposes to memorialize within ISE Gemini Rule 723, entitled ''Price Improvement Mechanism for Crossing Transactions'' the manner in which a trading halt will impact an order entered into PIM once it is migrated to the INET architecture.

Today, if a trading halt is initiated after an order is entered into the Price Improvement Mechanism (''PIM'') on ISE Gemini, such auction is terminated and eligible interest is executed. The Exchange proposes to amend today's current behavior and instead terminate the auction and not execute eligible interest when a trading halt occurs. In the event of a trading halt, terminating the auction and not executing eligible interest will provide certainty to participants in regard to how their interest will be handled. Memorializing the manner in which the system will handle orders entered into PIM during a trading halt will provide transparency for the benefit of members and investors.

The Exchange proposes an amendment to ISE Gemini Rule 716, entitled ''Block Trades'' to memorialize that if a trading halt is initiated after an order is entered into the Block Order Mechanism, Facilitation Mechanism, or Solicited Order Mechanism, such auction will also be automatically terminated without execution. This is the current behavior today on ISE Gemini and will not be changing.

As discussed above, Phlx Rule 1047(c) provides that in the event the Exchange halts trading, all trading in the affected option shall be halted. This is interpreted to restrict executions after a halt unless there is a specific rule specifying that such trades should take place. The Exchange is proposing to add more specificity into the relevant rules. With respect to Block Order Mechanism, Facilitation Mechanism, or Solicited Order Mechanism, the Exchange notes that the current behavior is consistent with Phlx Rule 1047(c) generally, where all trading in the affected option shall be halted.[10] In the event of a trading halt, terminating these auction mechanisms and not executing eligible interest will provide certainty to participants in regard to how their interest will be handled. Memorializing the manner in which the system will handle orders during a trading halt will provide transparency for the benefit of members and investors.

Market Order Spread Protection

The Exchange proposes to amend ISE Gemini Rule 711, entitled ''Acceptance of Quotes and Orders'' to adopt a new mandatory risk protection entitled Market Order Spread Protection. ISE Gemini does not have a similar feature today. This mandatory feature is currently offered on NOM to protect Market Orders from being executed in very wide markets.[11]

Pursuant to proposed ISE Gemini Rule 711(c), if the NBBO is wider than a preset threshold at the time a Market Order is received, the order will be rejected. For example, if the Market Order Spread Protection is set to $20.00, and a Market Order to buy is received while the NBBO is $1.00–$50.00, such Market Order will be rejected. The proposed feature would assist with the maintenance of fair and orderly markets by mitigating the risks associated with errors resulting in executions at prices that are away from the Best Bid or Offer and potentially erroneous. Further the proposal protects investors from potentially receiving executions away

[8] *See* note 3 above.

[9] The Exchange is introducing a Phlx protection, Acceptable Trade Range, into ISE [sic] Rules as discussed within this rule change.

[10] *See* Phlx Rule 1047(c).

[11] *See* NOM Rules at Chapter VI, Section 6(c). NOM's current rule states, ''System Orders that are Market Orders will be rejected if the *best of the* NBBO and the internal market BBO (the ''Reference BBO'') is wider than a preset threshold at the time the order is received by the System.'' NOM has two order types, Price-Improving and Post-Only Orders, which result in non-displayed pricing that may cause the internal market BBO to be better than the NBBO. ISE Gemini does not have similar non-displayed order types and therefore the reference to the internal market BBO is not necessary.

from the prevailing prices at any given time. The Exchange proposes this feature to avoid a series of improperly priced aggressive orders transacting in the Order Book.

Today, the NOM threshold is set at $5. ISE Gemini will initially set the threshold to $5. Similar to NOM, the Exchange will notify Members of the threshold with a notice, and, thereafter, Members will be notified of any subsequent changes to the threshold. NOM set the differential at $5 to match the bid/ask differential permitted for quotes on the Exchange.[12] ISE Gemini has a similar $5 differential.[13] Thus, the presence of a quote on the Exchange will ensure the NBBO is at least $5 wide. The Exchange believes the presence of a quote on the Exchange, or a bid/ask differential of the NBBO, which is no more than $5 wide affords Market Orders proper protection against erroneous execution and in the event a bid/ask differential is more than $5, then a Market Order is rejected. The threshold is appropriate because it seeks to capture improperly priced Market Orders and reject them to reduce the risk of, and to potentially prevent, the automatic execution of Market Orders at prices that may be considered erroneous. The Exchange's proposed threshold is a reasonable measure to ensure prices remain within the reasonable limits. This protection will bolster the normal resilience and market behavior that persistently produces robust reference prices. This feature should create a level of protection that prevents Market Orders from entering the Order Book outside of an acceptable range for the Market Order to execute.

Finally, the Market Order Spread Protection will be the same for all options traded on the Exchange, and is applicable to all Members that submit Market Orders.

Acceptable Trade Range

The Exchange proposes to amend Rule 714, entitled ''Automatic Execution of Orders,'' at ISE Gemini Rule 714(b)(1) to remove the current Price Level Protection rule and adopt Phlx's Acceptable Trade Range.[14] The Exchange is proposing to adopt similar functionality which is currently utilized on Phlx in connection with the replatform of ISE Gemini. Today, ISE Gemini places a limit on the number of price levels at which an incoming order or quote to sell (buy) will be executed automatically when there are no bids (offers) from other exchanges at any price for the options series. Orders and quotes are executed at each successive price level until the maximum number of price levels is reached, and any balance is either handled by the Primary Market Maker pursuant to Rule 803(c)(1) (in the case of Priority Customer Orders) or canceled (in the case of Professional Orders). The number of price levels, may be between one (1) and ten (10). The Exchange determines the number of price levels from time-to-time on a class-by-class basis.

ISE Gemini proposes to replace the current Price Level Protection with Phlx's Acceptable Trade Range.[15] The proposed Acceptable Trade Range is a mechanism to prevent the system from experiencing dramatic price swings by creating a level of protection that prevents the market from moving beyond set thresholds. The thresholds consist of a reference price plus (minus) set dollar amounts based on the nature of the option and the premium of the option.

The system will calculate an Acceptable Trade Range to limit the range of prices at which an order or quote will be allowed to execute. To bolster the normal resilience and market behavior that persistently produces robust reference prices, ISE Gemini is proposing to create a level of protection that prevents the market from moving beyond set thresholds. The Acceptable Trade Range is calculated (upon receipt of a new order or quote) by taking the reference price, plus or minus a value to be determined by the Exchange (*i.e.,* the reference price − (x) for sell orders/quotes and the reference price + (x) for buy orders).[16] Upon receipt of a new order, the reference price is the National Best Bid (''NBB'') for sell orders/quotes and the National Best Offer (''NBO'') for buy orders/quotes. If an order or quote reaches the outer limit of the Acceptable Trade Range (the ''Threshold Price'') without being fully executed, then any unexecuted balance will be cancelled. The proposed Acceptable Trade Range would work as follows: Prior to executing orders received by ISE Gemini, an Acceptable Trade Range is calculated to determine the range of prices at which orders/quotes may be executed.[17] When an order is initially received, the threshold is calculated by adding (for buy orders/quotes) or subtracting (for sell orders/quotes) a value,[18] as discussed below, to the National Best Offer for buy orders/quotes or the National Best Bid for sell orders/quotes to determine the range of prices that are valid for execution. A buy (sell) order or quote will be allowed to execute up (down) to and including the maximum (minimum) price within the Acceptable Trade Range.

For example, in a thinly traded option:

Away Exchange Quotes:

Exchange	Bid size	Bid price	Offer price	Offer size
NOM	10	$1.00	$1.05	10
NYSE Arca	10	1.00	1.05	10
NYSE MKT	10	1.00	1.10	10
BOX	10	1.00	1.15	10

ISE Gemini Price Levels:

[12] *See* Chapter VII, Section 6(d)(ii) of NOM Rules which describes the bid/ask differentials. Options on equities (including Exchange-Traded Fund Shares), and on index options must be quoted with a difference not to exceed $5 between the bid and offer regardless of the price of the bid, including before and during the opening. However, respecting in-the-money series where the market for the underlying security is wider than $5, the bid/ask differential may be as wide as the quotation for the underlying security on the primary market. The Exchange may establish differences other than the above for one or more series or classes of options.

[13] *See* ISE Gemini Rule 803(b)(4).

[14] *See* Phlx Rule 1080(p).

[15] The Exchange notes that the version of Acceptable Trade Range to be implemented on ISE Gemini will not include the posting period functionality available today on Phlx. The proposed rules reflect this change.

[16] The Acceptable Trade Range settings are tied to the option premium.

[17] The Acceptable Trade Range will not be available for all-or-none orders. Today, ISE Gemini's Price Level Protection rule is not available for all-or-none orders. The Exchange has determined that it would be difficult, from a technical standpoint, to apply this feature to those orders because their particular contingency makes it difficult to automate their handling.

[18] The value that is to be added to/subtracted from the reference price will be set by ISE Gemini and posted on its Web site.

Exchange	Bid size	Bid price	Offer price	Offer size
ISE Gemini orders	10	$1.00	$1.05	10
ISE Gemini orders			1.10	10
ISE Gemini orders			1.40	10
ISE Gemini orders			5.00	10

If ISE Gemini receives a routable market order to buy 80 contracts, the System will respond as described below:

- 10 contracts will be executed at $1.05 against ISE Gemini
- 10 contracts will be executed at $1.05 against NOM
- 10 contracts will be executed at $1.05 against NYSE Arca
- 10 contracts will be executed at $1.10 against ISE Gemini
- 10 contracts will be executed at $1.10 against NYSE MKT
- 10 contracts will be executed at $1.15 against BOX

After these executions, there are no other known valid away exchange quotes. The National Best Bid/Offer (''NBBO'') is therefore comprised of the remaining interest on the ISE Gemini book, specifically 10 contracts at $1.40 and 10 contracts at $5.00. In the absence of an Acceptable Trade Range mechanism, the order would execute against the remaining interest at $1.40 and $5.00, resulting in potential harm to investors.

ISE Gemini will set the parameters of the mechanism at levels that will ensure that it is triggered quite infrequently. Importantly, the Acceptable Trade Range is neutral with respect to away markets, an order may route to other destinations to access liquidity priced within the Acceptable Trade Range provided the order is designated as routable.

The options premium will be the dominant factor in determining the Acceptable Trade Range. Generally, options with lower premiums tend to be more liquid and have tighter bid/ask spreads; options with higher premiums have wider spreads and less liquidity. Accordingly, a table consisting of several steps based on the premium of the option will be used to determine how far the market for a given option will be allowed to move. This table or tables would be listed on the NASDAQTrader.com Web site and any periodic updates to the table would be announced via an Options Trader Alert.

For example, looking at some SPY May 2013 Call options on May 1st of 2013:

Bid/Offer of SPY May 160 Call (at or near-the-money): $1.23 × $1.24 (several hundred contracts on bid and offer)

Bid/Offer of SPY May 105 Call (deep in-the-money): $54.10 × $54.26 (11 contracts on each side)

The deep in-the-money calls (May 105 calls) have a wider spread ($54.10 − $54.26 = $0.16) compared to a spread of $0.01 for the at-the-money calls (May 160 calls). Therefore, it is appropriate to have different thresholds for the two options. For instance, it may make sense to have a $0.05 threshold for the at-the-money strikes (Premium < $2) and a $0.50 threshold for the deep in-the-money strikes (Premium > $10).

To consider another example, the May 2013 ORCL put options on May 1st of 2013:

Bid/Offer of ORCL 33 May Put (at or near-the-money): $0.33 × $0.34 (100 × 500)

Bid/Offer of ORCL 44 May Put (deep in-the-money): $10.40 × $10.55 (50 × 200)

Even though ORCL has a much lower share price than SPY, and is a different type of security (it is a common stock of a technology company whereas SPY is an ETF based on the S&P 500 Index), the pattern is the same. The option with the lower premium has a very narrow spread of $0.01 with significant size displayed whereas the higher premium option has a wide spread ($0.15) and less size displayed.

The Acceptable Trade Range settings will be tied to the option premium. However, other factors will be considered when determining the exact settings. For example, acceptable ranges may change if market-wide volatility is as high as it was during the financial crisis in 2008 and 2009, or if overall liquidity is low based on historical trends. These different market conditions may present the need to adjust the threshold amounts from time to time to ensure a well-functioning market. Without adjustments, the market may become too constrained or conversely, prone to wide price swings. As stated above, the Exchange would publish the Acceptable Trade Range table or tables on the Exchange Web site. The Exchange does not foresee updating the table(s) often or intraday, although the exchange may determine to do so in extreme circumstances. The Exchange will provide sufficient advanced notice of changes to the Acceptable Trade Range table, generally the prior day, to its membership via an Exchange alert.

The Acceptable Trade Range settings would generally be the same across all options traded on ISE Gemini, although ISE Gemini proposes to maintain flexibility to set them separately based on characteristics of the underlying security. For instance, Google is a stock with a high share price ($824.57 closing price on April 30, 2013). Google options therefore may require special settings due to the risk involved in actively quoting options on such a high-priced stock. Option spreads on Google are wider and the size available at the best bid and offer is smaller. Google could potentially need a wider threshold setting compared to other lower-priced stocks. There are other options that fit into this category (*e.g.* AAPL) which makes it necessary to have threshold settings that have flexibility based on the underlying security. Additionally, it is generally observed that options subject to the Penny Pilot program quote with tighter spreads than options not subject to the Penny Pilot. Currently, ISE Gemini expects to set Acceptable Trade Ranges for three categories of options: (1) Penny Pilot Options trading in one cent increments for options trading at less than $3.00 and increments of five cents for options trading at $3.00 or more, (2) Penny Pilot Options trading in one-cent increments for all prices, and (3) Non-Penny Pilot Options.

The Phlx rule contains language that references a posting period.[19] Specifically, the Phlx Rule provides if an order/quote reaches the outer limit of the Acceptable Trade Range (the ''Threshold Price'') without being fully executed, it will be posted at the Threshold Price for a brief period, not to exceed one second (''Posting Period''), to allow more liquidity to be collected, unless a Quote Exhaust has occurred, in which case the Quote Exhaust process in Phlx Rule 1082(a)(ii)(B)(3) will ensue, triggering a new Reference Price.[20] The Exchange

[19] *See* Phlx Rule 1080(p)(1)(B).

[20] The Quote Exhaust process occurs when the Exchange's disseminated market at a particular price level includes a quote, and such market is exhausted by an inbound contra-side quote or order, and following such exhaustion, contracts remain to be executed from such quote or order through the initial execution price.

will not post interest that exceeds the outer limit of the Acceptable Trade Range, rather the interest will be cancelled. Only if the order limit does not exceed the Acceptable Trade Range will it post on the Exchange, if not otherwise executed. Further, the Phlx rule provides for the re-pricing of that order or quote and calculation of a new Acceptable Trade Range. Consistent with the current treatment of orders and quotes under ISE Gemini rules, the Exchange is not adopting the posting period. Unlike Phlx, ISE Gemini does not offer a general continuous re-pricing mechanism, and does not consider iterations in its current functionality.[21] ISE Gemini would cancel rather than reprice orders which exceed the outer limit of the Acceptable Trade Range. Orders which do not exceed the outer limit of the Acceptable Trade Range will post to the order book and will reside on the order book at such price until they are either executed in full or cancelled by the Member. Additionally, resting orders do not re-price on the order book as they do today on Phlx. For these reasons, the unexecuted balance which exceeds the outer limit of the Acceptable Trade Range will be cancelled, rather than posted to the order book.

PMM Order Handling and Opening Obligations

Today, PMMs are responsible for handling Priority Customer orders that are not automatically executed pursuant to ISE Gemini Rule 714(b)(1), *i.e.,* the Price Level Protection, and to initiate the opening rotation in each series pursuant to ISE Gemini Rule 701. This responsibility is described in each of those rules, as well as in ISE Gemini Rule 803(c), which provides that:

In addition to the obligations contained in this Rule for market makers generally, for options classes to which a market maker is the appointed Primary Market Maker, it shall have the responsibility to: (1) As soon as practical, address Priority Customer Orders that are not automatically executed pursuant to Rule 714(b)(1) in a manner consistent with its obligations under paragraph (b) of this Rule by either (i) executing all or a portion of the order at a price that at least matches the NBBO and that improves upon the Exchange's best bid (in the case of a sell order) or the Exchange's best offer (in the case of a buy order); or (ii) releasing all or a portion of the order for execution against bids and offers on the Exchange. (2) Initiate trading in each series pursuant to Rule 701.

As described in more detail in the sections above, with the re-platform to Nasdaq technology, the Exchange is adopting Acceptable Trade Range and opening rotation functionality currently offered on NOM and Phlx, which do not contain similar requirements for the PMM. The Exchange therefore proposes to eliminate the PMM order handling and opening obligations in Rule 803(c).

The Exchange believes that the elimination of the PMM obligation to initiate the opening rotation in this rule is appropriate because the proposed opening process [22] is initiated by the receipt of an appropriate number of valid width Primary Market Maker or Competitive Market Maker quotes as outlined in proposed ISE Gemini Rule 701(c)(i). Similarly, the Acceptable Trade Range functionality will continue to provide an important protection to members without imposing any Primary Market Maker obligations. Today, Phlx does not have similar roles for a Specialist on its market. In connection with the replatform, the Exchange will conform its rules with those of Phlx with respect to the manner in which it operates the Opening Process.

Back-Up PMM

The Exchange also proposes to amend ISE Gemini Supplementary Material .03 to Rule 803 to eliminate its Back-Up Primary Market Maker program. Today, any ISE Gemini Member that is approved to act in the capacity of a Primary Market Maker may voluntarily act as a ''Back-Up Primary Market Maker'' in options series in which it is quoting as a Competitive Market Maker. A Back-Up Primary Market Maker assumes all of the responsibilities and privileges of a Primary Market Maker under the Exchange's rules with respect to any series in which the appointed Primary Market Maker fails to have a quote in the System except that a Back-Up Primary Market Maker's quoting obligations are the same as the quoting obligations for Competitive Market Makers as described in ISE Gemini Rule 804(e)(2)(iii) and .02 of Supplementary Material to Rule 804.[23] If more than one Competitive Market Maker that has volunteered to be a Back-Up Primary Market Maker is quoting in an options series at the time that a Primary Market Maker ceases quoting, the Competitive Market Maker with the largest offer at the lowest price in the series at that time will be chosen to be the Back-Up Primary Market Maker. In the event of a tie based on price and size, the Competitive Market Maker with time priority will be automatically chosen. The Back-Up Primary Market Maker is automatically restored to Competitive Market Maker status when the appointed Primary Market Maker initiates quoting in the series. The obligations of a Primary Market Maker include the initiation of a trading rotation pursuant to ISE Gemini Rule 701, quoting and other obligations pursuant to ISE Gemini Rules 803 and 804, and financial requirements pursuant to ISE Gemini Rule 809. The Exchange is proposing to amend the obligations of a PMM only with regard to the initiation of a trading rotation pursuant to ISE Gemini Rule 701. The quoting and financial requirements rules shall remain the same.

With the re-platform, a Back-Up Primary Market Maker is no longer necessary since the order handling obligations present on ISE Gemini today are not going to be present in the new system. Furthermore, the proposed Opening Process,[24] obviates the importance of such a role. The Opening Process describes the entry of quotes by both a Primary Market Maker and a Competitive Market Maker, provided they are Valid Width Quotes.[25] The Opening Process further describes alternative methods to open the market if such quotes are not entered at the opening by either of these market makers.[26] The reliance on a market maker to initiate the opening process is

[21] With respect to trade-throughs and locked and crossed markets, a Phlx order will not be executed at a price that trades through another market or is displayed at a price that would lock or cross another market. If, at the time of entry, an order that the entering party has elected not to make eligible for routing would cause a locked or crossed market violation or would cause a trade-through violation, it will be re-priced to the current national best offer (for bids) or the current national best bid (for offers) and displayed at one minimum price variance above (for offers) or below (for bids) the national best price. *See* Phlx Rule 1080(m)(iv)(A). In the instance that the System automatically reprices an order or quote, the System would assign the orders or quote a new timestamp and the order or quote will be reprioritized within the Order Book in accordance with the priority rules in Phlx Rule 1014 (g).

[22] *See* note 3 above.

[23] The Exchange notes that the current rule text for Back-up Primary Market Maker on ISE Gemini does not indicate that quoting obligations for Back-up Primary Market Makers are the same as for Competitive Market Makers. This, however, has been the Exchanges practice, and the practice of its affiliated exchanges, including, the International Securities Exchange, LLC. *See* Securities Exchange Act Release No. 76936 (January 20, 2016), 81 FR 4347 (January 26, 2016) (SR–ISE–2016–02).

[24] *See* note 3 above.

[25] A Valid Width Quote is a two-sided electronic quotation submitted by a Market Maker that consists of a bid/ask differential that is compliant with ISE Gemini proposed Rule 803(b)(4). *See* note 3 above.

[26] *See* note 3 above.

no longer present within the proposed rule.[27]

Market Maker Speed Bump

The Exchange proposes to amend ISE Gemini Rule 804, entitled ''Market Maker Quotations'' to establish default parameters for certain risk functionality. The Exchange offers a risk protection mechanism for market maker quotes that removes a member's quotes in an options class if a specified number of curtailment events occur during a set time period (''Market Maker Speed Bump''). In addition, the Exchange offers a market-wide risk protection that removes a market maker's quotes across all classes if a number of curtailment events occur (''Market-Wide Speed Bump'').[28] ISE Gemini Rule 804(g) currently requires that market makers set curtailment parameters for both the Market Maker Speed Bump and the Market-Wide Speed Bump. Today, if a market maker does not set these parameters their quotes are rejected by the trading system for each of the speed bumps mentioned herein.

With the re-platform, the Exchange has determined to provide default curtailment parameters to assist market makers when they do not enter their own parameters into the system. The default parameters will be determined by the Exchange and announced to members. Rather than rejecting quotes, the default parameters would be instituted. The default parameters are important because market makers at ISE Gemini have quoting obligations as specified in ISE Gemini Rule 804. When a market maker's quotes are removed from the system, the time does not count toward the continuous quoting obligations. The Exchange believes that allowing for default settings would cause quotes not to be rejected and would assist market makers in meeting their quoting obligations because they would not have their quotes removed from the market. Today, Phlx indicates default parameters for its detection of loss of communication settings.[29]

Anti-Internalization

The Exchange proposes to amend the ISE Gemini Supplementary Material at .03 to Rule 804, entitled ''Market Maker Quotations'' to adopt an Anti-Internalization rule. Today, ISE Gemini's functionality prevents Immediate-or-Cancel (''IOC'')[30] orders entered by a market maker from trading with the market maker's own quote.[31] As implemented, if an IOC order entered by a market maker would trade with a quote entered by the same market maker, that order will instead be allocated to other interest at the same price, and the balance cancelled. The Exchange proposes to replace this self-trade protection functionality with Anti-Internalization functionality currently offered on Phlx.[32]

Today, Phlx provides anti-internalization (''AIQ'') functionality to Specialists and Registered Options Traders (''collectively market makers''). Quotes and orders entered by Phlx market makers using the same badge[33] are not executed against quotes and orders entered on the opposite side of the market using the same badge. This automatically prevents these quotes and orders from interacting with each other in the System. On Phlx, the system cancels the resting quote or order back to the entering party prior to execution. This functionality does not apply in any auction or with respect to complex transactions.

The Exchange proposes to adopt a similar rule that provides that quotes and orders entered by Market Makers using the same member identifier will not be executed against quotes and orders entered on the opposite side of the market by the same market maker using the same member identifier. In such a case, the system will cancel the resting quote or order back to the entering party prior to execution. This functionality shall not apply in any auction. AIQ is difficult to apply during auctions, and there is limited benefit in doing so. There is limited benefit because, generally speaking, auctions do not raise the same policy concerns for wash sales and ERISA[34] due to the semi-random manner in which trades are matched.

This functionality does not relieve or otherwise modify the duty of best execution owed to orders received from public customers. Market Makers generally do not display public customer orders in market making quotations, opting instead to enter public customer orders using separate identifiers. In the event that a Market Maker opts to include a public customer order within a market making quotation, the Market Maker must take appropriate steps to ensure that public customer orders that do not execute due to anti-internalization functionality ultimately receive the same execution price (or better) they would have originally obtained if execution of the order was not inhibited by the functionality.

This Anti-Internalization functionality can assist Market Makers in reducing trading costs from unwanted executions potentially resulting from the interaction of executable buy and sell trading interest from the same firm when performing the same market making function.

Minimum Execution Quantity Orders

The Exchange proposes to amend ISE Gemini Rule 715, entitled ''Types of Orders'' at 715(q) to remove minimum quantity orders. Today, the Exchange allows members to enter minimum quantity orders, which is an order type that is available for partial execution, but each partial execution must be for a specified number of contracts or greater. If the balance of the order after one or more partial executions is less than the minimum, such balance is treated as all-or-none. Like all-or-none orders, minimum quantity orders are contingency orders that are not displayed in the Exchange's best bid or offer. However, the Exchange disseminates to market participants an indication that a minimum quantity order has been entered. The Exchange has found that the utilization of minimum quantity orders by its members has been very limited, and therefore proposes to remove this functionality.[35] Furthermore, the Exchange proposes to remove two references to minimum quantity orders in other rules. Specifically, the Exchange proposes to remove references to minimum quantity orders in ISE Gemini Supplementary Material .02 to Rule 713, which notes that minimum quantity orders are contingency orders that have no priority on the book, and in ISE Gemini Supplementary Material .04 to Rule 717, which explains that non-marketable minimum quantity orders are deemed ''exposed'' one second following a broadcast notifying the market that such an order to buy or

[27] *Id.*

[28] Market makers may request the Exchange to set the market wide parameter to apply to just ISE Gemini or across ISE Gemini and ISE.

[29] Phlx Rule 1019(c).

[30] An IOC order is a limit order that is to be executed in whole or in part upon receipt. Any portion not so executed is to be treated as cancelled. *See* Rule 715(b)(3).

[31] This functionality is not memorialized in ISE Gemini's rules.

[32] Phlx Rule 1080(p)(2).

[33] A badge is the same as a market participant identifier (''MPID'').

[34] AIQ also is designed to assist market participants in complying with certain rules and regulations of the Employee Retirement Income Security Act (''ERISA'') that preclude and/or limit managing broker-dealers of such accounts from trading as principal with orders generated for those accounts. It can also assist Market Makers in reducing trading costs from unwanted executions potentially resulting from the interaction of executable buy and sell trading interest from the same firm when performing the same market making function.

[35] This functionality is currently being utilized to transact less than 1% of ISE Gemini's volume.

sell a specified number of contracts at a specified with a specified minimum quantity has been received in the options series.

Delay of Implementation

The Exchange proposes to delay the implementation of Directed Order [36] and the Qualified Contingent Cross Order [37] functionalities on ISE Gemini. The Exchange proposes to continue to offer both of these functionalities on the current platform. The Exchange however would propose not to launch these functionalities on ISE Gemini at the same time as proposed herein for the proposals to amend other trading functions. The Exchange would instead issue an alert which specifies a different date for these two functionalities to commence on ISE Gemini. This functionality will remain the same on the new platform.

The Exchange proposes to amend the rule text in Rules 721 (Crossing Orders) and 811 (Directed Orders) to note that these functionalities will not be available as of a certain date in the first quarter of 2017 to be announced in a notice. The Exchange will recommence these functionalities on ISE Gemini within one year from the date of filing of this rule change to be announced in a separate notice.

The Exchange intends to begin implementation of the functionality for Directed Orders and Qualified Contingent Cross after Q1 2017. The migration will also be on a symbol by symbol basis, and the Exchange will issue an alert to members in the form of an Options Trader Alert to provide notification of the symbols that will migrate and the relevant dates. The Exchange will introduce the Directed Orders and Qualified Contingent Cross on ISE Gemini within one year from the date of this filing, otherwise the Exchange will file a rule proposal with the Commission to remove these rules.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[38] in general, and furthers the objectives of Section 6(b)(5) of the Act,[39] 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 for the reasons stated below.

Trading Halts

The Exchange's proposal to amend ISE Gemini Rule 702 concerning Trading Halts to specifically note that during a halt the Exchange will maintain existing orders on the book but not existing quotes is consistent with the Act because it provides market participants with clarity as to the manner in which interest will be handled by the system. During a trading halt, the market may move and create risk to market participants with respect to resting interest. The Exchange believes that cancelling existing quotes protects investors and the public interest by removing potentially stale quotes during the halt process.

The Exchange's proposal to amend its rules on order handling during Limit up-Limit Down states and trading halts is consistent with the Act because it will harmonize the way the Exchange treats orders during a Limit State or Straddle State in the equity market, or a trading halt in the option, with how those orders are handled on other Nasdaq Exchanges. The proposed rule text should provide certainty about how options orders and trades will be handled during periods of extraordinary volatility in the underlying security. Specifically, under the proposal, market participants will be able to continue to trade options overlying securities that are in a Limit State or Straddle State, while addressing specific order types that are subject to added risks during such periods. The Exchange believes that the rejection of options Market Orders (including elected Stop Orders) should help to prevent executions that might occur at prices that have not been reliably formed, which should, in turn, protect, in particular, retail investors from executions of un-priced orders during times of significant volatility. The Exchange believes that harmonizing these rules will provide a better experience to members that trade on multiple markets operated by Nasdaq, Inc.

Cancellation of Quotes

The Exchange's proposal to amend ISE Gemini Rule 702 concerning Trading Halts to specifically note that during a halt the Exchange will maintain existing orders on the book but not existing quotes is consistent with the Act because it provides market participants with clarity as to the manner in which interest will be handled by the system. During a trading halt, the market may move and create risk to market participants with respect to resting interest. The Exchange believes that cancelling existing quotes protects investors and the public interest by removing potentially stale quotes during the halt process.

Limit Up-Limit Down

The Exchange's proposal to add new ISE Gemini Rule 702(d) to replace rule text currently contained in ISE Gemini Rule 703A entitled ''Trading During Limit Up-Limit Down States in Underlying Securities'' is consistent with the Act because the proposed rules provide for protections from erroneous executions in a highly volatile period. The proposed rule text in ISE Gemini Rule 702(d) is similar to language currently in Phlx Rule 1047(d), which provides for Exchange handling due to extraordinary market volatility. As noted within this proposal, the Exchange will adopt opening limitation, Market Order and Stop Order handling consistent with handling today on Phlx. The Exchange proposes to adopt rule text to provide for how the Exchange shall treat the opening rotation.[40] If an opening process is occurring, it will cease and then start the opening process from the beginning once the Limit State or Straddle State is no longer occurring. The Exchange believes that this treatment at the opening will protect investors and the public interest by halting trading to prevent unintended executions. Also, with this proposal, Market Orders pending in the System will continue to be processed regardless of the Limit or Straddle State. The Exchange believes that this treatment of Market Orders is consistent with the Act because these Market Orders are only pending in the System if they are exposed at the NBBO pursuant to Supplementary Material .02 to Rule 1901. If at the end of the exposure period the affected underlying is in a Limit or Straddle State, the Market Order will be cancelled with no trade

[36] ISE Gemini currently operates a Directed Order system in which Electronic Access Members (''EAMs'') can send an order to a DMM for possible price improvement. If a DMM accepts Directed Orders generally, that DMM must accept all Directed Orders from all EAMs. Once such a DMM receives a Directed Order, it either (i) must enter the order into the Exchange's PIM auction and guarantee its execution at a price better than the ISE best bid or offer (''ISE BBO'') by at least a penny and equal to or better than the NBBO or (ii) must release the order into the Exchange's limit order book, in which case there are certain restrictions on the DMM interacting with the order. *See* ISE Gemini Rule 811.

[37] A Qualified Contingent Cross Order is comprised of an order to buy or sell at least 1000 contracts that is identified as being part of a qualified contingent trade, as that term is defined in Supplementary Material .01 to ISE Gemini Rule 715, coupled with a contra-side order to buy or sell an equal number of contracts. *See* ISE Gemini Rules 715(j).

[38] 15 U.S.C. 78f(b).

[39] 15 U.S.C. 78f(b)(5).

[40] *See* note 3 above.

occurring. If at the end of the exposure period, the affected underlying is no longer in a Limit or Straddle State, the Market Order will be handled pursuant to the normal operation of the rules.

Lastly, ISE Gemini does not currently elect Stop Orders that are pending in the System during a Limit or Straddle State. Under the proposal, and in-line with the Phlx implementation, Stop Orders that are pending in the System during a Limit or Straddle State will be elected, if conditions for such election are met, and, because they become Market Orders, will be cancelled back to the Member with a reason for such rejection. The Exchange believes that this is consistent with the Act because it affords the appropriate protections to an elected Stop Order once it becomes a Market Order after election. The Exchange believes that this approach provides the market participant with the intended result.

Auction Handling During a Trading Halt

The Exchange's proposal to amend various rules to add detail to ISE Gemini rules to account for the impact of a trading halt on the Exchange's auction mechanisms is consistent with the Act for the reasons which follow. The Exchange's proposal to amend today's current behavior and instead terminate the PIM auction and not execute eligible interest when a trading halt occurs is consistent with the Act because during a trading halt, the market may move and create risk to market participants with respect to resting interest. The Exchange believes that terminating the PIM auction protects investors and the public interest by providing certainty to participants in regard to how their interest will be handled. Memorializing the manner in which the system will handle orders entered into PIM during a trading halt will provide transparency for the benefit of members and investors.

The Exchange's proposal to amend ISE Gemini Rule 716, entitled ''Block Trades'' to memorialize that if a trading halt is initiated after an order is entered into the Block Order Mechanism, Facilitation Mechanism, or Solicited Order Mechanism, such auction will also be automatically terminated without execution is consistent with the Act because in the event of a trading halt, terminating these auction mechanisms and not executing eligible interest will provide certainty to participants in regard to how their interest will be handled. Memorializing the manner in which the system will handle orders during a trading halt will provide transparency for the benefit of members and investors.

Market Order Spread Protection

The Exchange's proposal to amend ISE Gemini Rule 711 to adopt a mandatory risk protection entitled Market Order Spread Protection is consistent with the Act because it provides a protection for Market Orders that may encourage price continuity, which should, in turn, protect investors and the public interest by reducing executions occurring at dislocated prices. Further, the Exchange believes that this rule proposal will mitigate risks to market participants.

Acceptable Trade Range

The Exchange's proposal to amend ISE Gemini Rule 714 to remove the current Price Level Protection rule and adopt Phlx's Acceptable Trade Range is consistent with the Act and will 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 making the Exchange's market more efficient, to the benefit of the investing public. Further, it should prevent the system from experiencing dramatic price swings by creating a level of protection that prevents the market from moving beyond set thresholds. The proposed rule change will reduce the negative impacts of sudden, unanticipated volatility in individual options, and serve to preserve an orderly market in a transparent and uniform manner, enhance the price-discovery process, increase overall market confidence, and promote fair and orderly markets and the protection of investors. Specifically, the Exchange believes that the NBBO is a fair representation of then-available prices and accordingly the proposal helps to avoid executions at prices that are significantly worse than the NBBO.

With respect to the posting information, which is described in the Phlx rule, but not contained in the proposed ISE Gemini rule, the Exchange believes that it is consistent with the Act to cancel unexecuted interest which is priced through an Acceptable Trade Range. Today, the Exchange does not have an iterative process wherein the Exchange will attempt to execute unexecuted balances for a period of time while that interest is automatically re-priced on the order book. Phlx has this type of functionality for Acceptable Trade Range, while the Exchange does not re-price interest on the order book. The Exchange transparently describes the cancellation of the interest within its rules.

PMM Order Handling and Opening Obligations

The Exchange's proposal to eliminate the PMMs order handling and opening obligations is consistent with the Act because PMMs will no longer have these obligations due to the introduction of Acceptable Trade Range and opening rotation functionality that is offered today on NOM and Phlx. Because the PMM will no longer have these obligations, the Exchange believes that it is appropriate to remove these rules.

Back-Up PMM

The Exchange's proposal to remove certain responsibilities of Primary Market Makers with respect to Back-Up Primary Market Maker assignments is consistent with the Act because the Exchange believes this function is not necessary. Today, in addition to market making obligations, the Primary Market Maker has certain order handling and other obligations as prescribed by Exchange Rules. Specifically, the obligations of a Primary Market Maker include the initiation of a trading rotation pursuant to ISE Gemini Rule 701, quoting and other obligations pursuant to ISE Gemini Rules 803 and 804, and financial requirements pursuant to ISE Gemini Rule 809. The Exchange is proposing to amend the obligations of a PMM only with regard to the initiation of a trading rotation pursuant to ISE Gemini Rule 701. The quoting and financial requirements rules shall remain the same. With the re-platform, a Back-Up Primary Market Maker is no longer necessary since the order handling obligations present on ISE Gemini today are not going to be present in the new system. Furthermore, the proposed Opening Process,[41] obviates the importance of such a role. The Opening Process further describes alternative methods to open the market if such quotes are not entered at the opening by either of these market makers.[42] The reliance on a market maker to initiate the opening process is no longer present within the proposed rule.[43]

In addition, the Exchange does not believe there is an interest among market participants for the back-up assignment.

Default Settings for Market Maker Risk Protections

The Exchange's proposal to amend ISE Gemini Rule 804(g) to introduce default curtailment settings for the Market Maker Speed Bump and Market-

[41] *See* note 3 above.

[42] *Id.*

[43] *Id.*

Wide Speed Bump is consistent with the Act as it will allow market makers to use Exchange set default values for these risk protections. Today, these market makers would have their quotes rejected if they fail to enter the required curtailment parameters. The default settings provide an alternative for market makers that have not entered their curtailment settings. Default settings will be announced to members who will have the opportunity to avoid the defaults by entering their own curtailment settings as required under the rule.

Anti-Internalization

The Exchange's proposal to amend the ISE Gemini Supplementary Material at .03 to Rule 804 to add Anti-Internalization is consistent with the Act because it is designed to assist market makers in reducing trading costs from unwanted executions potentially resulting from the interaction of executable buy and sell trading interest from the same firm when performing the same market making function.

Minimum Quantity Orders

The Exchange believes that removing minimum quantity orders would remove impediments to and perfect the mechanism of a free and open market and a national market system by simplifying functionality available on the Exchange and reducing complexity of its order types.

Delay of Implementation

The Exchange believes that delaying the implementation of the Directed Order and the Qualified Contingent Cross Order functionalities on ISE Gemini is consistent with the Act because the Exchange desires to rollout this functionality at a later date to allow additional time to rebuild this technology on the new platform. The Exchange is staging the replatform to provide maximum benefit to its Members while also ensuring a successful rollout. This delay will provide the Exchange additional time to implement this functionality, which is not being amended. Members have been given adequate notice of the implementation dates. The Exchange will continue to provide notifications to Members to ensure clarity about the delay of implementation of this functionality. The Exchange will note the applicable dates within the rule text.

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 explained above, the Exchange is re-platforming it's trading system onto the Nasdaq INET architecture, and is making certain other changes to its trading functionality in connection with this migration.

A majority of the functionality that is being added with the proposed rule change already exists on one or more Nasdaq Exchanges. As a result, the Exchange does not believe that the proposed rule change will impact the intense competition that exists in the options market. In fact, the Exchange believes that adopting this functionality on ISE Gemini will allow the Exchange to more effectively compete for order flow with other options 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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–ISEGemini–2016–17 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISEGemini–2016–17. This file number should be included on the subject line if email is used.

To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet 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–ISEGemini–2016–17, and should be submitted on or before January 19, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[44]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–31489 Filed 12–28–16; 8:45 am]

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[44] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79671; File No. SR–NYSE–2016–90]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change in Connection With the Proposed Acquisition of National Stock Exchange, Inc. by the Exchange's Parent the NYSE Group, Inc. To Amend Certain Organizational Documents of NYSE Group, NYSE Holdings LLC, Intercontinental Exchange Holdings, Inc., and Intercontinental Exchange, Inc.

December 22, 2016.

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 December 16, 2016, 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 in connection with the proposed acquisition of National Stock Exchange, Inc. (''NSX'') by the Exchange's parent the NYSE Group, Inc. (''NYSE Group''), to amend certain organizational documents of NYSE Group, NYSE Holdings LLC (''NYSE Holdings''), Intercontinental Exchange Holdings, Inc. (''ICE Holdings''), and Intercontinental Exchange, Inc. (''ICE''). 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

Background

On December 14, 2016, ICE entered into an agreement with the NSX pursuant to which its wholly-owned subsidiary NYSE Group would acquire all of the outstanding capital stock of the NSX (the ''Acquisition''). As a result of the Acquisition, the NSX would be renamed NYSE National, Inc. (''NYSE National'') and would be operated as a wholly-owned subsidiary of NYSE Group. NYSE Group is a wholly-owned subsidiary of NYSE Holdings, which is in turn 100% owned by ICE Holdings. ICE, a public company listed on the NYSE, owns 100% of ICE Holdings.

Following the Acquisition, NYSE National would continue to be registered as a national securities exchange and as a separate self-regulatory organization (''SRO''). As such, NYSE National would continue to have separate rules, membership rosters, and listings that would be distinct from the rules, membership rosters, and listings of the three other registered national securities exchanges and SROs owned by NYSE Group, namely, the NYSE, NYSE MKT LLC (''NYSE MKT''), and NYSE Arca, Inc. (''NYSE Arca'') (together, the ''NYSE Exchanges'').[4]

In connection with the Acquisition and as discussed more fully below, the following organizational documents of NYSE Group and its intermediary and ultimate parent entities would be amended:

- ICE bylaws and director independence policy,
- ICE Holdings bylaws and certificate of incorporation,
- NYSE Holdings operating agreement, and
- NYSE Group bylaws and certificate of incorporation.

These proposed changes would consist of technical and conforming amendments to reflect the proposed new ownership of NYSE National by the NYSE Group, and, indirectly, ICE.[5]

The proposed rule changes would be effected following approval of this rule filing no later than February 28, 2017, on a date determined by its Board.

Proposed Rule Change

The Exchange proposes that, in connection with the Acquisition, the Commission approve the organizational documents of ICE and its wholly-owned subsidiaries ICE Holdings and NYSE Group and the Independence Policy of the Board of Directors of Intercontinental Exchange, Inc. (''ICE Independence Policy''), all of which are to be amended concurrently with the Acquisition to reflect ownership of NYSE National.

The current organizational documents of ICE and its wholly-owned subsidiaries provide certain protections to the NYSE Exchanges that are designed to protect and facilitate their self-regulatory functions, including certain restrictions on the ability to vote and own shares of ICE.[6] In general, the organizational documents of ICE and its wholly-owned subsidiaries are being amended to provide similar protections to the NYSE National as are currently provided to the NYSE Exchanges under those documents.

In addition, obsolete references to NYSE Market (DE), Inc. (formerly NYSE Market, Inc.) (''NYSE Market (DE)''), and NYSE Regulation, Inc. (''NYSE Regulation'') found in various documents are proposed to be deleted.[7]

Proposed Seventh Amended and Restated Bylaws of Intercontinental Exchange, Inc. (''ICE Bylaws'')

The ICE Bylaws would be amended to reflect the Acquisition and incorporate NYSE National in the ICE Bylaws' existing voting and ownership restrictions, provisions relating to the qualifications of directors and officers and their submission to jurisdiction, compliance with the federal securities laws, access to books and records, and other matters related to its control of the U.S. Regulated Subsidiaries.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The NYSE Exchanges are referred to as the U.S. Regulated Subsidiaries in the corporate documents proposed to be amended in this rule filing.

[5] The proposed revisions are also discussed in the NYSE MKT and NYSE Arca companion rule filings related to the Acquisition. *See* SR–NYSEMKT–2016–122 & SR–NYSEArca–2016–167.

[6] *See* Securities Exchange Release No. 70210 (August 15, 2013), 78 FR 51758 (August 21, 2013) (approving rule changes related to NYSE Euronext becoming a wholly owned subsidiary of ICE (then called IntercontinentalExchange Group, Inc.)).

[7] NYSE Market (DE) and NYSE Regulation were previously parties to a Delegation Agreement whereby the NYSE delegated certain regulatory functions to NYSE Regulation and certain market functions to NYSE Market (DE). The Delegation Agreement was terminated when the NYSE re-integrated its regulatory and market functions. As a result, the two entities ceased being regulated subsidiaries. *See* Securities Exchange Act Release No. 75991 (September 28, 2015), 80 FR 59837 (October 2, 2015). NYSE Regulation has since been merged out of existence.

Specifically, the ICE Bylaws would be amended as follows:

• The definition of ''U.S. Regulated Subsidiaries'' in Article III, Section 3.15, which currently includes the NYSE, NYSE Market (DE), NYSE Regulation, NYSE Arca, LLC, NYSE Arca, NYSE Arca Equities, Inc. (''NYSE Arca Equities''), and NYSE MKT, would be amended to include NYSE National. The obsolete references to NYSE Market (DE) and NYSE Regulation would also be deleted.

• Article VIII (Confidential Information), Section 8.1, would be amended to extend to NYSE National the same protection regarding confidential information provided to the NYSE Exchanges and NYSE Arca Equities, and to remove the obsolete references to NYSE Market (DE) and NYSE Regulation.

• Article XI, Section 11.3, provides that, for so long as ICE controls any of the U.S. Regulated Subsidiaries, any amendment to or repeal of the ICE Bylaws must either be (i) filed with or filed with and approved by the Commission under Section 19 of the Exchange Act and the rules promulgated thereunder, or (ii) submitted to the boards of directors of the U.S. Regulated Subsidiaries or the boards of directors of their successors, in each case only to the extent that such entity continues to be controlled directly or indirectly by ICE. Section 11.3 would be amended to include the NYSE National, and to delete the obsolete references to NYSE Market (DE) and NYSE Regulation.

The ICE Bylaws would be further amended to add a new Article XII (Voting and Ownership Limitations). New Section 12.1.a of Article XII would provide that, subject to its fiduciary obligations under applicable law, for so long as ICE directly or indirectly controls NYSE National (or its successor), the board of directors of ICE shall not adopt any resolution pursuant to clause (b) of Section A.2 of Article V of the certificate of incorporation of ICE (which relates to ICE board of directors approval of ownership of ICE capital stock by a person together with its related persons in excess of 20%), unless the board of directors of ICE shall have determined that:

• In the case of a resolution to approve the exercise of voting rights in excess of 20% of the then outstanding votes entitled to be cast on such matter, neither such person nor any of its related persons is an ETP Holder of NYSE National;

• in the case of a resolution to approve the entering into of an agreement, plan or other arrangement under circumstances that would result in shares of stock of ICE that would be subject to such agreement, plan or other arrangement not being voted on any matter, or the withholding of any proxy relating thereto, where the effect of such agreement, plan or other arrangement would be to enable any person, but for Article V of the Certificate of Incorporation of ICE, either alone or together with its related persons, to vote, possess the right to vote or cause the voting of shares of stock of ICE that would exceed 20% of the then outstanding votes entitled to be cast on such matter neither such person nor any of its related persons is, with respect to NYSE National, an ETP Holder.

New Section 12.1.b would provide that, subject to its fiduciary obligations under applicable law, for so long as ICE directly or indirectly controls NYSE National (or its successor), the Board of Directors of ICE shall not adopt any resolution pursuant to clause (b) of Section B(2) of Article V of ICE's Certificate of Incorporation, unless the Board of Directors shall have determined that neither such person nor any of its related persons is an ETP Holder.

New Section 12.2 would provide that, for so long as ICE shall control, directly or indirectly, NYSE National (or its successor), the ICE board of directors shall not adopt any resolution to repeal or amend any provision of the certificate of incorporation of ICE unless such amendment or repeal shall either be (a) filed with or filed with and approved by the SEC under Section 19 of the Exchange Act and the rules promulgated thereunder or (b) submitted to the board of directors of NYSE National (or the board of directors of its successor), and if such board of directors determines that such amendment or repeal must be filed with or filed with and approved by the Commission under Section 19 of the Exchange Act and the rules promulgated thereunder before such amendment or repeal may be effectuated, then such amendment or repeal shall not be effectuated until filed with or filed with and approved by the Commission, as the case may be.

Proposed Eighth Amended and Restated Certificate of Incorporation of Intercontinental Exchange Holdings, Inc. (''ICE Holdings Certificate of Incorporation'')

The ICE Holdings Certificate of Incorporation is being amended as follows:

• On the first page, add ''Eighth'' and delete ''Seventh'' before ''Amended and Restated Certificate of Incorporation'' in the heading and update items (2)–(5) accordingly to reflect that this would be the eighth amendment and restatement including replacing an incorrect reference to ''Sixth'' before ''Amended'' in item (3). The date would also be updated in the preamble on the first page.

• To distinguish between the ETP Holders of NYSE Arca Equities and those of NYSE National, subsection A.3.c.ii of Article V (Limitations on Voting and Ownership) would be amended to define an ETP Holder of NYSE Arca Equities as an ''NYSE Arca Equities ETP Holder.'' Obsolete references to NYSE Market (DE) and NYSE Regulation, would also be deleted.[8]

Subsection A.3.c of Article V would be amended to add a new subsection (v), similar to those in place for the other NYSE Exchanges, which would provide that, for so long as the ICE Holdings directly or indirectly controls NYSE National (or its successor), no person nor any of its related persons (as those terms are defined therein) is an ETP Holder (as proposed to be defined in the bylaws of NYSE National, discussed above) of NYSE National.

• Subsection A.3.d of Article V would be amended to add ''NYSE Arca'' before ''ETP Holder'' in one place to distinguish between the NYSE Arca Equities ETP Holders of and those of NYSE National.

Subsection (A)(3)(d) would be further amended to add a new subsection (v) similar to those in place for the other NYSE Exchanges. The new subsection would incorporate NYSE National into the existing restriction, such that the ICE Holdings Board of Directors would be restricted from adopting a resolution to approve the exercise of voting rights that would exceed 20% of the then outstanding votes entitled to be cast on such matter, where neither such person nor any of its related persons is, with respect to NYSE National, an NYSE National ETP Holder.

• Subsection B.3 of Article V would be amended to add a new subsection (g) similar to those in place for the other NYSE Exchanges, incorporating NYSE National into the restriction on the ICE Holdings board of directors adopting any resolution pursuant to clause (b) of Section B.2 of Article V of the ICE Holdings Certificate of Incorporation (which relates to ICE board of directors approval of ownership of ICE capital stock by a person together with its related persons in excess of 20%) unless the NYSE Holdings board of directors determines that, for so long as ICE Holdings controls NYSE National, neither such person nor any of its

[8] *See* note 7, *supra.*

related persons is an NYSE National ETP Holder.

Proposed Fifth Amended and Restated Bylaws of Intercontinental Exchange Holdings, Inc. (''ICE Holdings Bylaws'')

The ICE Holdings Bylaws are being amended as follows:

• The cover page and heading on the first page would be amended to add ''Fifth'' and delete ''Fourth'' before ''Amended and Restated Bylaws'' to reflect that this would be the fifth amendment and restatement. The effective date on the cover page would also be updated.

• Similar to the ICE Bylaws discussed above, the ICE Holdings Bylaws would be amended to include ''NYSE National, Inc.'' in:

○ The definition of ''U.S. Regulated Subsidiaries'' in Article III, Section 3.15, which currently includes the NYSE, NYSE Market (DE), NYSE Regulation, NYSE Arca, LLC, NYSE Arca, NYSE Arca Equities, and NYSE MKT LLC, and to provide that the term ''U.S. Regulated Subsidiaries'' includes those entities listed or their successors, but only so long as they continue to be controlled, directly or indirectly, by ICE Holdings. Obsolete references to NYSE Market (DE) and NYSE Regulation in that section would also be deleted; [9]

○ Article VIII (Confidential Information), Section 8.1, which would be amended to extend the same protection to confidential information relating to the self-regulatory function of NYSE National or its successor; [10] and

○ Article XI (Amendment to the Bylaws), Section 11.3, which provides that, for so long as ICE controls any of the U.S. Regulated Subsidiaries, any amendment to or repeal of the ICE Bylaws must either be (i) filed with or filed with and approved by the Commission under section 19 of the Exchange Act and the rules promulgated thereunder, or (ii) submitted to the boards of directors of the U.S. Regulated Subsidiaries or the boards of directors of their successors, in each case only to the extent that such entity continues to be controlled directly or indirectly by ICE Holdings. Obsolete references to NYSE Market (DE) and NYSE Regulation would also be deleted from Article VXI, Section 11.3.[11]

Proposed Independence Policy of the Board of Directors of Intercontinental Exchange, Inc. (''ICE Director Independence Policy'')

The ICE Director Independence Policy would be amended to add NYSE National to the section describing ''Independence Qualifications.'' In particular, NYSE National would be added to categories (1)(b) and (c) that refer to ''members,'' as defined in section 3(a)(3)(A)(i), 3(a)(3)(A)(ii), 3(a)(3)(A)(iii) and 3(a)(3)(A)(iv) of the Exchange Act.[12] The clause ''and 'Person Associated with an ETP Holder' (as defined in Rule 1.5 of NYSE National, Inc.)'' would also be added to category (1)(b) in reference to ''allied persons.'' NYSE National would also be added to subsections (4) and (5) of the ''Independence Qualifications'' section.[13] Obsolete references to NYSE Market (DE) and NYSE Regulation would also be deleted.[14]

Proposed Eighth Amended and Restated Limited Liability Company Agreement of NYSE Holdings LLC (''NYSE Holdings LLC Operating Agreement'')

The NYSE Holdings LLC Operating Agreement would be amended as follows:

• The heading and preamble would be amended to add ''Eighth'' and delete ''Seventh'' before ''Amended and Restated Limited Liability Agreement'' to reflect that this would be the eighth amendment and restatement. The effective date would also be updated. After ''This Agreement amends and restates in its entirety that'' in the second full sentence would be added the clause ''certain Seventh Amended and Restated Limited Liability Company Agreement, dated as of May 22, 2015, which amended and restated in its entirety that.''

• The current penultimate whereas clause would be amended by adding ''in May 2015'' before ''the Company'' and ''now desires to amend and restate'' immediately following would be replaced with ''amended and restated.'' ''Had'' and ''are'' would be changed to the past tense ''had'' [sic] and ''were'' in the final sentence.

• The following new whereas clause would be added immediately above the current last whereas clause: ''WHEREAS, the Company now desires to amend and restate the Seventh Amended and Restated Agreement to reflect the acquisition of NYSE National, Inc. by the Company's wholly-owned subsidiary NYSE Group, Inc.;''.

• The definition of ETP Holder in Article I (Interpretation), Section 1.1 would be deleted and new definitions of an NYSE Arca ETP Holder and NYSE National ETP Holder would be added. The obsolete definition of NYSE Market (DE) would be deleted.[15]

• Article IX (Voting and Ownership Limitations), Section 9.1(a)(3)(C) would be amended to add ''NYSE Arca'' before ''ETP Holder'' and the defined term ''NYSE Arca ETP Holder'' to distinguish between the ETP Holders of NYSE Arca Equities and those of NYSE National. An obsolete reference to NYSE Market (DE) would also be deleted from Section 9.1(a)(3)(C).[16]

Section 9.1(a)(3)(C) would be amended to add a new subsection (v) similar to those in place for the other NYSE Exchanges. The new subsection (v) would incorporate NYSE National into the existing restriction, such that the ICE Holdings board of directors would be restricted from adopting a resolution pursuant to clause (b) of Section 9.1(a)(2) unless the NYSE Holdings board of directors determines that, for so long as NYSE Holdings directly or indirectly controls NYSE National, Inc. (or its successor), neither such person nor any of its related persons is an ETP Holder (as defined in the bylaws of NYSE National, as such bylaws may be in effect from time to time) of NYSE National (''NYSE National ETP Holder''). The clause would also provide that any such person that is a related person of an ETP Holder shall hereinafter also be deemed to be an ''NYSE National ETP Holder'' for purposes of the agreement, as the context may require.

• Article IX, Section 9.1(a)(3)(D) would be amended to add ''NYSE Arca'' before ''ETP Holder.'' An outdated reference to NYSE Market (DE) would also be deleted.

Further, a new clause (v) would be added to Section 9.1(a)(3)(D) to incorporate NYSE National into the existing restriction on the NYSE Holdings Board of Directors, such that it would be restricted from adopting a resolution to approve the exercise of voting rights that would exceed 20% of the then outstanding votes entitled to be cast on such matter for so long as NYSE Holdings controls NYSE National. The clause would provide that ''for so long as the Corporation directly or indirectly

[9] *See* note 7, *supra.*

[10] Article VIII, Section 8.1 would also be amended to delete obsolete references to NYSE Market (DE) and NYSE Regulation.

[11] *See* note 7, *supra.* Conforming changes to delete and replace connectors would also be made throughout.

[12] *See* 15 U.S.C. 78c(a)(3)(a).

[13] Conforming changes would also be made to delete and replace connectors. The link in footnote 2 to the NYSE Listed Company Manual and commentary would also be updated.

[14] *See* note 7, *supra.*

[15] *See* note 7, *supra.*

[16] *See* note 7, *supra.* Conforming changes to delete and replace connectors would also be made throughout.

controls NYSE National, neither such person nor any of its Related Persons is an NYSE National ETP Holder.''

• Article IX, Section 9.1(b)(3) of Article IX [sic] would be amended to add a new subpart (G) to incorporate NYSE National into the existing restriction on the NYSE Holdings Board of Directors, so that it would provide that, subject to its fiduciary obligations under applicable law, for so long as NYSE Holdings directly or indirectly controls NYSE National (or its successor), the board of directors of NYSE Holdings shall not adopt any resolution pursuant to (b) of Section 9.1(b)(2) of the NYSE Holdings LLC Operating Agreement, unless the board of directors of NYSE Holdings shall have determined that neither such person nor any of its related persons is an NYSE National ETP Holder.

Proposed Fifth Amended and Restated Certificate of Incorporation of NYSE Group, Inc. (''NYSE Group Certificate of Incorporation'')

The NYSE Group Certificate of Incorporation is being amended as follows:

• On the first page, add ''Fifth'' and delete ''Fourth'' before ''Amended and Restated Certificate of Incorporation'' in the heading. The Recitations would be amended to reflect that this would be the fifth amendment and restatement. First, the Fifth Recitation would be updated to reflect that a Fourth Amended and Restated Certificate of Incorporation was filed with the Secretary of State of the State of Delaware on December 29, 2014. A new Sixth Recitation would be updated to reflect that the Fifth Amended and Restated Certificate of Incorporation has been duly adopted. The current Sixth Recitation would become the Seventh and would reflect that the Fourth Amended and Restated Certificate of Incorporation is amended and restated in its entirety.

• NYSE National would be added to the list of ''Regulated Subsidiaries'' in Article 4 (Stock), Section 4(b)(1), which currently includes the NYSE, NYSE Market (DE), NYSE Regulation, NYSE Arca, LLC, NYSE Arca Equities, and NYSE MKT, and the obsolete references to NYSE Market (DE) and NYSE Regulation would be deleted.

• To distinguish between the ETP Holders of NYSE Arca Equities and those of NYSE National, Section 4(b)(1)(y) of Article IV would be amended to define an ETP Holder of NYSE Arca Equities as an ''NYSE Arca Equities ETP Holder.'' An outdated reference to NYSE Market (DE) would also be deleted.

Section 4(b)(1)(y) would also be amended to add a provision to [sic] similar to those in place for the other NYSE Exchanges providing that, for so long as NYSE Group directly or indirectly controls NYSE National (or its successor), neither such person nor any of its related persons is an ETP Holder (as defined in the rules of NYSE National, as such rules may be in effect from time to time) of NYSE National (defined as an ''NYSE National ETP Holder'') and that any such person that is a related person of an NYSE National ETP Holder shall hereinafter also be deemed to be an ''NYSE National ETP Holder'' for purposes of the certificate of incorporation, as the context may require.

• Further, subsection 4(b)(1)(z) of Article IV would be amended to define an ETP Holder of NYSE Arca Equities as an ''NYSE Arca Equities ETP Holder'' and delete an outdated reference to NYSE Market (DE).

Subsection 4(b)(1)(z) would also be amended to incorporate NYSE National into the existing restriction on the ICE Holdings Board of Directors, such that it would be restricted from adopting a resolution to approve the exercise of voting rights that would exceed 20% of the then outstanding votes entitled to be cast on such matter, where neither such person nor any of its related persons is, with respect to NYSE National, an NYSE National ETP Holder.

• A new subpart (vii) would be added to subsection 4(b)(2)(C) of Article IV to incorporate NYSE National into the existing restriction on the NYSE Group Board of Directors, such that it would be restricted from adopting a resolution to approve the exercise of voting rights that would exceed 20% of the then outstanding votes entitled to be cast on such matter, where neither such person nor any of its related persons is, with respect to NYSE National, an NYSE National ETP Holder.[17]

• Article X (Confidential Information) would be amended to extend the same protection to confidential information relating to the self-regulatory function of NYSE National or its successor and delete obsolete references to NYSE Market (DE) and NYSE Regulation.

• Article XII (Amendments to Certificate of Incorporation) provides that, for so long as NYSE Group controls the Regulated Subsidiaries, before any amendment or repeal of any provision of the Certificate of Incorporation shall be effective, such amendment or repeal shall either (a) be filed with or filed with and approved by the SEC under Section 19 of the Exchange Act and the rules promulgated thereunder or (b) be submitted to the boards of directors of NYSE, NYSE Market (DE), NYSE Regulation, NYSE Arca, NYSE Arca Equities, and NYSE MKT or the boards of directors of their successors. Article XII would be amended to add NYSE National to subsection (b) and delete references to NYSE Market (DE) and NYSE Regulation.

Proposed Third Amended and Restated Bylaws of NYSE Group, Inc. (''NYSE Group Bylaws'')

The NYSE Group Bylaws are being amended as follows:

• Add ''Third'' and delete ''Second'' before ''Amended and Restated Bylaws'' in the heading to reflect that this would be the third amendment and restatement.

Article VII (Miscellaneous), Section 7.9(A)(b) currently provides that, for so long as NYSE Group controls any of the NYSE Exchanges, any amendment to or repeal of the ICE Bylaws must either be (i) filed with or filed with and approved by the Commission under section 19 of the Exchange Act and the rules promulgated thereunder, or (ii) submitted to the boards of directors of the NYSE, NYSE Market (DE), NYSE Regulation, NYSE Arca, NYSE Arca Equities, and NYSE Alternext US LLC or the boards of directors of their successors, in each case only to the extent that such entity continues to be controlled directly or indirectly by ICE. Section 7.9(A)(b) would be amended to delete obsolete references to NYSE Market (DE) and NYSE Regulation, replace the outdated reference to ''NYSE Alternext US LLC'' with ''NYSE MKT LLC,'' and add NYSE National.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Exchange Act[18] in general, and with Section 6(b)(1)[19] in particular, in that it enables the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and to enforce compliance by its exchange members and persons associated with its exchange members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange. The Exchange believes that the proposed changes to the corporate documents of the NYSE Group and its intermediary and ultimate parent entities, including the ICE bylaws and director

[17] An obsolete reference to NYSE Market (DE) would also be deleted from Article IV, 4(b)(2)(C)(v).

[18] 15 U.S.C. 78f(b).

[19] 15 U.S.C. 78f(b)(1).

independence policy, ICE Holdings bylaws and certificate of incorporation, NYSE Holdings operating agreement, and the NYSE Group bylaws and certificate of incorporation, to reflect the Acquisition, including updating corporate names, would contribute to the orderly operation of the Exchange by adding clarity and transparency to the Exchange's rules and would enable the Exchange to continue to be so organized as to have the capacity to carry out the purposes of the Exchange Act and comply and enforce compliance with the provisions of the Exchange Act by its members and persons associated with its members. The Exchange therefore believes that approval of the amendment to the Bylaws is consistent with Section 6(b)(1).

For similar reasons, the Exchange also believes that this filing furthers the objectives of Section 6(b)(5) of the Exchange Act [20] because the proposed rule change would be consistent with and facilitate would [sic] create a governance and regulatory structure that is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. As discussed above, the proposed updates to the corporate documents and replacement of outdated or obsolete references removes impediments to and perfects the mechanism of a free and open market by removing confusion that may result from having these references in the governing documents following the Acquisition. The Exchange further believes that the proposal removes impediments to and perfects the mechanism of a free and open market by ensuring that persons subject to the Exchange's jurisdiction, regulators, and the investing public can more easily navigate and understand the governing documents. The Exchange further believes that eliminating an obsolete reference would not be inconsistent with the public interest and the protection of investors because investors will not be harmed and in fact would benefit from increased transparency, thereby reducing potential confusion. Removing such obsolete references will also further the goal of transparency and add clarity to the Exchange's rules.

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 Exchange Act. The proposed rule change is not intended to address competitive issues but rather is concerned solely with updating the Exchange's rules to reflect the Acquisition and to remove obsolete references.

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 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 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–2016–90 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2016–90. 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–2016–90 and should be submitted on or before January 19, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–31483 Filed 12–28–16; 8:45 am]

BILLING CODE 8011–01–P

[20] 15 U.S.C. 78f(b)(5).

[21] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79675; File No. SR–NYSEMKT–2016–122]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing of Proposed Rule Change in Connection With the Proposed Acquisition of National Stock Exchange, Inc. by the NYSE Group, Inc.

December 22, 2016.

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 December 16, 2016, NYSE MKT LLC (the ''Exchange'' or ''NYSE MKT'') filed with the Securities and Exchange

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b-4.

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 in connection with the proposed acquisition of National Stock Exchange, Inc. (''NSX'') by the Exchange's parent the NYSE Group, Inc. (''NYSE Group''), to amend certain organizational documents of NYSE Group, NYSE Holdings LLC (''NYSE Holdings''), Intercontinental Exchange Holdings, Inc. (''ICE Holdings''), and Intercontinental Exchange, Inc. (''ICE''). 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

Background

On December 14, 2016, ICE entered into an agreement with the NSX pursuant to which its wholly-owned subsidiary NYSE Group would acquire all of the outstanding capital stock of the NSX (the ''Acquisition''). As a result of the Acquisition, the NSX would be renamed NYSE National, Inc. (''NYSE National'') and would be operated as a wholly-owned subsidiary of NYSE Group. NYSE Group is a wholly-owned subsidiary of NYSE Holdings, which is in turn 100% owned by ICE Holdings. ICE, a public company listed on the New York Stock Exchange LLC (the ''NYSE''), owns 100% of ICE Holdings.

Following the Acquisition, NYSE National would continue to be registered as a national securities exchange and as a separate self-regulatory organization (''SRO''). As such, NYSE National would continue to have separate rules, membership rosters, and listings that would be distinct from the rules, membership rosters, and listings of the three other registered national securities exchanges and SROs owned by NYSE Group, namely, the Exchange, the NYSE, and NYSE Arca, Inc. (''NYSE Arca'') (together, the ''NYSE Exchanges'').[4]

In connection with the Acquisition and as discussed more fully below, the following organizational documents of NYSE Group and its intermediary and ultimate parent entities would be amended:

- ICE bylaws and director independence policy,
- ICE Holdings bylaws and certificate of incorporation,
- NYSE Holdings operating agreement, and
- NYSE Group bylaws and certificate of incorporation.

These proposed changes would consist of technical and conforming amendments to reflect the proposed new ownership of NYSE National by the NYSE Group, and, indirectly, ICE.[5]

The proposed rule changes would be effected following approval of this rule filing no later than February 28, 2017, on a date determined by its Board.

Proposed Rule Change

The Exchange proposes that, in connection with the Acquisition, the Commission approve the organizational documents of ICE and its wholly-owned subsidiaries ICE Holdings and NYSE Group and the Independence Policy of the Board of Directors of Intercontinental Exchange, Inc. (''ICE Independence Policy''), all of which are to be amended concurrently with the Acquisition to reflect ownership of NYSE National.

The current organizational documents of ICE and its wholly-owned subsidiaries provide certain protections to the NYSE Exchanges that are designed to protect and facilitate their self-regulatory functions, including certain restrictions on the ability to vote and own shares of ICE.[6] In general, the organizational documents of ICE and its wholly-owned subsidiaries are being amended to provide similar protections to the NYSE National as are currently provided to the NYSE Exchanges under those documents.

In addition, obsolete references to NYSE Market (DE), Inc. (formerly NYSE Market, Inc.) (''NYSE Market (DE)''), and NYSE Regulation, Inc. (''NYSE Regulation'') found in various documents are proposed to be deleted.[7]

Proposed Seventh Amended and Restated Bylaws of Intercontinental Exchange, Inc. (''ICE Bylaws'')

The ICE Bylaws would be amended to reflect the Acquisition and incorporate NYSE National in the ICE Bylaws' existing voting and ownership restrictions, provisions relating to the qualifications of directors and officers and their submission to jurisdiction, compliance with the federal securities laws, access to books and records, and other matters related to its control of the U.S. Regulated Subsidiaries.

Specifically, the ICE Bylaws would be amended as follows:

- The definition of ''U.S. Regulated Subsidiaries'' in Article III, Section 3.15, which currently includes the NYSE, NYSE Market (DE), NYSE Regulation, NYSE Arca, LLC, NYSE Arca, NYSE Arca Equities, Inc. (''NYSE Arca Equities''), and NYSE MKT, would be amended to include NYSE National. The obsolete references to NYSE Market (DE) and NYSE Regulation would also be deleted.
- Article VIII (Confidential Information), Section 8.1, would be amended to extend to NYSE National the same protection regarding confidential information provided to the NYSE Exchanges and NYSE Arca Equities, and to remove the obsolete references to NYSE Market (DE) and NYSE Regulation.
- Article XI, Section 11.3, provides that, for so long as ICE controls any of the U.S. Regulated Subsidiaries, any amendment to or repeal of the ICE Bylaws must either be (i) filed with or filed with and approved by the Commission under Section 19 of the

[4] The NYSE Exchanges are referred to as the U.S. Regulated Subsidiaries in the corporate documents proposed to be amended in this rule filing.

[5] The proposed revisions are also discussed in the NYSE and NYSE Arca companion rule filings related to the Acquisition. *See* SR–NYSE–2016–90 & SR–NYSEArca–2016–167.

[6] *See* Securities Exchange Release No. 70210 (August 15, 2013), 78 FR 51758 (August 21, 2013) (approving rule changes related to NYSE Euronext becoming a wholly owned subsidiary of ICE (then called IntercontinentalExchange Group, Inc.)).

[7] NYSE Market (DE) and NYSE Regulation were previously parties to a Delegation Agreement whereby the NYSE delegated certain regulatory functions to NYSE Regulation and certain market functions to NYSE Market (DE). The Delegation Agreement was terminated when the NYSE re-integrated its regulatory and market functions. As a result, the two entities ceased being regulated subsidiaries. *See* Securities Exchange Act Release No. 75991 (September 28, 2015), 80 FR 59837 (October 2, 2015). NYSE Regulation has since been merged out of existence.

Exchange Act and the rules promulgated thereunder, or (ii) submitted to the boards of directors of the U.S. Regulated Subsidiaries or the boards of directors of their successors, in each case only to the extent that such entity continues to be controlled directly or indirectly by ICE. Section 11.3 would be amended to include the NYSE National, and to delete the obsolete references to NYSE Market (DE) and NYSE Regulation.

The ICE Bylaws would be further amended to add a new Article XII (Voting and Ownership Limitations). New Section 12.1.a of Article XII would provide that, subject to its fiduciary obligations under applicable law, for so long as ICE directly or indirectly controls NYSE National (or its successor), the board of directors of ICE shall not adopt any resolution pursuant to clause (b) of Section A.2 of Article V of the certificate of incorporation of ICE (which relates to ICE board of directors approval of ownership of ICE capital stock by a person together with its related persons in excess of 20%), unless the board of directors of ICE shall have determined that:

- In the case of a resolution to approve the exercise of voting rights in excess of 20% of the then outstanding votes entitled to be cast on such matter, neither such person nor any of its related persons is an ETP Holder of NYSE National;
- in the case of a resolution to approve the entering into of an agreement, plan or other arrangement under circumstances that would result in shares of stock of ICE that would be subject to such agreement, plan or other arrangement not being voted on any matter, or the withholding of any proxy relating thereto, where the effect of such agreement, plan or other arrangement would be to enable any person, but for Article V of the Certificate of Incorporation of ICE, either alone or together with its related persons, to vote, possess the right to vote or cause the voting of shares of stock of ICE that would exceed 20% of the then outstanding votes entitled to be cast on such matter neither such person nor any of its related persons is, with respect to NYSE National, an ETP Holder.

New Section 12.1.b would provide that, subject to its fiduciary obligations under applicable law, for so long as ICE directly or indirectly controls NYSE National (or its successor), the Board of Directors of ICE shall not adopt any resolution pursuant to clause (b) of Section B(2) of Article V of ICE's Certificate of Incorporation, unless the Board of Directors shall have determined that neither such person nor any of its related persons is an ETP Holder.

New Section 12.2 would provide that, for so long as ICE shall control, directly or indirectly, NYSE National (or its successor), the ICE board of directors shall not adopt any resolution to repeal or amend any provision of the certificate of incorporation of ICE unless such amendment or repeal shall either be (a) filed with or filed with and approved by the SEC under Section 19 of the Exchange Act and the rules promulgated thereunder or (b) submitted to the board of directors of NYSE National (or the board of directors of its successor), and if such board of directors determines that such amendment or repeal must be filed with or filed with and approved by the Commission under Section 19 of the Exchange Act and the rules promulgated thereunder before such amendment or repeal may be effectuated, then such amendment or repeal shall not be effectuated until filed with or filed with and approved by the Commission, as the case may be.

Proposed Eighth Amended and Restated Certificate of Incorporation of Intercontinental Exchange Holdings, Inc. (''ICE Holdings Certificate of Incorporation'')

The ICE Holdings Certificate of Incorporation is being amended as follows:

- On the first page, add ''Eighth'' and delete ''Seventh'' before ''Amended and Restated Certificate of Incorporation'' in the heading and update items (2)–(5) accordingly to reflect that this would be the eighth amendment and restatement including replacing an incorrect reference to ''Sixth'' before ''Amended'' in item (3). The date would also be updated in the preamble on the first page.
- To distinguish between the ETP Holders of NYSE Arca Equities and those of NYSE National, subsection A.3.c.ii of Article V (Limitations on Voting and Ownership) would be amended to define an ETP Holder of NYSE Arca Equities as an ''NYSE Arca Equities ETP Holder.'' Obsolete references to NYSE Market (DE) and NYSE Regulation, would also be deleted.[8]

Subsection A.3.c of Article V would be amended to add a new subsection (v), similar to those in place for the other NYSE Exchanges, which would provide that for so long as the ICE Holdings directly or indirectly controls NYSE National (or its successor), no person nor any of its related persons (as those terms are defined therein) is an ETP Holder (as proposed to be defined in the bylaws of NYSE National, discussed above) of NYSE National.

- Subsection A.3.d of Article V would be amended to add ''NYSE Arca'' before ''ETP Holder'' in one place to distinguish between the NYSE Arca Equities ETP Holders of and those of NYSE National.

Subsection (A)(3)(d) would be further amended to add a new subsection (v) similar to those in place for the other NYSE Exchanges. The new subsection would incorporate NYSE National into the existing restriction, such that the ICE Holdings Board of Directors would be restricted from adopting a resolution to approve the exercise of voting rights that would exceed 20% of the then outstanding votes entitled to be cast on such matter, where neither such person nor any of its related persons is, with respect to NYSE National, an NYSE National ETP Holder.

- Subsection B.3 of Article V would be amended to add a new subsection (g) similar to those in place for the other NYSE Exchanges, incorporating NYSE National into the restriction on the ICE Holdings board of directors adopting any resolution pursuant to clause (b) of Section B.2 of Article V of the ICE Holdings Certificate of Incorporation (which relates to ICE board of directors approval of ownership of ICE capital stock by a person together with its related persons in excess of 20%) unless the NYSE Holdings board of directors determines that, for so long as ICE Holdings controls NYSE National, neither such person nor any of its related persons is an NYSE National ETP Holder.

Proposed Fifth Amended and Restated Bylaws of Intercontinental Exchange Holdings, Inc. (''ICE Holdings Bylaws'')

The ICE Holdings Bylaws are being amended as follows:

- The cover page and heading on the first page would be amended to add ''Fifth'' and delete ''Fourth'' before ''Amended and Restated Bylaws'' to reflect that this would be the fifth amendment and restatement. The effective date on the cover page would also be updated.
- Similar to the ICE Bylaws discussed above, the ICE Holdings Bylaws would be amended to include ''NYSE National, Inc.'' in:
- The definition of ''U.S. Regulated Subsidiaries'' in Article III, Section 3.15, which currently includes the NYSE, NYSE Market (DE), NYSE Regulation, NYSE Arca, LLC, NYSE Arca, NYSE Arca Equities, and the Exchange, and to provide that the term ''U.S. Regulated Subsidiaries'' includes those entities

[8] *See* note 7, *supra.*

listed or their successors, but only so long as they continue to be controlled, directly or indirectly, by ICE Holdings. Obsolete references to NYSE Market (DE) and NYSE Regulation in that section would also be deleted; [9]

• Article VIII (Confidential Information), Section 8.1, which would be amended to extend the same protection to confidential information relating to the self-regulatory function of NYSE National or its successor; [10] and

• Article XI (Amendment to the Bylaws), Section 11.3, which provides that, for so long as ICE controls any of the U.S. Regulated Subsidiaries, any amendment to or repeal of the ICE Bylaws must either be (i) filed with or filed with and approved by the Commission under section 19 of the Exchange Act and the rules promulgated thereunder, or (ii) submitted to the boards of directors of the U.S. Regulated Subsidiaries or the boards of directors of their successors, in each case only to the extent that such entity continues to be controlled directly or indirectly by ICE Holdings. Obsolete references to NYSE Market (DE) and NYSE Regulation would also be deleted from Article VXI, Section 11.3.[11]

Proposed Independence Policy of the Board of Directors of Intercontinental Exchange, Inc. (''ICE Director Independence Policy'')

The ICE Director Independence Policy would be amended to add NYSE National to the section describing ''Independence Qualifications.'' In particular, NYSE National would be added to categories (1)(b) and (c) that refer to ''members,'' as defined in section 3(a)(3)(A)(i), 3(a)(3)(A)(ii), 3(a)(3)(A)(iii) and 3(a)(3)(A)(iv) of the Exchange Act.[12] The clause ''and 'Person Associated with an ETP Holder' (as defined in Rule 1.5 of NYSE National, Inc.)'' would also be added to category (1)(b) in reference to ''allied persons.'' NYSE National would also be added to subsections (4) and (5) of the ''Independence Qualifications'' section.[13] Obsolete references to NYSE Market (DE) and NYSE Regulation would also be deleted.[14]

Proposed Eighth Amended and Restated Limited Liability Company Agreement of NYSE Holdings LLC (''NYSE Holdings LLC Operating Agreement'')

The NYSE Holdings LLC Operating Agreement would be amended as follows:

• The heading and preamble would be amended to add ''Eighth'' and delete ''Seventh'' before ''Amended and Restated Limited Liability Agreement'' to reflect that this would be the eighth amendment and restatement. The effective date would also be updated. After ''This Agreement amends and restates in its entirety that'' in the second full sentence would be added the clause ''certain Seventh Amended and Restated Limited Liability Company Agreement, dated as of May 22, 2015, which amended and restated in its entirety that.''

• The current penultimate whereas clause would be amended by adding ''in May 2015'' before ''the Company'' and ''now desires to amend and restate'' immediately following would be replaced with ''amended and restated.'' ''Had'' and ''are'' would be changed to the past tense ''had'' [sic] and ''were'' in the final sentence.

• The following new whereas clause would be added immediately above the current last whereas clause: ''WHEREAS, the Company now desires to amend and restate the Seventh Amended and Restated Agreement to reflect the acquisition of NYSE National, Inc. by the Company's wholly-owned subsidiary NYSE Group, Inc.;''.

• The definition of ETP Holder in Article I (Interpretation), Section 1.1 would be deleted and new definitions of an NYSE Arca ETP Holder and NYSE National ETP Holder would be added. The obsolete definition of NYSE Market (DE) would be deleted.[15]

• Article IX (Voting and Ownership Limitations), Section 9.1(a)(3)(C) would be amended to add ''NYSE Arca'' before ''ETP Holder'' and the defined term ''NYSE Arca ETP Holder'' to distinguish between the ETP Holders of NYSE Arca Equities and those of NYSE National. An obsolete reference to NYSE Market (DE) would also be deleted from Section 9.1(a)(3)(C).[16]

Section 9.1(a)(3)(C) would be amended to add a new subsection (v) similar to those in place for the other NYSE Exchanges. The new subsection (v) would incorporate NYSE National into the existing restriction, such that the ICE Holdings board of directors would be restricted from adopting a resolution pursuant to clause (b) of Section 9.1(a)(2) unless the NYSE Holdings board of directors determines that, for so long as NYSE Holdings directly or indirectly controls NYSE National, Inc. (or its successor), neither such person nor any of its related persons is an ETP Holder (as defined in the bylaws of NYSE National, as such bylaws may be in effect from time to time) of NYSE National (''NYSE National ETP Holder''). The clause would also provide that any such person that is a related person of an ETP Holder shall hereinafter also be deemed to be an ''NYSE National ETP Holder'' for purposes of the agreement, as the context may require.

• Article IX, Section 9.1(a)(3)(D) would be amended to add ''NYSE Arca'' before ''ETP Holder.'' An outdated reference to NYSE Market (DE) would also be deleted.

Further, a new clause (v) would be added to Section 9.1(a)(3)(D) to incorporate NYSE National into the existing restriction on the NYSE Holdings Board of Directors, such that it would be restricted from adopting a resolution to approve the exercise of voting rights that would exceed 20% of the then outstanding votes entitled to be cast on such matter for so long as NYSE Holdings controls NYSE National. The clause would provide that ''for so long as the Corporation directly or indirectly controls NYSE National, neither such person nor any of its Related Persons is an NYSE National ETP Holder.''

• Article IX, Section 9.1(b)(3) of Article IX [sic] would be amended to add a new subpart (G) to incorporate NYSE National into the existing restriction on the NYSE Holdings Board of Directors, so that it would provide that, subject to its fiduciary obligations under applicable law, for so long as NYSE Holdings directly or indirectly controls NYSE National (or its successor), the board of directors of NYSE Holdings shall not adopt any resolution pursuant to (b) of Section 9.1(b)(2) of the NYSE Holdings LLC Operating Agreement, unless the board of directors of NYSE Holdings shall have determined that neither such person nor any of its related persons is an NYSE National ETP Holder.

Proposed Fifth Amended and Restated Certificate of Incorporation of NYSE Group, Inc. (''NYSE Group Certificate of Incorporation'')

The NYSE Group Certificate of Incorporation is being amended as follows:

• On the first page, add ''Fifth'' and delete ''Fourth'' before ''Amended and

[9] *See* note 7, *supra.*

[10] Article VIII, Section 8.1 would also be amended to delete obsolete references to NYSE Market (DE) and NYSE Regulation.

[11] *See* note 7, *supra.* Conforming changes would also be made throughout.

[12] *See* 15 U.S.C. 78c(a)(3)(a).

[13] Conforming changes would also be made to delete and replace connectors. The link in footnote 2 to the NYSE Listed Company Manual and commentary would also be updated.

[14] *See* note 7, *supra.*

[15] *See* note 7, *supra.*

[16] *See* note 7, *supra.* Conforming changes to delete and replace connectors would also be made throughout.

Restated Certificate of Incorporation'' in the heading. The Recitations would be amended to reflect that this would be the fifth amendment and restatement. First, the Fifth Recitation would be updated to reflect that a Fourth Amended and Restated Certificate of Incorporation was filed with the Secretary of State of the State of Delaware on December 29, 2014. A new Sixth Recitation would be updated to reflect that the Fifth Amended and Restated Certificate of Incorporation has been duly adopted. The current Sixth Recitation would become the Seventh and would reflect that the Fourth Amended and Restated Certificate of Incorporation is amended and restated in its entirety.

• NYSE National would be added to the list of ''Regulated Subsidiaries'' in Article 4 (Stock), Section 4(b)(1), which currently includes the NYSE, NYSE Market (DE), NYSE Regulation, NYSE Arca, LLC, NYSE Arca Equities, and NYSE MKT, and the obsolete references to NYSE Market (DE) and NYSE Regulation would be deleted.

• To distinguish between the ETP Holders of NYSE Arca Equities and those of NYSE National, Section 4(b)(1)(y) of Article IV would be amended to define an ETP Holder of NYSE Arca Equities as an ''NYSE Arca Equities ETP Holder.'' An outdated reference to NYSE Market (DE) would also be deleted.

Section 4(b)(1)(y) would also be amended to add a provision to [sic] similar to those in place for the other NYSE Exchanges providing that, for so long as NYSE Group directly or indirectly controls NYSE National (or its successor), neither such person nor any of its related persons is an ETP Holder (as defined in the rules of NYSE National, as such rules may be in effect from time to time) of NYSE National (defined as an ''NYSE National ETP Holder'') and that any such person that is a related person of an NYSE National ETP Holder shall hereinafter also be deemed to be an ''NYSE National ETP Holder'' for purposes of the certificate of incorporation, as the context may require.

• Further, subsection 4(b)(1)(z) of Article IV would be amended to define an ETP Holder of NYSE Arca Equities as an ''NYSE Arca Equities ETP Holder'' and delete an outdated reference to NYSE Market (DE). Subsection 4(b)(1)(z) would also be amended to incorporate NYSE National into the existing restriction on the ICE Holdings Board of Directors, such that it would be restricted from adopting a resolution to approve the exercise of voting rights that would exceed 20% of the then outstanding votes entitled to be cast on such matter, where neither such person nor any of its related persons is, with respect to NYSE National, an NYSE National ETP Holder.

• A new subpart (vii) would be added to subsection 4(b)(2)(C) of Article IV to incorporate NYSE National into the existing restriction on the NYSE Group Board of Directors, such that it would be restricted from adopting a resolution to approve the exercise of voting rights that would exceed 20% of the then outstanding votes entitled to be cast on such matter, where neither such person nor any of its related persons is, with respect to NYSE National, an NYSE National ETP Holder.[17]

• Article X (Confidential Information) would be amended to extend the same protection to confidential information relating to the self-regulatory function of NYSE National or its successor and delete obsolete references to NYSE Market (DE) and NYSE Regulation.

• Article XII (Amendments to Certificate of Incorporation) provides that, for so long as NYSE Group controls the Regulated Subsidiaries, before any amendment or repeal of any provision of the Certificate of Incorporation shall be effective, such amendment or repeal shall either (a) be filed with or filed with and approved by the SEC under Section 19 of the Exchange Act and the rules promulgated thereunder or (b) be submitted to the boards of directors of NYSE, NYSE Market (DE), NYSE Regulation, NYSE Arca, NYSE Arca Equities, and NYSE MKT or the boards of directors of their successors. Article XII would be amended to add NYSE National to subsection (b) and delete references to NYSE Market (DE) and NYSE Regulation.

Proposed Third Amended and Restated Bylaws of NYSE Group, Inc. (''NYSE Group Bylaws'')

The NYSE Group Bylaws are being amended as follows:

• Add ''Third'' and delete ''Second'' before ''Amended and Restated Bylaws'' in the heading to reflect that this would be the third amendment and restatement.

• Article VII (Miscellaneous), Section 7.9(A)(b) currently provides that, for so long as NYSE Group controls any of the NYSE Exchanges, any amendment to or repeal of the ICE Bylaws must either be (i) filed with or filed with and approved by the Commission under section 19 of the Exchange Act and the rules promulgated thereunder, or (ii) submitted to the boards of directors of the NYSE, NYSE Market (DE), NYSE Regulation, NYSE Arca, NYSE Arca Equities, and NYSE Alternext US LLC or the boards of directors of their successors, in each case only to the extent that such entity continues to be controlled directly or indirectly by ICE. Section 7.9(A)(b) would be amended to delete obsolete references to NYSE Market (DE) and NYSE Regulation, replace the outdated reference to ''NYSE Alternext US LLC'' with ''NYSE MKT LLC,'' and add NYSE National.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Exchange Act [18] in general, and with Section 6(b)(1) [19] in particular, in that it enables the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and to enforce compliance by its exchange members and persons associated with its exchange members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange. The Exchange believes that the proposed changes to the corporate documents of the NYSE Group and its intermediary and ultimate parent entities, including the ICE bylaws and director independence policy, ICE Holdings bylaws and certificate of incorporation, NYSE Holdings operating agreement, and the NYSE Group bylaws and certificate of incorporation, to reflect the Acquisition, including updating corporate names, would contribute to the orderly operation of the Exchange by adding clarity and transparency to the Exchange's rules and would enable the Exchange to continue to be so organized as to have the capacity to carry out the purposes of the Exchange Act and comply and enforce compliance with the provisions of the Exchange Act by its members and persons associated with its members. The Exchange therefore believes that approval of the amendment to the Bylaws is consistent with Section 6(b)(1).

For similar reasons, the Exchange also believes that this filing furthers the objectives of Section 6(b)(5) of the Exchange Act [20] because the proposed rule change would be consistent with and facilitate [sic] would create a governance and regulatory structure that is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and

[17] An obsolete reference to NYSE Market (DE) would also be deleted from Article IV, 4(b)(2)(C)(v).

[18] 15 U.S.C. 78f(b).

[19] 15 U.S.C. 78f(b)(1).

[20] 15 U.S.C. 78f(b)(5).

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. As discussed above, the proposed updates to the corporate documents and replacement of outdated or obsolete references removes impediments to and perfects the mechanism of a free and open market by removing confusion that may result from having these references in the governing documents following the Acquisition. The Exchange further believes that the proposal removes impediments to and perfects the mechanism of a free and open market by ensuring that persons subject to the Exchange's jurisdiction, regulators, and the investing public can more easily navigate and understand the governing documents. The Exchange further believes that eliminating an obsolete reference would not be inconsistent with the public interest and the protection of investors because investors will not be harmed and in fact would benefit from increased transparency, thereby reducing potential confusion. Removing such obsolete references will also further the goal of transparency and add clarity to the Exchange's rules.

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 Exchange Act. The proposed rule change is not intended to address competitive issues but rather is concerned solely with updating the Exchange's rules to reflect the Acquisition and to remove obsolete references.

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 (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–NYSEMKT–2016–122 on the subject line.*

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEMKT–2016–122. 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–2016–122 and should be submitted on or before January 19, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–31487 Filed 12–28–16; 8:45 am]

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[21] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79666; File No. SR–MIAX–2016–47]

Self-Regulatory Organizations; Miami International Securities Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Modify the Exchange's Connectivity Fees

December 22, 2016

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 December 13, 2016, Miami International Securities Exchange LLC (''MIAX'' 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 a proposal to amend the MIAX Options Fee Schedule (the ''Fee Schedule'') to modify the Exchange's connectivity fees.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.miaxoptions.com/filter/wotitle/rule_filing,* at MIAX'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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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 the Fee Schedule regarding connectivity to the Exchange.

Network Connectivity Fees

First, the Exchange proposes to amend Section 5(a) and (b) of the Fee Schedule to increase the connectivity fee for the 1 Gigabit (''Gb'') fiber connection, the 10 Gb fiber connection, and the 10 Gb ultra-low latency (''ULL'') fiber connection, which are charged to both Members [3] and Non-Members of the Exchange.

The Exchange currently offers various bandwidth alternatives for connectivity to the Exchange, consisting of a 10Gb ULL fiber connection, a 10Gb fiber connection and a 1Gb fiber connection. The 10Gb ULL offering uses a new ultra-low latency switch, which provides faster processing of messages sent to it in comparison to the switch used for the other types of connectivity. The Exchange currently assesses the following monthly network connectivity fees to both Members and non-Members for connectivity to the Exchange's Primary and Secondary Facility: (a) $1,000 for the 1Gb connection; (b) $5,000 for the 10 Gb connection; and (c) $7,500.00 for the 10Gb ULL connection.

The Exchange proposes to increase the monthly network connectivity fees for such connections for both Members and non-Members as follows: (a) From $1,000 to $1,100 for the 1Gb connection; (b) from $5,000 to $5,500 for the 10Gb connection; and (c) from $7,500 to $8,500 for the 10Gb ULL connection. All of the foregoing network connectivity fees will continue to be pro-rated based on the number of trading days that the Member or non-Member has been credentialed to utilize any of the Exchange APIs in a production environment through the applicable connection, divided by the total number of trading days in such month multiplied by the monthly rate. The 1Gb and 10Gb connectivity fees to the Disaster Recovery Facility assessable to both Members and non-Members shall remain unchanged.

The Exchange believes that the increase in the pricing of the Exchange's connectivity is reflective of the continued value that it provides and the increasing costs to the Exchange for providing and maintaining the necessary hardware and other infrastructure to support this technology. The Exchange notes that other exchanges have similar connectivity alternatives for their participants, including similar low-latency connectivity. For example, NASDAQ PHLX LLC (''PHLX''), NYSE Arca, Inc. (''Arca''), NYSE MKT LLC (''Amex'') and the International Securities Exchange, LLC (''ISE'') all offer a 1Gb, 10Gb and 10Gb low latency Ethernet connectivity alternative to each of their participants.[4] The Exchange further notes that PHLX, Arca and Amex each charge higher rates for such similar connectivity and that the Exchange's proposed connectivity fees are within the range of the fees charged by the ISE for similar connectivity alternatives.[5] The Exchange believes that it is appropriate to increase its fees charged for use of its connectivity to offset increasing costs associated with providing and maintaining the necessary hardware and other infrastructure to support this technology and also to more closely align its fees with the rates charged by competing options exchanges.

Port Fees

Second, the Exchange proposes to amend Section (5)(d)(i) of the Fee Schedule to increase the Financial Information Exchange (''FIX'') Port fees assessable to Members. A FIX Port is an interface with MIAX systems that enables the Port user to submit simple and complex orders electronically to MIAX.

Currently, MIAX assesses monthly FIX Port fees on Members based upon the number of FIX Ports used by the Member submitting orders to the Exchange. The Exchange currently assesses a fee of $500 per month for the first FIX Port, $300 per month for each FIX Port 2 through 5; and $100 per month for each additional FIX Port over 5. The FIX Ports include access to MIAX's primary and secondary data centers and its disaster recovery center.

Accordingly, the Exchange proposes to increase the fees charged to Members for use of FIX Ports. Specifically, the Exchange proposes to: (i) Increase the fee for the first FIX Port, from $500 to $550 per month; (ii) increase the fee for each FIX Port 2 through 5, from $300 to $350 per month; and (iii) increase the fee for each FIX Port over 5, from $100 to $150 per month. The Exchange notes that a competing exchange charges more for the use of similar ports.[6]

Finally, the Exchange proposes to amend Section 5(d)(ii) of the Fee Schedule to increase the fees for MIAX Express Interface (''MEI'') Ports to Market Makers assessed for additional Limited Service Ports.[7] The MEI is a connection to MIAX systems that enables Market Makers to submit simple and complex electronic quotes to MIAX.

Currently, MIAX assesses monthly MEI Port Fees on Market Makers based upon the number of MIAX matching engines [8] used by the Market Maker. Market Makers are allocated two (2) Full Service MEI Ports [9] and two (2) Limited Service MEI Ports per matching engine to which they connect. The Exchange currently assesses the following MEI Port fees: (i) $5,000 for Market Maker Assignments in up to 5 option classes or up to 10% of option classes by volume; (ii) $10,000 for Market Maker Assignments in up to 10 option classes or up to 20% of option classes by volume; (iii) $14,000 for Market Maker Assignments in up to 40 option classes or up to 35% of option classes by volume; (iv) $17,500 for Market Maker Assignments in up to 100 option classes

[3] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[4] *See* NASDAQ PHLX LLC (''PHLX'') Pricing Schedule, Section X(b); *see also* NYSE Amex Options (''Amex'') Fee Schedule, Section V.B, and NYSE Arca Options (''Arca'') Fees and Charges, p. 16; *see further* International Securities Exchange, LLC (''ISE'') Schedule of Fees, Section VI.B.

[5] *Id.*

[6] *See* NASDAQ PHLX LLC (''PHLX'') Pricing Schedule, Section VII and The NASDAQ Options Market (''NOM'') Pricing Schedule, Chapter XV, Section 3. Both PHLX and NOM assess members monthly an Order Entry Port Fee of $650 per month per mnemonic.

[7] Limited Service MEI Ports provide Market Makers with the ability to send eQuotes and quote purge messages only, but not Market Maker Quotes, to the MIAX System. Limited Service MEI Ports are also capable of receiving administrative information. Market Makers initially receive two Limited Service MEI Ports per matching engine (as defined herein).

[8] A ''matching engine'' is a part of the MIAX electronic system that processes options quotes and trades on a symbol-by-symbol basis. Some matching engines will process option classes with multiple root symbols, and other matching engines will be dedicated to one single option root symbol (for example, options on SPY will be processed by one single matching engine that is dedicated only to SPY). A particular root symbol may only be assigned to a single designated matching engine. A particular root symbol may not be assigned to multiple matching engines.

[9] Full Service MEI Ports provide Market Makers with the ability to send Market Maker quotes, eQuotes, and quote purge messages to the MIAX System. Full Service MEI Ports are also capable of receiving administrative information. Market Makers are limited to two Full Service MEI Ports per matching engine.

or up to 50% of option classes by volume; and (v) $20,500.00 for Market Maker Assignments in over 100 option classes or over 50% of option classes by volume up to all option classes listed on MIAX.[10] The Exchange also currently charges $50 per month for each additional Limited Service MEI Port per matching engine for Market Makers over and above the two (2) Limited Service MEI Ports per matching engine that are allocated with the Full Service MEI Ports. The Full Service MEI Ports, Limited Service MEI Ports and the additional Limited Service MEI Ports all include access to MIAX's primary and secondary data centers and its disaster recovery center.

Accordingly, the Exchange proposes to increase the fees charged to Market Makers for use of additional Limited Service MEI Ports. Specifically, the Exchange proposes to increase the fee for additional Limited Service MEI Ports from $50 to $100 per month. The Exchange notes that a competing exchange charges more for the use of similar ports.[11]

The Exchange proposes to implement the proposed changes to the Fee Schedule effective as of January 1, 2017.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act [12] in general, and furthers the objectives of Section 6(b)(4) of the Act [13] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which the Exchange operates or controls. The Exchange also believes the proposal furthers the objectives of Section 6(b)(5) of the Act [14] 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 and is not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

Network Connectivity Fees

The Exchange believes that its proposal is consistent with Section 6(b)(4) of the Act because the fees assessed for connectivity allow the Exchange to cover the costs associated with providing and maintaining the necessary hardware and other infrastructure to support this technology. The Exchange believes that the proposal to increase the fees for connectivity alternatives is fair, equitable and not unreasonably discriminatory because the increased fees are assessed equally among all users of the applicable connections.

As discussed above, PHLX and ISE each offer different connections with respect to latency, and NYSE Arca, Inc. and NYSE Amex both offer similar connectivity alternatives.[15] Despite this, PHLX, Arca and Amex charge a higher fee than the Exchange currently charges for similar connections and ISE's fees are within the range of that of the proposed fees of the Exchange.[16] For these reasons, the Exchange believes the proposed increase in the fees for the fiber connectivity to the Exchange is reasonable and not unfairly discriminatory.

The Exchange also believes that its proposal is consistent with Section 6(b)(5) of the Act [17] because all MIAX participants have the opportunity to subscribe to the Exchange's connections. There is also no differentiation among MIAX participants with regard to the fees charged for these services.

Port Fees

The Exchange believes that its proposal to increase the FIX Port fees is consistent with Section 6(b)(4) of the Act and is reasonable, equitable and not unfairly discriminatory because Members are free to add or remove FIX Ports and will only be charged for the amount of FIX Ports that are utilized. The proposed fee is fair and equitable and not unreasonably discriminatory because it applies equally to all Members regardless of type.

The Exchange also believes that its proposal is consistent with Section 6(b)(5) of the Act [18] because all similarly situated Members, with the same number of FIX Ports, will be subject to the same fee, and access to the Exchange is offered on terms that are not unfairly discriminatory. The Exchange believes that the proposed fees are reasonable in that the rates are within the range of those charged by competing options exchanges.

The Exchange believes that its proposal to increase the fee for additional Limited Service MEI Ports is consistent with Section 6(b)(4) of the Act and is reasonable, equitable and not unfairly discriminatory because Market Makers are free to add or remove additional Limited Service MEI Ports and will only be charged for the number of additional Limited Service MEI Ports that are utilized.

The Exchange also believes that its proposal is consistent with Section 6(b)(5) of the Act [19] because it will be uniformly applied to all Market Makers. All similarly situated Market Makers, with the same number of additional Limited Service MEI Ports, will be subject to the same fee, and access to the Exchange is offered on terms that are not unfairly discriminatory. The Exchange believes that the proposed fees are reasonable in that the rates are within the range of those charged by other competing options exchanges.

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. On the contrary, the Exchange believes that the proposed changes should increase both intermarket and intramarket competition. Specifically, the Exchange believes that the changes will promote competition by increasing the connectivity fees to become more within the range of comparable fees assessed by other competing exchanges.[20]

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 adjust its fees to remain competitive with other exchanges. The Exchange believes that the proposed changes reflect this competitive environment. To the extent that this purpose is achieved, all the Exchange's market participants should benefit from the improved market liquidity.

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.

[10] *See* MIAX Fee Schedule, Section 5(d)(ii).

[11] *See* PHLX Pricing Schedule, Section VII. PHLX assesses specialists and market makers an Active SQF Port Fee of $1,250 per month, with such total port fees capped at $42,000 per month. *See also* NOM Pricing Schedule, Chapter XV, Section 3. NOM assesses Market Makers a monthly SQF Port Fee per port of $500 for the use of 21 Ports or more.

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(4).

[14] 15 U.S.C. 78f(b)(5).

[15] *See supra* note 4.

[16] *Id.*

[17] 15 U.S.C. 78f(b)(5).

[18] 15 U.S.C. 78f(b)(5).

[19] 15 U.S.C. 78f(b)(5).

[20] *See supra* notes 4, 6 and 11.

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,[21] and Rule 19b–4(f)(2)[22] 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 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–MIAX–2016–47 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–MIAX–2016–47. 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 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–MIAX–2016–47, and should be submitted on or before January 19, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Eduardo A. Aleman,

Assistant Secretary.

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[21] 15 U.S.C. 78s(b)(3)(A)(ii).

[22] 17 CFR 240.19b–4(f)(2).

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79664; File No. SR–ISEGemini–2016–16]

Self-Regulatory Organizations; ISE Gemini, LLC; Notice of Filing of Proposed Rule Change, as Modified by Amendment Nos. 1 and 2, To Permit Nasdaq Execution Services, LLC To Become an Affiliated Member of the Exchange To Perform Certain Routing and Other Functions

December 22, 2016.

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 December 9, 2016, ISE Gemini, LLC (''ISE Gemini'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change. On December 20, 2016, the Exchange filed Amendment No. 1 to the proposed rule change, which amended and replaced the Form 19b–4, and Exhibit 1 thereto, in their entirety. On December 20, 2016, the Exchange filed Amendment No. 2 to the proposed rule change.[3] The proposed rule change, as modified by Amendment Nos. 1 and 2, is 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, as modified by Amendment Nos. 1 and 2, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to (1) permit the Exchange to receive inbound orders in options routed through Nasdaq Execution Services, LLC (''NES'') from certain affiliated exchanges, as described in detail below, by establishing procedures designed to prevent potential informational advantages resulting from the affiliation with NES; and (2) grant the Exchange an exemption to permit NES, an affiliate of the Exchange, to become a Member of the Exchange in order to perform certain routing an [sic] other functions on behalf of the Exchange.

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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the filing is to permit ISE Gemini to receive inbound orders in options routed through Nasdaq Execution Services, LLC (''NES'') from certain affiliated exchanges, as described herein and establish procedures designed to prevent potential informational advantages resulting from the affiliation between ISE Gemini and NES. The Exchange requests approval to permit NES, an affiliate of the Exchange, to become a Member of the Exchange in order to perform inbound routing on behalf of the Exchange. The Exchange is also filing to permit ISE Gemini to route outbound orders through NES either directly or indirectly through a third

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Amendment No. 2 amended the description of one of the inbound routing conditions that would apply. Specifically, the Exchange modified the third condition to specify that the report that FINRA will provided to the Exchange's chief regulatory officer on a quarterly basis will quantify all alerts, of which the Exchange or FINRA (rather than solely FINRA) are aware, that identify Nasdaq Execution Services, LLC as a participant that has potentially violated Commission or Exchange rules.

party routing broker-dealer[4] to other market centers and perform other functions regarding the cancellation of orders and the maintenance of a NES error account.[5]

Restriction on Affiliation

NES is a broker-dealer owned and operated by Nasdaq, Inc. NES is affiliated with International Securities Exchange, LLC (''ISE''), ISE Gemini, ISE Mercury LLC,[6] NASDAQ PHLX LLC (''Phlx''), The NASDAQ Options Market LLC (''NOM'') and NASDAQ BX, Inc. (''BX''). For purposes of this filing the term ''Affiliated Entities'' shall refer to ISE, ISE Mercury, Phlx, NOM and BX (collectively ''Affiliated Entities''). Currently, NES is a member of Phlx, NOM and BX (collectively ''Nasdaq Exchanges'') and provides all options routing functions for Phlx, NOM and BX.[7]

Today, Phlx Rule 985 (Affiliation and Ownership Restrictions), The NASDAQ Stock Market LLC (''Nasdaq'') Rule 2160 (Restrictions on Affiliation)[8] and BX Rule 2140 (Restrictions on Affiliation) currently prohibit the Nasdaq Exchanges or any entity with which it is affiliated from, directly or indirectly, acquiring or maintaining an ownership interest in, or engaging in a business venture with, a Nasdaq Exchange member or an affiliate of a Nasdaq Exchange member in the absence of an effective filing under 19(b) of the Act. Specifically, in connection with prior filings, the Commission has expressed concern that the affiliation of an exchange with one of its members raises the potential for unfair competitive advantage and potential conflicts of interest between an exchange's self-regulatory obligations and its commercial interests.[9] NES performs similar functions for the Nasdaq Exchanges and is a member of those three markets respectively.[10]

Similarly, NES would be prohibited from becoming an ISE Gemini member pursuant to ISE Gemini Rule 309, titled ''Limitation on Affiliation between the Exchange and Members,'' without Commission approval. Specifically, a Member may not become an affiliate of the Exchange, or any facility of the Exchange, or any entity with which the Exchange or any facility of the Exchange is affiliated such as the Affiliated Entities. This rule change requests permission from the Commission to allow NES, an affiliate of ISE Gemini to become a Member of ISE Gemini for the purpose of performing certain functions, including, but not limited to receiving inbound orders from one of the Affiliated Entities.

In order for NES to be a Member of ISE Gemini, the Exchange proposes to permit the acceptance of inbound orders that NES routes in its capacity as a facility of the Affiliated Exchanges[11] subject to certain limitations and conditions as follows:

- First, ISE Gemini shall maintain a Regulatory Services Agreement (''RSA'') with FINRA, as well as an agreement pursuant to Rule 17d–2 under the Act (''17d–2 Agreement'').[12] Pursuant to the RSA and the 17d–2 Agreement, FINRA will be allocated regulatory responsibilities to review NES's compliance with certain Exchange rules.[13] Pursuant to the RSA, however, ISE Gemini retains ultimate responsibility for enforcing its rules with respect to NES.
- Second, FINRA will monitor NES for compliance with the Exchange's trading rules, and will collect and maintain certain related information.[14]
- Third, FINRA will provide a report to the Exchange's chief regulatory officer (''CRO''), on a quarterly basis, that: (i) Quantifies all alerts (of which the Exchange or FINRA is aware) that identify NES as a participant that has potentially violated Commission or Exchange rules, and (ii) lists all investigations that identify NES as a participant that has potentially violated Commission or Exchange rules.
- Fourth, ISE Gemini has in place Rule 309. The Exchange proposes to adopt a new paragraph (b) to Rule 309 to state that Nasdaq, Inc., as the holding company owning ISE Gemini and NES, to [sic] establish and maintain procedures and internal controls reasonably designed to ensure that NES does not develop or implement changes to its system, based on non-public information obtained regarding planned changes to ISE Gemini's system, obtained as a result of its affiliation with the Exchange, until such information is available generally to similarly situated Exchange Members, in connection with the provision of inbound order routing to the Exchange.[15]

[4] The ability to route orders to other exchanges using either the Exchange's affiliated broker-dealer (NES) or a third party unaffiliated broker-dealer, which the Exchange may choose to use, is for efficiency and potential cost savings.

[5] The ability to route orders to other exchanges using either the Exchange's affiliated broker-dealer (NES) or a third party unaffiliated broker-dealer, which the Exchange may choose to use, is for efficiency and potential cost savings. *See* ISE–2016–27 (not published) which amends ISE Chapter 19, Rules 1901, 1903, 1904 and 1905. The ISE rule changes impact ISE Gemini because Chapter 19 is incorporated by reference into the ISE Gemini Rulebook.

[6] ISE, ISE Gemini and ISE Mercury are collectively referred to as ''ISE Exchanges.''

[7] *See* Phlx Rule 1080(m) and Nasdaq and BX Rules at Chapter VI, Section 11.

[8] NOM is a facility of Nasdaq.

[9] Securities Exchange Act Release Nos. 71416 (January 28, 2014), 79 FR 6244 (February 3, 2014) (SR–Phlx–2014–05); 71419 (January 28, 2014), 79 FR 6247 (February 3, 2014) (SR–NASDAQ–2014–007); and 714121 (January 28, 2014), 79 FR 6264 (February 3, 2014) (SR–BX–2014–003).

[10] *See* Securities Exchange Act Release Nos. 59721 (April 7, 2009), 74 FR 17245 (April 14, 2009) (SR–Phlx–2009–32); 59779 (April 16, 2009) 74 FR 18600 (April 23, 2009) (SR–Phlx–2009–32, Amendment No. 1) notice of filing of proposed rule change relating to enhanced electronic trading platform for options); 61667 (March 5, 2010), 75 FR 11964 (March 12, 2016)(SR–Phlx–2010–36)(notice of filing and immediate effectiveness of proposed rule changes to establish procedures to prevent information advantages resulting from the affiliation between Phlx and NES); and 71416 (January 28, 2014), 79 FR 6244 (February 3, 2014) (SR–Phlx–2014–05)(notice of filing and immediate effectiveness of proposed rule change to inbound routing of options orders). Nasdaq Options Services was the affiliated broker-dealer prior to a rule change to utilize NES, another affiliated broker-dealer of Nasdaq. *See also* Securities Exchange Act Release Nos. 63769 (January 25, 2011), 76 FR 5423 (January 31, 2011) (SR–BX–2011–003); 63859 (February 7, 2011), 76 FR 8391 (February 14, 2011) (SR–BX–2011–007) (notice of filing of proposed rule change relating to permanent approval of the BX and NES inbound routing relationship); 71420 (January 28, 2014), 79 FR 6256 (February 3, 2014)(SR–BX–2014–004)(notice of filing and immediate effectiveness of proposed rule change to inbound routing). *See also* Securities Exchange Act Release Nos. 65554 (October 13, 2011), 76 FR 65311 (October 20, 2011)(SR–NASDAQ–2011–142); 71418 (January 28, 2014), 79 FR 6262 (February 3, 2014)(SR–NASDAQ–2014–008)(notice of filing and immediate effectiveness of proposed rule change to inbound routing).

[11] The Exchange notes that ISE and ISE Mercury are separately filing rule changes to permit NES to be a Member of ISE and ISE Mercury for the purpose of performing certain routing and other functions, including, but not limited to receiving inbound orders from other entities that are affiliated with NES such as the Affiliated Entities. *See* SR–ISE–2016–27 and SR–ISEMercury–2016–22 (both not published).

[12] 17 CFR 240.17d–2. FINRA will review NES' compliance for certain common rules. The RSA with FINRA specifies the types of business activities that NES may undertake and it also indicates the obligations to which NES is subject under the RSA. Among other things, NES must maintain a certain amount of net capital pursuant to SEC Rule 15c3–1(a)(1)(ii) and operate pursuant to SEC Rule 15c3–3(k)(2)(ii). NES is permitted to route orders in options to the appropriate market center for execution in accordance with member order and requirements.

[13] NES is also subject to independent oversight by FINRA, its designated examining authority, for compliance with financial responsibility requirements.

[14] Pursuant to the RSA, both FINRA and ISE Gemini shall collect and maintain all alerts, complaints, investigations and enforcement actions in which NES (in its capacity as a facility of the Affiliated Entities) is identified as a participant that has potentially violated applicable Commission or Exchange rules. The Exchange and FINRA shall retain these records in an easily accessible manner in order to facilitate any potential review conducted by the Commission's Office of Compliance Inspections and Examinations.

[15] Similarly, Phlx Rule 985 also prohibits a Phlx member from being or becoming an affiliate of Phlx,

Continued

The Exchange also proposes to add the letter ''(a)'' in front of the existing paragraph in Rule 309.

Inbound Routing

ISE Gemini Rule 309 is being amended to add rule language similar to Phlx Rule 985(c)(2). This new rule text provides that Nasdaq, Inc. which owns NES and ISE Gemini, shall establish and maintain procedures and internal controls reasonably designed to ensure that NES does not develop or implement changes to its system on the basis of non-public information regarding planned changes to the Exchange's systems, obtained as a result of its affiliation with the Exchange, until such information is available generally to Exchange members in connection with the provision of inbound routing to the Exchange.

By meeting the conditions described above under Restrictions on Affiliation, ISE Gemini will have set up mechanisms that protect the independence of ISE Gemini's regulatory responsibilities, with respect to NES, as well as demonstrate that NES cannot use any information advantage it may have because of its affiliation with ISE Gemini.

The Exchange has approval from Financial Regulatory Authority (''FINRA'') [16] and The Options Clearing Corporation (''OCC'') [17] for NES to perform these functions.

The Exchange notes that the Nasdaq Exchanges are separately filing rule changes to permit NES to route orders inbound from ISE Gemini to the Nasdaq Exchanges.[18]

Outbound Routing

ISE has rules in place in Chapter 19 related to routing orders, which rules impact routing on ISE Gemini because those rules are incorporated by reference. Today, ISE Gemini utilizes Linkage Handlers [19] to route orders. These Linkage Handlers are unaffiliated with ISE Gemini. The Exchange proposes to have NES route, either directly to other options exchanges or indirectly through third-party routing brokers on behalf of ISE Gemini.[20] With the proposal, regardless of whether a third-party routing broker is utilized, all options routing will go through NES, however the Exchange could determine to direct NES to route orders to certain exchanges through a routing broker rather than routing an order directly. In those cases, orders are submitted to the third-party routing broker through NES, and the third-party routing broker routes the orders to the routing destination in its name.[21] Specifically, within that proposal ISE proposes to amend Rule 1903 to adopt new language similar to Phlx Rule 1080(m).[22]

ISE also proposed to amend Rule 1904 to replace the rule text with rule text similar to Phlx Rule 1080(m)(v) to provide general authority for ISE or NES to cancel orders in order to maintain fair and orderly markets when technical system issues are occurring, and set forth the manner in which error positions may be handled by the ISE or NES.[23]

Rule 1901 is being amended to remove references to Linkage Handlers along with other references in Rules 1903.[24] Finally Rule 1905 concerning error accounts is being deleted within that proposal.[25]

The Exchange is proposing that NES be permitted to perform the same functions pursuant to the same conditions with respect to the outbound routing of orders, cancellation or orders, and the handling of error positions as set forth in the ISE proposal.

The Exchange also proposes to amend Rule 705 to remove the rule text in Rule 705(d)(4) which provided an exception to the limits on compensation for Linkage Handlers. NES is replacing the Linkage Handlers for purposes of routing options orders from the ISE Exchanges. Today, Phlx does not have a similar provision and ISE is removing it from this rule.

Implementation

The Exchange notes that with respect to the Rules in Chapter 19, Rules 1901, 1903, 1904 and 1905, these rules impact not only the ISE market but also ISE Gemini because Chapter 19 is incorporated by reference into the ISE Gemini Rulebook. ISE Gemini will be implemented in Q1 2017 on a symbol by symbol basis. The Exchange will add notations in the ISE Gemini Rulebook to cross reference the amended rule text and make clear the implementation date.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[26] in general, and furthers the objectives of Section 6(b)(5) of the Act,[27] 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, because the proposed rule change will allow the Exchange to receive inbound orders from each Affiliated Entity through NES, acting in its capacity as a facility of the respective Affiliated Entity, in a manner consistent with prior approvals and established protections. The Exchange believes that these conditions establish mechanisms that protect the independence of the Exchange's regulatory responsibility with respect to NES, as well as ensure that NES cannot use any information it may have because of its affiliation with the Exchange to its advantage.

Further, the Exchange notes that its proposal 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 because ISE Gemini will have set up mechanisms that protect the independence of ISE Gemini's regulatory responsibilities, with respect to NES, as well as demonstrate that NES cannot use any information advantage it may have because of its affiliation with ISE Gemini. The Exchange will not be granting any preferential access to information from the Exchange's Order Book to NES. As an affiliated routing broker, NES would not be treated differently than any other unaffiliated routing broker.

or an affiliate of an entity affiliated with Phlx, in the absence of an effective filing under Section 19(b). *See* Phlx Rule 985(b)(1)(B). Phlx filed a rule proposal and received approval based on meeting the four conditions specified above to protect the independence of the Exchange's regulatory responsibility with respect to NES, and has demonstrated that NES cannot use any information advantage it may have because of its affiliation with the Exchange.

[16] The Membership Agreement as between NES and FINRA, dated January 15, 2014, provides that NES may ''[e]ngage in the following types of business: Route orders in equities and options to the appropriate market center for execution in accordance with member order and requirements.''

[17] On December 5, 2013 OCC provided NES membership approval.

[18] *See* SR–NASDAQ–2016–169, SR–Phlx–2016–120 and SR–BX–2016–068 (not published).

[19] A Linkage Handler is a broker that is unaffiliated with the Exchange with which the Exchange has contracted to provide Routing Services, as that term is defined in Rule 1903, by routing ISO(s) to other exchange(s) as agent on behalf of Public Customer and Non-Customer Orders according to the requirements of Rule 1901 (prohibition on trade-throughs) and Rule 1902 (prohibition on locked and crossed markets). *See* Supplementary Material .03 to ISE Rule 1901.

[20] *See* SR–ISE–2016–27 (not published). This proposed rule change proposes to replace Linkage Handlers with NES for the purpose of outbound routing and to establish rules for the cancellation or [sic] orders and maintenance of an error account.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] 15 U.S.C. 78f(b).

[27] 15 U.S.C. 78f(b)(5).

The proposal should remove impediments to and perfect the mechanism of a free and open market and a national market system by providing customer order protection and by facilitating trading at away exchanges so customer orders trade at the best market price. The proposal should also protect investors and the public interest by fostering compliance with the Options Order Protection and Locked/Crossed Market Plan. In addition, the Exchange believes that the proposal is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, because of the specific protections pertaining to the routing broker, in light of the potential conflict of interest where the member routing broker could have access to information regarding other members' orders or the routing of those orders. These protections include the Exchange's control over all routing logic as well as the confidentiality of routing information.[28]

The Exchange believes that its proposal related to the cancellation of orders and error account is consistent with the Act because NES's or the Exchange's ability to cancel orders during a technical or systems issue and to maintain an error account facilitates the smooth and efficient operations of the market.[29] Specifically, the Exchange believes that allowing NES or the Exchange to cancel orders during a technical or systems issue would allow the Exchange to maintain fair and orderly markets.[30] Moreover, the Exchange believes that allowing NES to assume error positions in an error account and to liquidate those positions, subject to the conditions set forth in the proposed amendments to Rule 1904 would be the least disruptive means to correct these errors, except in cases where NES can assign all such error positions to all affected members of the Exchange.[31] Overall, the proposed amendments are designed to ensure full trade certainty for market participants and to avoid disrupting the clearance and settlement process.[32] The proposed amendments are also designed to provide a consistent methodology for handling error positions in a manner that does not discriminate among members.[33] The proposed amendments are also consistent with Section 6 of the Act insofar as they would require NES to establish controls to restrict the flow of any confidential information between the third-party broker and NES/the Exchange associated with the liquidation of error positions.[34]

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. Receiving orders through NES does not raise any issues of intra-market competition because it involves inbound routing from an affiliated exchange. This proposal provides that Nasdaq, which owns NES and the Exchange, shall establish and maintain procedures and internal controls reasonably designed to ensure that NES does not develop or implement changes to its system on the basis of non-public information regarding planned changes to the Exchange's systems, obtained as a result of its affiliation with the Exchange, until such information is available generally to similarly situated Exchange members and member organizations in connection with the provision of inbound routing to the Exchange. Utilizing NES as the routing broker does not create any undue burden on inter-market competition because NES cannot use any information advantage it may have because of its affiliation with ISE Gemini. The Exchange will not be granting any preferential access to information from the Exchange's Order Book to NES. As an affiliated routing broker, NES would not be treated differently than any other unaffiliated routing broker.

The proposal does not result in a burden on competition among exchanges, because there are many competing options exchanges that provide routing services, including through an affiliate. Further, the proposal does not raise issues of intra-market competition, because the Exchange's decision to route through a particular routing broker would impact all participants equally.

With respect to the proposal to establish error accounts, the Exchange's proposal does not result in a burden on competition among exchanges because NES' or the Exchange's ability to cancel orders during a technical or systems issue and to maintain an error account facilitates the smooth and efficient operations of the market for all impacted members. The proposals regarding assumption of error positions and [sic] to liquidation of those positions ensures certainty for all impacted market participants. The proposal does not discriminate among Members.[35]

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 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, as modified by Amendment Nos. 1 and 2, 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–ISEGemini-2016–16 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISEGemini-2016–16. 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

[28] *See* proposed Rule 1903(e).

[29] *See* SR–ISE–2016–27 (not published).

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *See* SR–ISE–2016–27 (not published).

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–ISEGemini-2016–16, and should be submitted on or before January 19, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[36]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–31479 Filed 12–28–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79654; File No. SR–Phlx–2016–122]

Self-Regulatory Organizations; NASDAQ PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify Administrative Charges for Distributors of Proprietary Data Feed Products

December 22, 2016.

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 December 14, 2016, NASDAQ PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's Pricing Schedule under Section VIII, entitled ''NASDAQ PSX FEES,'' in the subsection currently entitled ''Annual Administrative Fee,'' to change the billing cycle for administrative fees paid by distributors of the Exchange's market data from annual to monthly, and to: (1) Replace the current $500 annual administrative fee assessed to distributors of delayed market data with a $50 monthly administrative fee, and (2) replace the current $1,000 annual administrative fee assessed to distributors of real-time market data with a $100 monthly administrative fee. The proposal is described further below.[3]

While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on January 1, 2017.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqphlx.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 change the billing cycle for administrative fees paid by distributors of the Exchange's market data from annual to monthly, and to: (1) Replace the current $500 annual administrative fee assessed to distributors of delayed market data with a $50 monthly administrative fee, and (2) replace the current $1,000 annual administrative fee assessed to distributors of real-time market data with a $100 monthly administrative fee.

Annual Administrative Fee

The Exchange assesses an annual administrative fee to any market data distributor that receives any proprietary Exchange data feed product. The amount of that annual fee is $500 for delayed market data and $1,000 for real-time market data. Distributors of both delayed and real-time market data are not required to pay both fees; they are charged only the higher fee. The time difference between ''delayed'' and ''real-time'' data varies by product. PSX Basic, for example, is considered delayed after 15 minutes, while PSX TotalView-ITCH data is considered delayed after midnight ET. The specific delay interval applicable to each product is published on the Nasdaq Trader Web site. The fee is not prorated if the distributor receives the data feed for less than a year.

Proposed Changes

The Exchange proposes to change the billing cycle for administrative fees paid by distributors of the Exchange's market data from annual to monthly, and to: (1) Replace the current $500 annual administrative fee assessed to distributors of delayed market data with a $50 monthly administrative fee, and (2) replace the current $1,000 annual administrative fee assessed to distributors of real-time market data with a $100 monthly administrative fee.

The purposes of the proposal are to: (1) Facilitate billing by aligning the current annual administrative fee billing cycle with the standard monthly billing cycle used by the Exchange; (2) allocate the fee more equitably by charging distributors that receive less than a year of market data an administrative fee only for those months that they receive market data; and (3) bring the Exchange's administrative fee into alignment with the Nasdaq and BX market data administrative fees, which, after current proposals take effect, will be charged the same administrative fees on the same billing cycle.

The complexity of administering the Exchange's market data program has increased significantly since the current fee was set in November of 2011. New, more complex products and services require the Exchange to expend more resources in administration and

[36] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The NASDAQ Stock Market LLC and NASDAQ BX, Inc. are filing companion proposals similar to this one. All three proposals will change the billing cycle for administrative fees paid by distributors of market data from annual to monthly, and will: (1) Replace the current $500 annual administrative fee assessed to distributors of delayed market data with a $50 monthly administrative fee, and (2) replace the current $1,000 annual administrative fee assessed to distributors of real-time market data with a $100 monthly administrative fee.

monitoring. For example, the introduction of Enhanced Display Solutions—which allow subscribers to view data from PSX TotalView on computer monitors and export it to applications—required the Exchange to create new reporting systems and review mechanisms for the use of market data. New reporting and review mechanisms also had to be created to implement Managed Data Solutions, which allow electronic systems access to PSX TotalView without human intervention. These programs were created in response to customer demand, and all require administrative expenditures that had not been necessary when the amount of the administrative fee was set in 2011.

The administrative fee is entirely optional in that it applies only to firms that elect to distribute the Exchange's market data.

The proposed changes do not raise the cost of any other product sold by the Exchange, except to the extent that they increase the total cost of purchasing market data.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[4] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[5] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [6]

Likewise, in *NetCoalition* v. *Securities and Exchange Commission* [7] (''NetCoalition'') the D.C. Circuit upheld the Commission's use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.[8] As the court emphasized, the Commission ''intended in Regulation NMS that 'market forces, rather than regulatory requirements' play a role in determining the market data . . . to be made available to investors and at what cost.'' [9]

Further, ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers' . . . .'' [10]

The Exchange believes that the proposal to replace the current $500 annual administrative fee assessed to distributors of delayed market data with a $50 monthly administrative fee, and the current $1,000 annual administrative fee assessed to distributors of real-time data with a $100 monthly administrative fee, is fair and equitable in accordance with Section 6(b)(4) of the Act, and not unreasonably discriminatory in accordance with Section 6(b)(5) of the Act. As described above, the proposed fee change is reasonable and necessary to facilitate billing, allocate fees more equitably, and align the administrative charges for market data with those of the Nasdaq and BX exchanges. Moreover, administrative fees are constrained by the Exchange's need to compete for order flow.

The Exchange believes that the proposed change is an equitable allocation and is not unfairly discriminatory because the Exchange will apply the same fee to all similarly-situated distributors.

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 terms of inter-market competition, 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 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, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

The proposal is to replace the current $500 annual administrative fee assessed to distributors of delayed market data with a $50 monthly administrative fee, and the current $1,000 annual administrative fee assessed to distributors of real-time market data with a $100 monthly administrative fee. If the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result.

Specifically, market forces constrain administrative fees in three respects. First, all fees associated with proprietary data are constrained by competition among exchanges and other entities attracting order flow. Second, administrative fees impact the total cost of market data, and are constrained by the total cost of the market data offered by other entities. Third, competition among distributors constrains the total cost of market data, including administrative fees.

Competition for Order Flow

Administrative fees are constrained by competition among exchanges and other entities seeking to attract order flow. Order flow is the ''life blood'' of the exchanges. Broker-dealers currently have numerous alternative venues for their order flow, including thirteen 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''). Each SRO market competes to produce transaction reports via trade executions, and two FINRA-regulated Trade Reporting Facilities (''TRFs'') compete to attract internalized transaction reports. The existence of fierce competition for order flow implies a high degree of price sensitivity on the part of BDs, which may readily reduce costs by directing orders toward the lowest-cost trading venues.

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(4) and (5).

[6] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[7] *NetCoalition* v. *SEC,* 615 F.3d 525 (D.C. Cir. 2010).

[8] *See NetCoalition,* at 534–535.

[9] *Id.* at 537.

[10] *Id.* at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca 2006–21)).

The level of competition and contestability in the market for order flow is demonstrated by the numerous 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 BATS/Direct Edge. A proliferation of dark pools and other ATSs operate profitably with fragmentary shares of consolidated market volume. For a variety of reasons, competition from new entrants, especially for order execution, has increased dramatically over the last decade.

Each SRO, TRF, ATS, and BD that competes for order flow is permitted to produce proprietary data products. Many currently do or have announced plans to do so, including NYSE, NYSE Amex, NYSE Arca, BATS, and IEX. This is because Regulation NMS deregulated the market for proprietary data. While BDs had previously published their proprietary data individually, Regulation NMS encourages market data vendors and BDs to produce market data products cooperatively in a manner never before possible. Order routers and market data vendors can facilitate production of proprietary data products for single or multiple BDs. The potential sources of proprietary products are virtually limitless.

The markets for order flow and market data are inextricably linked: A trading platform cannot generate market information unless it receives trade orders. As a result, the competition for order flow constrains the prices that platforms can charge for proprietary data products. Firms make decisions on how much and what types of data to consume based on the total cost of interacting with an exchange. Administrative fees are part of the total cost of proprietary data. A supracompetitive increase in the fees charged for either transactions or market data has the potential to impair revenues from both products.

Competition From Market Data Providers

Administrative fees are constrained by competition from other exchanges that sell market data. If administrative fees were to become excessive, distributors may elect to discontinue one or two products or services purchased from the Exchange, or reduce the level of their purchases, to signal that the overall cost of market data had become excessive. Such a reduction in purchases would act as a discipline to the PSX administrative fees, and would constrain the Exchange in its pricing decisions.

Competition Among Distributors

Distributors provide another form of price discipline for market data products. Distributors are in competition for users, and can curtail their purchases of market data if the total price of market data, including administrative fees, were set above competitive levels.

In summary, market forces constrain the level of administrative fees through competition for order flow, competition from other sources of proprietary data, and in the competition among distributors for customers. For these reasons, the Exchange has provided a substantial basis demonstrating that the fee is equitable, fair, reasonable, and not unreasonably discriminatory, and therefore consistent with and in furtherance of the purposes of the Exchange Act.

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.[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: (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–2016–122 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2016–122. 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–Phlx–2016–122, and should be submitted on or before January 19, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–31471 Filed 12–28–16; 8:45 am]

BILLING CODE 8011–01–P

[11] 15 U.S.C. 78s(b)(3)(A)(ii).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79658; File No. SR–NYSEMKT–2016–119]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing of Proposed Rule Change To Conform to Proposed Amendments to Securities Exchange Act Rule 15c6–1(a) To Shorten the Standard Settlement Cycle From Three Business Days After the Trade Date (''T+3'') to Two Business Days After the Trade Date (''T+2'')

December 22, 2016.

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 December 15, 2016, 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 to adopt new Rules 14T—Equities, 64T—Equities, 235T—Equities, 236T—Equities, 257T—Equities and 282.65T—Equities, and Sections 510T and 512T of the NYSE MKT Company Guide to conform to proposed amendments to Securities Exchange Act Rule 15c6–1(a) to shorten the standard settlement cycle from three business days after the trade date to two business days after the trade date. 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 adopt the following new rules to conform to proposed amendments to Securities Exchange Act Rule 15c6–1(a) [4] to shorten the standard settlement cycle from T+3 to T+2:

- Rule 14T—Equities (Non-Regular Way Settlement Instructions for Orders);
- Rule 64T—Equities (Bonds, Rights and 100-Share-Unit Stocks);
- Rule 235T—Equities (Ex-Dividend, Ex-Rights);
- Rule 236T—Equities (Ex-Warrants);
- Rule 257T—Equities (Deliveries After ''Ex'' Date);
- Rule 282.65T—Equities (Failure to Deliver and Liability Notice Procedures); and
- Sec. 510T (Two Day Delivery Plan) and Sec. 512T (Ex-Dividend Procedure) of the NYSE MKT Company Guide (the ''Company Guide'').

The proposed new rules would have the same numbering as the current rules, but with the modifier ''T'' appended to the rule number. For example, Rule 14—Equities, governing non-regular way settlement instructions for orders, would remain unchanged and continue to apply to non-regular way settlements on the Exchange. Proposed Rule 14T—Equities would reflect that a regular way settlement would be two days and not the current three days. As discussed below, because the Exchange would not implement the proposed rules until after the final implementation of T+2, the Exchange proposes to retain the current versions of each rule on its books and not delete it until after the proposed rules are approved. The Exchange also proposes to file separate proposed rule changes to establish the operative date of the proposed rules and to delete the current version of each rule.

Background

In 1993, the Securities and Exchange Commission (the ''SEC'' or ''Commission'') adopted Rule 15c6–1(a) [5] under the Act, which established three business days after trade date instead of five business days (''T+5''), as the standard trade settlement cycle for most securities transactions. The rule became effective in June 1995.[6] In November 1994, the Exchange amended its rules to be consistent with the T+3 settlement cycle for securities transactions.[7]

On September 28, 2016, the SEC proposed amendments to Rule 15c6–1(a) to shorten the standard settlement cycle from T+3 to T+2 on the basis that the shorter settlement cycle would reduce the risks that arise from the value and number of unsettled securities transactions prior to completion of settlement, including credit, market and liquidity risk faced by U.S. market participants.[8] The proposed rule amendment was published for comment in the **Federal Register** on October 5, 2016.[9] In light of this action by the SEC, the Exchange proposes new rules to reflect ''regular way'' settlement as occurring on T+2.[10]

Proposed Rule Change

The Exchange proposes the following new rules identified with the modifier ''T'' in order to reflect a T+2 settlement cycle. Except for changes reflecting the shortened settlement period, the proposed rules are the same as their current counterparts:

- Current Rule 14(a)(i)—Equities defines non-regular way settlement instructions as instructions that allow for settlement other than regular way, that is, ''settlement on the third business day following trade date for securities other than U.S. Government Securities''. The Exchange proposes a new Rule 14T—Equities that replaces ''third'' business day with ''second'';
- Current Rule 64(a)—Equities defines ''regular way'' as ''for delivery on the third business day following the day of the contract.'' The Exchange proposes new Rule 64T(a)—Equities

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* 17 CFR 240.15c6–1(a); *see also* notes 8–9, *infra.*

[5] 17 CFR 240.15c6–1(a).

[6] *See* Securities Exchange Act Release Nos. 33023 (October 6, 1993), 58 FR 52891 (order adopting Rule 15c6–1) and 34952 (November 9, 1994), 59 FR 59137 (order changing the effective date from June 1, 1995, to June 7, 1995).

[7] *See* Securities Exchange Act Release Nos. 35110 (December 16, 1994), 59 FR 0 (December 23, 1994) (SR–NYSE–94–40) (Notice) and 35506 (March 17, 1995), 60 FR 15618 (March 24, 1995) (SR–NYSE–94–40) (Approval Order).

[8] *See* SEC Press Release 2016–200: ''SEC Proposes Rule Amendment to Expedite Process for Settling Securities Transactions'' (September 28, 2016).

[9] *See* Securities Exchange Act Release No. 78962 (September 28, 2016), 81 FR 69240 (October 5, 2016) (File No. S7–22–16) (''SEC Proposing Release'').

[10] Earlier this year the MSRB also filed a rule change to reflect ''regular way'' settlement as occurring on T+2. *See* Securities Exchange Act Release Nos. 77744 68678 [sic] (April 29, 2016), 81 FR 14906 (March 18, 2016) (SR–MSRB–2016–04) (approving proposed amendments to MSRB Rules G–12 and G–15 to define regular-way settlement for municipal securities transactions as occurring on a two-day settlement cycle and technical conforming amendments).

that changes ''third'' business day to ''second.'' Current Rule 64—Equities (a)(ii) provides that on the second and third business days preceding the final day for subscription, bids and offers in rights to subscribe shall be made only ''next day.'' To conform with the move to a T+2 settlement cycle, proposed Rule 64T(a)(ii)—Equities would not contain a clause referring to the second and third business days preceding the final day for subscription because the third business day preceding the final day for subscription in a T+2 settlement cycle would simply be a regular way settlement. Finally, current Rule 64(c)—Equities requires ''seller's option'' trades, defined as trades for delivery between two and 60 business days, to be reported to the tape only in calendar day. Proposed Rule 64T(c)—Equities would define ''seller's option'' trades as trades for delivery between three and 60 business days to reflect the shortened settlement period. Further, the final sentence of the current Rule provides that the settlement date of a ''seller's option'' transaction printed as calendar days cannot coincide with the normal three business day ''regular way'' settlement. In proposed Rule 64T—Equities, the Exchange would change the reference to ''regular way'' settlements to two business day.[11]

• Rule 235—Equities provides that transactions in stocks, except those made for ''cash'' as prescribed in Rule 14—Equities, shall be ex-dividend or ex-rights on the second business day preceding the record date fixed by the corporation or the date of the closing of transfer books. The Exchange proposes to adopt proposed Rule 235T—Equities that would delete the word ''second'' so the reference would be to the ''business day'' preceding the record date. The current Rule further provides that if the record date or closing of transfer books occurs upon a day other than a business day, Rule 235—Equities shall apply for the third preceding business day. The Exchange proposes to change ''third preceding business day'' to ''second preceding business day'' in proposed Rule 235T—Equities;[12]

• Current Rule 236—Equities prescribes that ex-warrant trading will begin on the second business day preceding the date of expiration of the warrants, except that when expiration occurs on a non-business day, in which case it will begin on the third business day preceding date of expiration. The Exchange proposes to adopt proposed Rule 236T—Equities and change the warrant period to the business day preceding expiration of the warrants instead of the second business day. Under the proposed Rule, when warrant expiration occurs on other than a business day, the ex-warrant period will begin on the second business day preceding the expiration date instead of on the third business day;[13]

• Current Rule 257—Equities prescribes the time frame for delivery of dividends or rights for securities sold before the ''ex'' date but delivered after the record date. The current time frame is within three days after the record date. Consistent with the T+2 initiative, proposed Rule 257T—Equities the time frame is being shortened to two days;[14]

• Subdivision (1)(A) of Supplementary Material .65 to current Rule 282—Equities sets forth the fail-to-deliver and liability notice procedures where a securities contract is for warrants, rights, convertible securities or other securities which have been called for redemption; are due to expire by their terms; are the subject of a tender or exchange offer; or are subject to other expiring events such as a record date for the underlying security and the last day on which the securities must be delivered or surrendered is the settlement date of the contract or later.

Under current Rule 282.65(1)(A)—Equities, the receiving member organization delivers a liability notice to the delivering member organization as an alternative to the close-out procedures set forth in the Rule. The liability notice sets a cutoff date for the delivery or surrender of the securities and provides notice to the delivering member organization of the liability attendant to its failure to deliver or surrender the securities in time. If the delivering member organization delivers or surrenders the securities in response to the liability notice, it has met its delivery obligation. If the delivering member organization fails to deliver or surrender the securities on the expiration date, it will be liable for any damages that may accrue thereby.

Current Rule 282.65(1)(A)—Equities further provides that when the parties to a contract are both participants in a Qualified Clearing Agency that has an automated service for notifying a failing party of the liability that will be attendant to a failure to deliver, the transmission of the liability notice must be accomplished through such automated notification service. When the parties to a contract are not both participants in a Qualified Clearing Agency[15] that has an automated service for notifying a failing party of the liability that will be attendant to a failure to deliver, such notice must be issued using written or comparable electronic media having immediate receipt capabilities no later than one business day prior to the latest time and the date of the offer or other event in order to obtain the protection provided by this Rule.[16]

Given the proposed shortened settlement cycle, and in order to address concerns that the requirement for the delivering member organization to deliver a liability notice to the receiving member no later than one business day prior to the latest time and the date of the offer or other event in order to obtain the protection provided by the Rule may no longer be appropriate in a T+2 environment,[17] the Exchange

[11] The Exchange also proposes to make several non-substantive changes. As reflected in proposed Rule 64T(a)(i)—Equities, italics would be removed from the single quote before the words ''issued'' and ''regular'' and a missing parenthesis added before the word ''See'' in the second sentence of the second paragraph. Italics would also be removed from the single quote before the word ''seller's'' in five places in proposed Rule 64T(c)—Equities as well as before the word ''regular'' in the last sentence. Finally, as reflected in proposed Rule 64T(a)(1), (a)(ii) and (b)—Equities, bold would be removed from ''(a)(i),'' ''(ii)'' and ''(b).''

[12] The Exchange also proposes to make non-substantive changes to correct punctuation in proposed Rule 235T—Equities by removing italics from the single quote before the word ''cash'' in two places.

[13] The Exchange also proposes to make non-substantive changes to correct punctuation in proposed Rule 236T—Equities by removing italics from the single quote before the word ''cash'' in two places.

[14] The Exchange also proposes to make non-substantive changes to correct punctuation in proposed Rule 257T—Equities by removing italics from the single quote before the word ''Ex'' in the heading and the word ''cash'' in the rule text.

[15] Rule 180—Equities governs failure to deliver and provides in part that ''[w]hen the parties to a contract are both participants in a registered clearing agency which has an automated service for notifying a failing party of the liability that will be attendant to a failure to deliver and that contract was to be settled through the facilities of said registered clearing agency, the transmission of the liability notification must be accomplished through use of said automated notification service.'' Rule 180—Equities does not address the transmission of the liability notification for parties to a contract that are not both participants in a registered clearing agency, which is governed by Rule 282.65—Equities.

[16] The one-day time frame also appears in comparable provisions of other SROs. *See, e.g.,* FINRA Rule 11810(j)(1)(A); NSCC Rules & Procedures, Procedure X (Execution of Buy-Ins) (Effective August 10, 2016); and Nasdaq Rule IM–11810 (Buying-in).

[17] *See, e.g.,* Letter from Thomas F. Price, Managing Director, Operations, Technology & BCP, Securities Industry and Financial Markets Association, to Marcia E. Asquith, Corporate Secretary, FINRA, dated April 4, 2016 (''SIFMA'') (April 4, 2016), noting in connection with FINRA Rule 11810(j), the comparable provision to Rule 282.65(1)(A)—Equities, that the ''industry has identified a number of situations where one-day notice may no longer be appropriate in a T+2 environment, including (1) where the delivery obligation is transferred to another party as a result of continuous net settlement, (2) settlements

proposes to amend Rule 282.65(1)(A)—Equities in situations where both parties to a contract are not participants of a registered clearing agency with an automated notification service by extending the time frame for delivery of the liability notice. Rule 282.65(1)(A)—Equities would accordingly be amended to provide that in such cases, the receiving member organization must send the liability notice to the delivering member organization as soon as practicable but not later than two hours prior to the cutoff time set forth in the instructions on a specific offer or other event to obtain the protection provided by the Rule. The proposed change would be the only change to the text of current Supplementary Material .65;

- Current Sec. 510 of the Company Guide provides that all transactions effected on the Exchange (unless otherwise specified) will be settled in three business days and that a ''regular way'' transaction is due for settlement by delivery of the securities against payment on the third business day after the transaction date. To reflect the change to a two day delivery rule, proposed Sec. 510T would change both references from three business days to two business days. Additionally, current Sec. 510 provides an example of the delivery plan for ex-dividend and ex-rights, and states that a ''regular way'' transaction made on a Friday is due for settlement on Wednesday of the following week and that a transaction on Monday is due for settlement on Thursday. To reflect the change to a two day delivery rule, proposed Sec. 510T would change the Wednesday to Tuesday and Thursday to Wednesday in the example; and
- Current Sec. 512 of the Company Guide provides that transactions in stocks (except those made for ''cash'') are ex-dividend on the second business day preceding the record date unless the record date selected is not a business day, in which case the stock will be quoted ex-dividend on the third preceding business day. Consistent with the T+2 initiative, proposed Sec. 512 would shorten the time frames to the business day preceding the record date and in cases where the record date is not a business day, the second preceding business day.

Operative Date Preambles

As noted above, because the Exchange would not implement the proposed rules until after the final implementation of T+2, the Exchange proposes to retain the current versions of each rule on its books and not delete them until after the proposed rules are approved. The Exchange also proposes to file separate proposed rule changes as necessary to establish the operative date of the proposed rules and to delete the current version of each rule.

To reduce the potential for confusion regarding which version of a given rule governs, the Exchange proposes to add a preamble to each current rule providing that: (1) The rule will remain operative until the Exchange files separate proposed rule changes as necessary to establish the operative date of the revised rule, to delete the current rule and proposed preamble, and to remove the preamble text from the revised rule; and (2) in addition to filing the necessary proposed rule changes, the Exchange will announce via Information Memo the operative date of the deletion of the current rule and implementation of the proposed rule designated with a T.

The Exchange also proposes to add a preamble to each proposed rule that would provide that: (1) The Exchange will file a separate rule change to establish the operative date of the proposed rule, delete the current version and the proposed preamble, and remove the preamble text from the revised rule; and (2) until such time, the current version of the rule will remain operative and that, in addition to filing the necessary proposed rule changes, the Exchange will announce via Information Memo the implementation of the proposed rule and the operative date of the deletion of the current rule.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[18] in general, and furthers the objectives of Section 6(b)(5) of the Act,[19] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, 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 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 the proposed rule change supports the industry-led initiative to shorten the settlement cycle to two business days. Moreover, the proposed rule change is consistent with the SEC's proposed amendment to SEA Rule 15c6–1(a) to require standard settlement no later than T+2. The Exchange believes that the proposed rule change will provide the regulatory certainty to facilitate the industry-led move to a T+2 settlement cycle. Further, the Exchange believes that, by shortening the time period for settlement of most securities transactions, the proposed rule change would protect investors and the public interest by reducing the number of unsettled trades in the clearance and settlement system at any given time, thereby reducing the risk inherent in settling securities transactions to clearing corporations, their members and public investors. The Exchange also believes that adding a preamble to each current rule and to each proposed rule clarifying the operative dates of the respective versions would remove impediments to and perfect the mechanism of a free and open market and a national market system by adding clarity and transparency to the Exchange's rules, reducing potential confusion, and making the Exchange's rules easier to navigate.

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 is not designed to address any competitive issue but rather facilitate the industry's transition to a T+2 regular-way settlement cycle. The Exchange also believes that the proposed rule change will serve to promote clarity and consistency, thereby reducing burdens on the marketplace and facilitating investor protection. Moreover, the proposed rule changes are consistent with the SEC's proposed amendment to SEA Rule 15c6–1(a) to require standard settlement no later than T+2. Accordingly, the Exchange believes that the proposed changes do not impose any burdens on the industry in addition to those necessary to implement amendments to SEA Rule 15c6–1(a) as described and enumerated in the SEC Proposing Release.[20]

outside of National Securities Clearing Corporation (the ''NSCC'') and (3) settlements where the third party is not a[n NYSE MKT] member.''

[18] 15 U.S.C. 78f(b).

[19] 15 U.S.C. 78f(b)(5).

[20] *See* note 9, *supra.*

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 such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove 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–NYSEMKT–2016–119 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEMKT–2016–119. 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–2016–119, and should be submitted on or before January 19, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–31473 Filed 12–28–16; 8:45 am]

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[21] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79655; File No. SR–NSCC–2016–008]

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing of Proposed Rule Change To Reflect Updates to the Consolidated Trade Summary, Eliminate Re-Pricing in the Foreign Security Accounting Operation and Make Other Changes

December 22, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, as amended (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 15, 2016, National Securities Clearing Corporation (''NSCC'') 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 clearing agency. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change consists of amendments to NSCC's Rules & Procedures (''Rules'')[3] in order to (i) reflect updates that NSCC would make to the Consolidated Trade Summary (referred to herein as the ''CTS'' and as the ''CTSs'' for more than one CTS), which is provided to Members and contains summarized trade obligation information, and (ii) eliminate the practice of re-pricing in the Foreign Security Accounting Operation. The proposed rule change would amend the following Rules: (i) Procedure II, Section H (Consolidated Trade Summaries), (ii) Procedure V, Section C (Net Balance Orders) and Section E (Consolidated Trade Summaries), (iii) Procedure VI, Section A (Introduction), Section B (Trade-for-Trade Foreign Security Receive and Deliver Instructions), and Section C (Netted Member-to-Member Receive and Deliver Instructions) and (iv) Procedure VII, Section B (Consolidated Trade Summary), as described in more detail below. In addition, the proposed rule change would make technical changes to clarify and correct certain provisions of the foregoing Rules, as described in greater detail below.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the clearing agency 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 clearing agency has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The current CTS[4] output consists of a main file and two supplemental files as well as an additional file that reflects transactions in Foreign Securities.[5] The

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Capitalized terms not defined herein are defined in the Rules, *available at http://dtcc.com/~/media/Files/Downloads/legal/rules/nscc_rules.pdf.*

[4] The CTS is described in Procedure II (Trade Comparison and Recording Service), Procedure V (Balance Order Accounting Operation) and Procedure VII (CNS Accounting Operation).

[5] The Foreign Securities file is a transaction file reporting Foreign Securities trades as received. The transactions are netted in the foreign netting process to become balance orders, which are reported on the CTS. The current CTS reports the netted summary records and balance orders on T+1. The revised CTS would report Foreign Securities trades on trade date. The revised CTS will report both foreign and domestic netted transactions and

CTS is issued to Members as an iterative report three times a day: Beginning with the main CTS, which is issued at approximately 21:00 ET, then the first Supplemental CTS, which is issued at approximately 24:00 ET, and finally, the second Supplemental CTS, which is issued the following business day at approximately 12:00 ET. Each iteration of the CTS contains the same type of summarized trade obligation information, however, depending on the time of day the iteration of the CTS is issued, it may be referred to as the ''Consolidated Trade Summary'' (or ''CTS'') or a ''Supplemental Consolidated Trade Summary.'' Furthermore, any information contained in a prior CTS does not appear again in any successive CTS, including any later Supplemental CTS.[6]

NSCC held numerous industry meetings in order to give Members an open forum to express their ideas about changes that are needed to the CTS. In order to address the Member feedback it received, NSCC would, with this proposed rule change: (1) Consolidate the file layouts into one common file layout, (2) provide more details in the revised CTSs, (3) discontinue a current output format (print image) and introduce a more user-friendly format (referred to as comma separated value or ''CSV'') and an online query tool, (4) simplify the terminology in the Rules by referring to each iteration of the CTS as the ''Consolidated Trade Summary'' (instead of the way in which the Rules are currently drafted to refer to a ''Consolidated Trade Summary'' and a ''Supplemental Consolidated Trade Summary''), and (5) discontinue the Foreign Securities transaction file because information contained in that additional file would be reflected in the revised CTSs, each of which is described below.

(i) Changes to the CTS and Technical Changes to the CTS-Related Rules

First, the proposed rule change would consolidate the file layouts of the current CTSs into one common file layout that would be used for each of the three CTSs that are issued each day. Currently, each of the main CTS file, the supplemental CTS file, and the Foreign Securities file has its own individual file layout. NSCC would consolidate these multiple file layouts into one common file layout in the revised CTS file. Having one common layout in the revised CTS would eliminate the need for Members to maintain coding for multiple file layouts.

Second, the proposal would update the CTS output file layout to provide Members with additional transparency and clarity regarding their trade summary, balance orders and receive and deliver instructions, which would help with reconciliation. For example, the current CTS output file layout specifies if a security is a CNS security or a non-CNS security but does not further clarify the non-CNS obligations as guaranteed or not guaranteed. Under the proposal, the CTS output file layout would be expanded to include a field for the guarantee/not guarantee designation to clearly indicate to users whether a trade obligation is guaranteed or not guaranteed. Other examples of new fields that would be added include: (1) Netting type to describe whether netted (*e.g.,* multilaterally netted or bilaterally netted) or trade-for-trade instructions resulted, and (2) a net reason code to add clarity as to the netting type.

Third, Members have also expressed interest in having NSCC change the current file format of the CTSs, which are currently available in print image format and machine-readable (''MRO'') format. As a result, NSCC would discontinue the current print image format while maintaining the current MRO format and would also introduce an online query tool. The print image format would be replaced by CSV which can be downloaded into spreadsheet programs. In addition to the three iterations of the CTS that would continue to be distributed to Members, Members would also be able to use a new online query tool to search information and create their own custom data view and custom reports. The new online query tool would enable users to research information that has been previously distributed in a CTS. Members have expressed interest in this change in file formats and the online query tool which allows results to be downloaded to spreadsheet programs.

Fourth, from a Rules perspective, the terminology in Procedure II, Section H, Procedure V, Section E and Procedure VII, Section B would be revised, so that each CTS would be referred to as the ''Consolidated Trade Summary'' and more than one CTS would be referred to as the ''Consolidated Trade Summaries.'' The proposed rule change would eliminate references to alternate terminology such as ''Supplemental Consolidated Trade Summary,'' ''Supplemental Consolidated Trade Summaries,'' and ''CTS.'' In addition, conforming changes would be made to Procedure V, Section C and Procedure VII, Section B to add phrases and terms such as ''next available,'' ''applicable'' and ''prior'' before references to ''Consolidated Trade Summary.'' Additional technical changes would be made to clarify that the CTS would continue to be issued to Members three times a day and would continue to be non-cumulative; these changes would apply to Procedure II, Section H, Procedure V, Section E and Procedure VII, Section B. Procedure VII, Section B would also be amended to reflect the change in output format of the Consolidated Trade Summaries (specifically, because the print image format is being discontinued and the CSV format is being introduced, the Rules and terminology must be changed to use terminology consistent with the different format).

Fifth, the Foreign Securities transaction file would be discontinued. Information that is currently in this additional file would be reflected in the revised CTSs.

NSCC would continue to issue the CTSs to Members three times a day, at approximately the same intervals as it does today.[7] The revised CTSs would continue to be iterative (*i.e.,* any information that appeared on prior CTSs would not appear again on any successive CTSs), and also continue to be available in MRO format.

(ii) Discontinuation of the Re-Pricing of Foreign Securities and Technical Clarifications/Corrections to Procedure VI (Foreign Security Accounting Operation)

Based on Member feedback, NSCC is also proposing to update the code associated with NSCC's Foreign Security Accounting Operation, which receives and processes Foreign Securities traded over-the-counter and settled in U.S. Dollars.[8] The current foreign netting process aggregates Foreign Securities obligations, bilaterally nets these obligations and then re-prices these obligations using a uniform Settlement Price. As further explained below, NSCC is proposing to no longer re-price these Foreign Securities obligations.

By way of background, Members often settle their Foreign Securities trades bilaterally in the local market prior to receiving the main CTS (which contains netted obligations marked to market

the associated balance orders. By consolidating the Foreign Securities file and CTS files, Members would have only one file to support.

[6] The trade obligation information in the CTS is Member-specific; it is not anonymized.

[7] The header of the CTS output file would indicate whether the CTS is for Cycle 1 (*i.e.,* the one issued at approximately 21:00 ET), Cycle 2 (*i.e.,* the one issued at approximately 24:00 ET) or Cycle 3 (*i.e.,* the one issued at approximately 12:00 ET on the next business day).

[8] *See* Procedure VI (Foreign Security Accounting Operation).

using the uniform Settlement Prices of such Foreign Securities). There is, therefore, a timing mismatch between the Members' settlement of Foreign Securities trades that are executed in U.S. Dollars and the distribution of the CTS to Members by NSCC. Currently, NSCC re-prices these Foreign Securities at the uniform Settlement Prices, creating potential cash adjustments that are not guaranteed by NSCC. For example, assume there are 10 trades of a Foreign Security which have been executed at different contract prices between Member A and Member B. First, these 10 trades are aggregated by NSCC so that there is a net buy obligation and a net sell obligation between Member A and Member B. The Foreign Securities trades may have been executed at different contract prices, so, today, NSCC applies the uniform Settlement Price to the netted buy obligation and the netted sell obligation. Re-pricing can create a cash adjustment for Members; this cash adjustment is not guaranteed by NSCC and is a concern for Members. For example, if a Member's respective counterparty in a trade becomes insolvent, then the solvent Member is liable for the cash adjustment because it is not guaranteed by NSCC. With this proposed rule change, the cash adjustment and the associated risk due to re-pricing would be eliminated, as requested by Members.[9]

Foreign Securities would continue to be bilaterally netted, but would no longer be re-priced at uniform Settlement Prices. Instead, they would be bilaterally netted at their contract prices to eliminate the risk of a cash adjustment (which is not guaranteed by NSCC) due to re-pricing.

To effectuate this proposed change, NSCC proposes to remove language in Procedure VI, Section C that permits NSCC to establish a uniform Settlement Price and calculate any related Foreign Security Clearance Cash Adjustment associated with the re-pricing. Unlike the underlying Foreign Securities transactions (which are settled in the local markets and not at NSCC), the payments of any Foreign Security Clearance Cash Adjustment (whether due to netting or re-pricing) related to those underlying Foreign Securities transactions are made through NSCC today and under the proposed rule change, this would continue to be the case with respect to Foreign Security Clearance Cash Adjustments that arise due to netting. The proposed rule change would revise the language in Procedure VI to clearly state that the failure of a Member to make payment of the Foreign Security Clearance Cash Adjustment with NSCC will cause NSCC to reverse all such cash adjustment debits and credits (rather than generally stating this would be caused by the failure to ''make settlement with the Corporation''). The proposed rule change would further clarify that neither the settlement of the underlying transaction nor the payment of the related Foreign Security Clearance Cash Adjustment would be guaranteed by NSCC (which is also the case today).[10]

Additional clarifying changes to Procedure VI include revising the reference from ''T+2'' in Section B to ''SD–1'' because Foreign Securities transactions are not always settled on T+3 (according to local market practices) and thus, are not always compared on T+2, as Section B of Procedure VI states. Therefore, using Settlement Date (*i.e.,* ''SD'') as the reference point is more appropriate. Furthermore, Foreign Securities transactions are reported on the CTSs, which are Settlement Date-based. In addition, in Section C, ''produced'' would be revised to ''reported,'' because ''reported'' more accurately describes what occurs today—that is, NSCC reports the netted Member-to-Member receive and deliver instructions. In addition, the proposed rule change would make the following corrections: (i) The reference in Section C to ''Foreign Security Clearing Cash Adjustment'' would be revised to the correct term, ''Foreign Security Clearance Cash Adjustment'' and (ii) the cross-references to ''Section II'' and ''Section IV'' in Section A would be replaced with references to ''Procedure II'' and ''Procedure IV,'' respectively.

Implementation Timeframe

The proposed rule changes would become effective by July 14, 2017. After Commission approval of the proposed rule changes, a legend would be added to each of Procedures II, V, VI and VII stating that there are approved but not yet operative changes to the respective Procedure and specifying the applicable section or sections that would be amended by the proposed rule change. The legend would state that such changes would be operative by July 14, 2017, but if such changes become operative before July 14, 2017, NSCC would notify Members by Important Notice 30 days before the actual implementation date. The legend would also state that underlined and boldface text indicates new text and strikethrough and boldface text indicates deleted text. Additionally, the legend would include a reference to the file number of the proposed rule change and would state that once operative, the legend would automatically be removed from the Rules, and the formatting of the text of the changes in the applicable section or sections would automatically be revised to reflect that these changes have become operative.

2. Statutory Basis

Section 17A(b)(3)(F) of the Securities Exchange Act of 1934, as amended (''Act'') requires, in part, that the Rules be designed to promote the prompt and accurate clearance and settlement of securities transactions and to protect investors and the public interest.[11]

NSCC believes that the proposed rule changes are consistent with the requirements of the Act and the rules and regulations thereunder applicable to NSCC, in particular Section 17(A)(b)(3)(F), because NSCC believes that the proposed rule changes would promote the prompt and accurate clearance and settlement of securities transactions in furtherance of the Act.[12] Specifically, by updating the CTS to provide more details and information in one common file layout, the proposal would provide Members with more transparency and clarity regarding their trade obligations, which would help with reconciliation (including, for example, reconciliation of trades for settlement). Furthermore, Members would continue to receive the CTS three times a day, but would receive the CTS in a more user-friendly format (*i.e.,* CSV) in addition to the current MRO format. With the new online query tool, Members would also be able to access trade obligation information that has been distributed in prior CTSs and customize searches of trade obligation information according to their needs. Therefore, NSCC believes that these changes to the CTS would make it a more effective tool for Members to manage their trade obligations and any associated risks, facilitating the protection of investors and the public

[9] A cash adjustment due to netting, however, is still possible, and would continue to be not guaranteed; this cash adjustment occurs because of the cash differences due to the netting process. A cash adjustment due to netting would arise, if, for example, Member A sold 5 shares of Security X for $20 and Member B bought 5 shares of Security X for $10. In this case, the shares would net out to zero, but there would be a cash adjustment of $10.

[10] Under the proposed rule change, only a Foreign Security Clearance Cash Adjustment due to re-pricing would be eliminated. A Foreign Security Clearance Cash Adjustment due to netting is still possible, so this Procedure is still applicable to such Foreign Security Clearance Cash Adjustments.

[11] 15 U.S.C. 78q–1(b)(3)(F).

[12] *Id.*

interest from such risks and also promoting the prompt and accurate clearance of securities transactions.

NSCC believes that the proposed rule changes associated with the Foreign Security Accounting Operation also would promote the prompt and accurate clearance and settlement of securities transactions in furtherance of the Act.[13] Specifically, the proposed rule change would address the timing mismatch between the receipt of the CTS by Members and the settlement of Foreign Securities trades in the local markets by Members by discontinuing the practice of re-pricing Foreign Securities at the uniform Settlement Prices. This change also would eliminate the possibility of a cash adjustment due to re-pricing and the associated risk that a solvent Member could be liable for the cash adjustment if its counterparty defaults because the cash adjustment is not guaranteed by NSCC. Therefore, NSCC believes that the proposed rule change would promote the prompt and accurate clearance and settlement of securities transactions in furtherance of the Act.[14]

Additionally, the proposed rule changes to (i) revise the CTS-related terminology and to make the conforming language changes to the affected provisions in the Rules associated with the CTS and (ii) correct certain Rules, which have been described in detail above, would provide technical accuracy and additional clarity to Members, thereby also promoting the prompt and accurate clearance and settlement of securities transactions, consistent with Section 17A(b)(3)(F) of the Act.[15]

(B) Clearing Agency's Statement on Burden on Competition

NSCC does not believe that the proposed rule changes associated with the CTS would impose any burden on competition that is not necessary or appropriate in furtherance of the Act, as described above.[16] While the proposed rule changes relating to the CTS would require Members to make technological changes and thereby incur costs in doing so that may burden the Member competitively, the proposed rule changes have been structured to better meet the needs of Members. Specifically, the proposed rule changes associated with the CTS would meet Members' needs by revising the terminology in the Rules to be simpler, modifying the layout of the CTS to be clearer, and providing users with more information and transparency. In addition to continuing to receive the CTSs three times a day, Members would be able to access CTS information by using the online query tool. Moreover, the proposed rule changes associated with the CTS are appropriate in that such changes reflect Members' feedback. Consequently, NSCC believes that any burden on competition derived from the proposed rule changes would be necessary and appropriate in support of the beneficial objectives of the improvements in the CTS, which would be made in furtherance of the Act, as described above. Moreover, NSCC believes any such burden on competition derived from the proposed rule changes would not be significant because Members have requested these changes and were involved in developing the business requirements.

NSCC does not believe that the proposed changes associated with the Foreign Security Accounting Operation would have any impact on competition. These changes do not require Members to make any coding changes or incur costs. Members would continue to accept output from NSCC associated with their activity in the Foreign Security Accounting Operation as they do today with the difference being that this output would no longer reflect the re-pricing discussed in detail above.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

NSCC has not received or solicited any written comments relating to this proposal. NSCC will notify the Commission of any written comments it receives.

III. Date of Effectiveness of the Proposed Rule Change, and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NSCC–2016–008 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

All submissions should refer to File Number SR–NSCC–2016–008. 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 NSCC and on DTCC's Web site (*http://dtcc.com/legal/sec-rule-filings.aspx*). 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–NSCC–2016–008 and should be submitted on or before January 19, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–31472 Filed 12–28–16; 8:45 am]

BILLING CODE 8011–01–P

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] 15 U.S.C. 78q–1(b)(3)(I).

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79676; File No. SR–NYSE–2016–72]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change Amending Its Listing Standards for Special Purpose Acquisition Companies

December 22, 2016.

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 December 8, 2016, 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 its listing standards for special purpose acquisition companies (''SPACs'') set forth in Section 102.06 of the NYSE Listed Company Manual (the ''Manual'') to (i) reflect changes to the SPAC structure in transactions that have come to market in recent years and (ii) adjust the quantitative requirements for initial and continued listing. 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 its listing standards for Acquisition Companies (or ''ACs'') set forth in Section 102.06.

An AC (typically known in the marketplace as a special purpose acquisition company or ''SPAC'') is a special purpose company formed for the purpose of effecting a merger, capital stock exchange, asset acquisition, stock purchase, reorganization or similar business combination with one or more operating businesses or assets. The securities sold by the AC in its initial public offering are typically units, consisting of one share of common stock and one or more warrants (or a fraction of a warrant) to purchase common stock, that are separable at some point after the IPO. Management generally is granted a percentage of the AC's equity and may be required to purchase additional shares in a private placement at the time of the AC's IPO.

The typical AC structure has changed significantly since the NYSE adopted its current listing standards. The listing standards of the Nasdaq Stock Market and NYSE MKT both permit the listing of ACs with this revised structure and the NYSE now proposes to revise Section 102.06 accordingly.

Currently, Section 102.06 requires that at least 90% of the proceeds raised in the IPO and any concurrent sale of equity securities be placed in a trust account. Further, Section 102.06 requires that, within 36 months or such shorter time period as specified by the AC, the AC complete one or more business combinations having an aggregative fair market value of at least 80% of the value of the trust account (the ''Business Combination''). Until the AC has completed a business combination of at least 80% of the trust account value, the AC must, among other things, submit the Business Combination to a shareholder vote. Any public shareholders who vote against the Business Combination have a right to convert their shares of common stock into a *pro rata* share of the aggregate amount then in the trust account, if the business combination is approved and consummated. The AC cannot consummate its Business Combination if public shareholders owning in excess of a threshold amount (to be set no higher than 40%) of the shares of common stock issued in the AC's initial public offering exercise their conversion rights in connection with such Business Combination.

Since the adoption of Section 102.06, ACs that went public and did not list on an exchange began to adopt a modified structure. In response, Nasdaq and NYSE MKT both amended their listing rules to accommodate these changes. The Exchange understands that these changes were made to address a strategy that had been undertaken by hedge funds and other activist investors in relation to a number of ACs. The Exchange understands that these investors may have acquired an interest in an AC and used their ability to vote against a proposed acquisition as leverage to obtain additional consideration not available to other shareholders. For example, they may negotiate the sale of their stake to an affiliate of the AC's management for a price higher than their *pro rata* share of the trust account. In other cases, the withheld votes may have caused the proposed acquisition to fail altogether. The Exchange understands the revisions to the AC structure were adopted to prevent this sort of ''greenmail.''

Under the revised structure, an AC would not seek a vote on the Business Combination unless otherwise required by law. Instead, the AC would conduct a redemption offer pursuant to Rule 13e–4 and Regulation 14E under the Act after the public announcement and prior to the completion of the business combination, enabling shareholders who are opposed to the transaction to tender their shares in exchange for a pro rata share of the cash held by the acquisition vehicle. This is the same outcome available to public shareholders who vote against the acquisition pursuant to the Exchange's existing rule. Under this new alternative, shareholders would still maintain the ability to ''vote with their feet'' if they oppose a proposed transaction and would, as just noted, also obtain their pro rata share of the AC's cash through the tender offer pursuant to Rule 13e–4 and Regulation 14E under the Act. As such, the Exchange believes that the protections provided by the existing rule would continue to be available. Accordingly, the Exchange proposes to modify Section 102.06 to allow an AC to conduct a tender offer for all shares of all shareholders in exchange for a *pro rata* share of the cash held in trust by the AC in compliance with Rule 13e–4 and Regulation 14E under the Act instead of soliciting a shareholder vote.

In addition, the proposed rule change would require an AC that is not subject to the Commission's proxy rules to conduct a tender offer for shares in

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

exchange for a *pro rata* share of the cash held in trust by the AC in compliance with Rule 13e–4 and Regulation 14E under the Act and provide information similar to that required by the Commission's proxy rules, even if the AC seeks a shareholder vote. This change would assure that investors, in all cases, get comparable information about the proposed transaction.

The Exchange also proposes to eliminate the requirement that the AC cannot consummate its Business Combination if public shareholders owning in excess of a threshold amount (to be set no higher than 40%) of the shares of common stock issued in the AC's initial public offering exercise their conversion rights in connection with such Business Combination. The Exchange notes that this limitation does not exist under the rules of Nasdaq or NYSE MKT and also that there will be disclosure enabling shareholders to include in their decision making consideration of the fact that the post-Business Combination entity may vary in size depending on how many shares are redeemed for cash. The amended rule would permit AC shareholders to make their own informed decisions as to whether they want to participate in the Business Combination.

The Exchange also proposes to amend the quantitative requirements of Section 102.06. Under the current rule, an AC must have an aggregate market value of $250 million and $200 million of market value of publicly-held shares [4] at the time of initial listing. The Exchange has observed that most of the ACs that have listed on other markets in recent years are significantly smaller than they would need to be to meet the NYSE's current quantitative requirements. As such, the Exchange proposes to change the aggregate market value and market value of publicly-held shares requirements of Section 102.06 to $100 million and $80 million, respectively. The Exchange notes that there are a number of ACs listed currently on other markets that would have met these revised requirements, but not those of the current rule, and that there is no evidence that these companies are unfit for exchange trading. The Exchange also notes that its revised quantitative requirements would remain higher than those of Nasdaq and NYSE MKT.[5]

The Exchange also proposes to adjust the continued listing standards for ACs to align them with the proposed revised initial listing standards. Currently, the Exchange will initiate suspension and delisting procedures of an AC prior to its Business Combination if its average aggregate global market capitalization fell below $125 million or the average aggregate global market capitalization attributable to its publicly-held shares fell below $100 million, in each case over 30 consecutive trading days. An AC is not eligible to follow the compliance plan procedures outlined in Sections 802.02 and 802.03 with respect to this criterion, and any such AC is subject to an immediate trading suspension and the commencement of immediate delisting proceedings. The Exchange proposes to replace this with a provision under which a pre-Business Combination AC would be subject to prompt initiation of suspension and delisting procedures if its average global market capitalization fell below $50 million or its aggregate market value of publicly-held shares fell below $40,000,000 over 30 consecutive trading days. The Exchange believes that this continued listing standard is appropriate as it is consistent with the requirement applied to operating companies (as described in the next paragraph), but without the cure periods provided to operating companies. The Exchange would notify the AC if its average aggregate global market capitalization fell below $75,000,000 or its aggregate market value of publicly-held shares fell below $60,000,000.

Currently, an AC upon consummation of its Business Combination is subject only to the continued listing requirements applicable to operating companies (*i.e.,* either its average global market capitalization or its stockholders' equity must be at least $50 million).[6] In connection with its adjustment of the initial listing standards for ACs, the Exchange proposes to adopt a requirement that, immediately after consummation of the Business Combination, the post-Business Combination company must meet the following requirements:

- A price per share of at least $4.00;
- a global market capitalization of at least $150,000,000;
- an aggregate market value of publicly-held shares of at least $40,0000,000; and
- the requirements with respect to shareholders and publicly-held shares set forth in Section 102.01A for companies listing in connection with an initial public offering.[7]

When a listed AC consummates its Business Combination, the Exchange will require the AC to submit an original listing application which must be approved by the Exchange prior to consummation of the Business Combination. The Exchange believes that by requiring a post-Business Combination AC to meet a significantly enhanced continued listing requirement, it would better ensure that only ACs that post-Business Combination are clearly suitable for listing on the NYSE will remain listed.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[8] in general, and furthers the objectives of Section 6(b)(5) [9] of the Act, in particular in that it is designed 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 is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange believes the proposed rule change furthers these goals in that it imposes additional requirements on ACs, which are designed to protect investors and the public interest and prevent fraudulent and manipulative acts and practices on the part of ACs and their promoters.

The Exchange believes that the proposed revisions to the aggregate market value and market value of publicly-held shares requirements are consistent with the protection of investors in that a number of ACs have listed on other markets that would have

[4] Shares held by directors, officers, or their immediate families and other concentrated holding of 10 percent or more are excluded in calculating the number of publicly-held shares.

[5] The Exchange notes that an AC could list on Nasdaq Global Market under Nasdaq Marketplace Rule 5405(b)(3) on the basis of a market value of listed securities of $75 million and a market value of publicly held shares of $20 million. The Exchange's understanding is that Nasdaq calculates the market value of listed securities by multiplying the total shares outstanding by the public offering price per share, which is also how the Exchange calculates aggregate market value for purposes of Section 102.06. As such, the comparable requirements are clearly lower on Nasdaq Global Market in both cases.

[6] In addition, when a listed AC consummates its Business Combination, the Exchange will consider whether the Business Combination gives rise to a ''back door listing'' as described in Section 703.08(E). If the resulting company would not qualify for original listing, the Exchange will promptly initiate suspension and delisting of the AC.

[7] Currently, Section 102.01A requires companies listing in connection with their IPO to have a minimum of 400 holders of 100 shares and 1,100,000 publicly-held shares.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

met the proposed new standards (but not those in the existing rule) and there is no evidence that they have proven unfit for exchange trading. The Exchange also believes that the proposal to modify Section 102.06 to allow an AC to conduct a tender offer for all shares of all shareholders in exchange for a *pro rata* share of the cash held in trust by the AC in compliance with Rule 13e–4 and Regulation 14E under the Act instead of soliciting a shareholder vote protects investors and the public interest, as it will help prevent ''greenmail'' strategies where professional investors seek to force ACs to give them consideration not available to other shareholders as a condition for voting in favor of an acquisition.

The Exchange believes that it is consistent with the protection of investors to delete the requirement that a Business Combination not go forward if shareholders exceeding a threshold amount exercise their conversion rights, as shareholders will be informed in advance of the fact that the size of the post-Business Combination entity will vary depending on the amount of securities that are converted and they will be able to make their own informed decisions as to whether to participate in light of that disclosure. The Exchange believes that the proposed amendments to the continued listing standards are consistent with the protection of investors as the requirements for pre-Business Combination ACs would be as high as those applied to operating companies and the standard applied at the time of the Business Combination would be significantly higher than that applied to other continued listings.

While the proposed amended quantitative requirements for the listing of ACs would be lower than those for other listing applicants, the Exchange does not believe that this difference is unfairly discriminatory. The Exchange believes this to be the case because market value-based listing standards are largely adopted to ensure adequate trading liquidity and, consequently, efficient market pricing of a company's securities. As an investment in an AC prior to its Business Combination represents a right to a *pro rata* share of the AC's assets held in trust, AC shares typically have a trading price very close to their liquidation value and the liquidity and market efficiency concerns relevant to listed operating companies do not arise to the same degree. As such, the Exchange does not believe it is unfairly discriminatory to apply different market value requirements to ACs than to other listing applicants.

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 rule change is designed to harmonize the Exchange's rules with changes in the AC structure prevalent in the marketplace and embodied in the rules of other listing markets. As such, it is intended to promote competition for the listing of ACs.

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 *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 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–2016–72 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2016–72. 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–2016–72 and should be submitted on or before January 19, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–31488 Filed 12–28–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79667; File No. SR–BX–2016–071]

Self-Regulatory Organizations; NASDAQ BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify Administrative Charges for Distributors of Proprietary Data Feed Products

December 22, 2016.

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 December 14, 2016, NASDAQ 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

[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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 Exchange's market data fees at Rule 7035 to change the billing cycle for administrative fees paid by distributors of BX market data from annual to monthly, and to: (1) Replace the current $500 annual administrative fee assessed to distributors of delayed market data with a $50 monthly administrative fee, and (2) replace the current $1,000 annual administrative fee assessed to distributors of real-time market data with a $100 monthly administrative fee. The proposal is described further below.[3]

While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on January 1, 2017.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqbx.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 change the billing cycle for administrative fees paid by distributors of BX market data from annual to monthly, and to: (1) Replace the current $500 annual administrative fee assessed to distributors of delayed market data with a $50 monthly administrative fee, and (2) replace the current $1,000 annual administrative fee assessed to distributors of real-time market data with a $100 monthly administrative fee.

Annual Administrative Fee

BX assesses an annual administrative fee to any market data distributor that receives a proprietary market data product. The amount of that fee is $500 for delayed market data and $1,000 for real-time market data. Distributors of both delayed and real-time market data are not required to pay both fees; they are charged only the higher fee. The time difference between ''delayed'' and ''real-time'' data varies by product. BX Last Sale (BLS), for example, is considered delayed after 15 minutes, while BX TotalView-ITCH data is considered delayed after midnight ET. The specific delay interval applicable to each product is published on the Nasdaq Trader Web site. The administrative fee is waived for BX members who, pursuant to BX rules, solely conduct an options business. The fee is not prorated if the distributor receives the data feed for less than a year.

Proposed Changes

The Exchange proposes to change the billing cycle for administrative fees paid by distributors of BX market data from annual to monthly, and to: (1) Replace the current $500 annual administrative fee assessed to distributors of delayed market data with a $50 monthly administrative fee, and (2) replace the current $1,000 annual administrative fee assessed to distributors of real-time market data with a $100 monthly administrative fee.

The purposes of the proposal are to: (1) Facilitate billing by aligning the current annual administrative fee billing cycle with the standard monthly billing cycle used by the Exchange; (2) allocate the fee more equitably by charging distributors that receive less than a year of market data an administrative fee only for those months that they receive market data; and (3) bring the BX administrative fee into alignment with the Nasdaq and PHLX market data administrative fees, which, after current proposals take effect, will be charged the same administrative fees on the same billing cycle.

The complexity of administering the market data program has increased significantly since the current fee was set in 2009. New, more complex products and services require the Exchange to expend more resources in administration and monitoring. For example, the introduction of Enhanced Display Solutions—which allow subscribers to view BX TotalView and BX Basic on computer monitors and export it to applications—required the Exchange to create new reporting systems and review mechanisms for the use of market data. New reporting and review mechanisms also had to be created to implement Managed Data Solutions, which allow electronic systems access to BX TotalView without human intervention. These programs were created in response to customer demand, and require administrative expenditures that had not been necessary when the amount of the administrative fee was set in 2009.

The administrative fee is entirely optional in that it applies only to firms that elect to distribute BX market data.

The proposed changes do not raise the cost of any other BX product, except to the extent that they increase the total cost of purchasing market data.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[4] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[5] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [6]

Likewise, in *NetCoalition* v. *Securities and Exchange Commission* [7]

[3] The NASDAQ Stock Market LLC and NASDAQ PHLX LLC are filing companion proposals similar to this one. All three proposals will change the billing cycle for administrative fees paid by distributors of market data from annual to monthly, and will: (1) Replace the current $500 annual administrative fee assessed to distributors of delayed market data with a $50 monthly administrative fee, and (2) replace the current $1,000 annual administrative fee assessed to distributors of real-time market data with a $100 monthly administrative fee.

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(4) and (5).

[6] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[7] *NetCoalition* v. *SEC,* 615 F.3d 525 (D.C. Cir. 2010).

(''NetCoalition'') the D.C. Circuit upheld the Commission's use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.[8] As the court emphasized, the Commission ''intended in Regulation NMS that 'market forces, rather than regulatory requirements' play a role in determining the market data . . . to be made available to investors and at what cost.'' [9]

Further, ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers' . . . .'' [10]

The Exchange believes that the proposal to replace the current $500 annual administrative fee assessed to distributors of delayed market data with a $50 monthly administrative fee, and the current $1,000 annual administrative fee assessed to distributors of real-time data with a $100 monthly administrative fee, is fair and equitable in accordance with Section 6(b)(4) of the Act, and not unreasonably discriminatory in accordance with Section 6(b)(5) of the Act. As described above, the proposed fee change is reasonable and necessary to facilitate billing, allocate fees more equitably, and align the administrative fees with those of the Nasdaq and PHLX exchanges. Moreover, administrative fees are constrained by the Exchange's need to compete for order flow.

The Exchange believes that the proposed change is an equitable allocation and is not unfairly discriminatory because the Exchange will apply the same fee to all similarly-situated distributors.

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 terms of inter-market competition, 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 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, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

The proposal is to replace the current $500 annual administrative fee assessed to distributors of delayed market data with a $50 monthly administrative fee, and the current $1,000 annual administrative fee assessed to distributors of real-time market data with a $100 monthly administrative fee. If the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result.

Specifically, market forces constrain administrative fees in three respects. First, all fees associated with proprietary data are constrained by competition among exchanges and other entities attracting order flow. Second, administrative fees impact the total cost of market data, and are constrained by the total cost of the market data offered by other entities. Third, competition among distributors constrains the total cost of market data, including administrative fees.

Competition for Order Flow

Administrative fees are constrained by competition among exchanges and other entities seeking to attract order flow. Order flow is the ''life blood'' of the exchanges. Broker-dealers currently have numerous alternative venues for their order flow, including thirteen 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''). Each SRO market competes to produce transaction reports via trade executions, and two FINRA-regulated Trade Reporting Facilities (''TRFs'') compete to attract internalized transaction reports. The existence of fierce competition for order flow implies a high degree of price sensitivity on the part of BDs, which may readily reduce costs by directing orders toward the lowest-cost trading venues.

The level of competition and contestability in the market for order flow is demonstrated by the numerous 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 BATS/Direct Edge. A proliferation of dark pools and other ATSs operate profitably with fragmentary shares of consolidated market volume. For a variety of reasons, competition from new entrants, especially for order execution, has increased dramatically over the last decade.

Each SRO, TRF, ATS, and BD that competes for order flow is permitted to produce proprietary data products. Many currently do or have announced plans to do so, including NYSE, NYSE Amex, NYSE Arca, BATS, and IEX. This is because Regulation NMS deregulated the market for proprietary data. While BDs had previously published their proprietary data individually, Regulation NMS encourages market data vendors and BDs to produce market data products cooperatively in a manner never before possible. Order routers and market data vendors can facilitate production of proprietary data products for single or multiple BDs. The potential sources of proprietary products are virtually limitless.

The markets for order flow and market data are inextricably linked: A trading platform cannot generate market information unless it receives trade orders. As a result, the competition for order flow constrains the prices that platforms can charge for proprietary data products. Firms make decisions on how much and what types of data to consume based on the total cost of interacting with an exchange. Administrative fees are part of the total cost of proprietary data. A supracompetitive increase in the fees charged for either transactions or market data has the potential to impair revenues from both products.

Competition From Market Data Providers

Administrative fees are constrained by competition from other exchanges that sell market data. If administrative fees were to become excessive, distributors may elect to discontinue one or two products or services purchased from the Exchange, or reduce the level of their purchases, to signal that the overall cost of market data had become excessive. Such a reduction in purchases would act as a discipline to

[8] *See NetCoalition,* at 534–535.

[9] *Id.* at 537.

[10] *Id.* at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca-2006–21)).

the BX administrative fees, and would constrain the Exchange in its pricing decisions.

Competition Among Distributors

Distributors provide another form of price discipline for market data products. Distributors are in competition for users, and can curtail their purchases of market data if the total price of market data, including administrative fees, were set above competitive levels.

In summary, market forces constrain the level of administrative fees through competition for order flow, competition from other sources of proprietary data, and in the competition among distributors for customers. For these reasons, the Exchange has provided a substantial basis demonstrating that the fee is equitable, fair, reasonable, and not unreasonably discriminatory, and therefore consistent with and in furtherance of the purposes of the Exchange Act.

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.[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: (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–2016–071 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BX–2016–071. 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–BX–2016–071, and should be submitted on or before January 19, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–31482 Filed 12–28–16; 8:45 am]

BILLING CODE 8011–01–P

[11] 15 U.S.C. 78s(b)(3)(A)(ii).

[12] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

Announcement of the Aspire Challenge—An Agency Prize Competition

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: The Aspire Challenge is a prize competition conducted under the America Competes Act. The objective of the prizes is to spur the development and provision of innovative entrepreneurial development and access to capital resources for formerly incarcerated individuals or those who are non-violent ex-offenders

DATES: The submission period for entries will begin on December 29, 2016 and close on February 13, 2017. SBA anticipates that winners will be announced no later than March 14, 2017.

FOR FURTHER INFORMATION CONTACT: Matthew Stevens, Strategic Initiatives Manager, Office of Entrepreneurial Development, U.S. Small Business Administration, 409 Third Street SW., 6th Floor, Washington, DC 20416, (202) 205–7699, *SI@sba.gov.*

SUPPLEMENTARY INFORMATION:

Background

The U.S. Small Business Administration (SBA), officially established in 1953, maintains and strengthens the nation's economy by aiding, counseling, assisting, and protecting the interests of small businesses, and by helping families and businesses to recover from national disasters. The SBA's mission includes assisting small businesses to start, grow, and compete in markets by providing quality training, counseling, and access to resources.

The Aspire Challenge is a prize competition designed to spur the development and provision of innovative entrepreneurial development and access to capital resources for formerly incarcerated individuals or those who are non-violent ex-offenders. Of the 600,000 individuals released on average each year from federal prisons, an estimated 60 percent remain unemployed one year after their release, raising the risk of recidivism and resulting in lost lifetime earnings. In fact, two-thirds of these individuals historically are rearrested within three years of their release.

This challenge competition is separate but builds on the momentum of the Aspire Entrepreneurship Initiative, a public-private partnership announced in August 2016 between the SBA, W.K. Kellogg Foundation and JUSTINE Petersen. The three-year initiative is a pilot to test entrepreneurship education programming and microloan assistance through SBA Microloan Intermediaries to formerly incarcerated individuals in St. Louis, MO, Chicago, IL, Louisville, KY and Detroit, MI. The goal of the Aspire Challenge is to source additional

innovative solutions in other areas in the United States beyond these four metropolitan areas. This challenge also aligns with other actions identified by the Federal Interagency Reentry Council, a cabinet-level working group to support the federal government's efforts to promote public safety and economic opportunity through purposeful cross-agency coordination and collaboration.[1]

Through the design and delivery of intensive entrepreneurial education and increased access to micro-loans, the Aspire Challenge will serve as a catalyst to leverage business formation as a tool for economic mobility and self-employment for the formerly incarcerated. This competition is designed to award prizes to entrepreneurial support organizations that propose innovative and sustainable solutions to equipping the formerly incarcerated with the education and technical assistance they need to start and grow a business.

Competition Details

(1) *Subject of Challenge Competition:* The SBA is working to create pathways towards entrepreneurship and access to capital resources to individuals who have been formerly incarcerated. The SBA is looking for contestants who offer solutions that are innovative and relevant based on the needs of this target market. Solutions should incorporate the following two components:

(i) *Delivery of Intensive Entrepreneurial Education* to individuals who have been formerly incarcerated, by providing innovative and comprehensive entrepreneurial education with a focus on the following:

(A) Develop and deliver comprehensive entrepreneurship training, for which individuals who have been incarcerated will earn a certificate upon completion;

(B) Provide individualized business mentoring to support participants' growth as prospective entrepreneurs;

(C) Build participants' ties to the larger business community; and

(D) Connect participants to opportunities for life skills development and financial literacy.

(ii) *Access to Capital:*

When appropriate, link participants with participating microlenders including SBA Microloan Intermediaries, to fund new businesses and provide capital to existing ventures.

(iii) Aspire Challenge contestants shall provide a data-driven assessment of the proposed community's entrepreneurial ecosystem as it exists today and identify training, education and support gaps for individuals who have been formerly incarcerated. Contestants shall propose an intensive entrepreneurship education and program plan that provides targeted support to participating entrepreneurs in an effort to increase their ability to start and grow businesses, while at the same time, enhancing their personal and professional skills to improve their employment outlook. Contestants shall demonstrate an ability and cultural competency to reach formerly incarcerated individuals or those who are non-violent ex-offenders.

(2) *Eligibility Rules for Participating in the Competition:* To be eligible to win a prize under this competition, a contestant:

(i) Shall have registered to participate in the competition under the rules promulgated by SBA;

(ii) Shall have complied with all the requirements under this Notice;

(iii) In the case of a private entity, shall be incorporated in and maintain a primary place of business in the United States, and

(iv) May not be a Federal entity or Federal employee acting within the scope of their employment;

(v) Shall not be an SBA employee working on their applications during assigned duty hours.

(3) *Registration Process for Contestants:* Contestants will submit their application through *challenge.gov*. Winners will be required to have an account in System for Award Management (SAM) *https://www.sam.gov* to receive the award.

(4) *Amount of Prize:* Through the Aspire Challenge, the SBA will award up to sixteen awards of up to $75,000 each for a total of up to $1.2 million in prizes.

(5) *Payment of Prize:* The cash prize portion of the award will be disbursed in a series of three of payments. The first payment, equal to 40 percent of a winner's total prize amount, will be disbursed upon award once all initial requirements in the Official Rules available at *https://www.challenge.gov* (see Rules tab under the Aspire Entrepreneurship Challenge subpage) have been met and the contestant has provided documentary evidence satisfactory to SBA. The second payment, equal to 30 percent of a winner's total prize amount, will be disbursed after a winner has delivered a kickoff event and the first 50% of the proposed training program has been delivered to the intended audience and the contestant has provided documentary evidence satisfactory to SBA. The kickoff and first 50% of the program must be executed within six months of the date of the award unless otherwise specified by the SBA. The remaining 30 percent of the total prize amount will be disbursed after a winner submits a written assessment that includes, but is not limited to, the outcomes and outputs of the pilot implementation of the training program as measured by the metrics outlined in its challenge application, a summary of any lessons learned and best practices, and suggestions for any improvements to the design or implementation of similar competitions in the future. The written assessment must be submitted to SBA no later than eighteen months after a winner receives its first prize payment and the documentation must be satisfactory to SBA.

(6) *Selection of Winners:*

(i) Competition entries will be evaluated by a review committee that may be comprised of SBA officials, employees of other Federal agencies, and/or private sector experts. Winners will be selected based on the quality, clarity, completeness, and feasibility of their proposals in addressing the issues outlined in the criteria below. In addition, in order to achieve nationwide distribution of prizes for the purpose of assisting business startups across the entire United States, SBA may take into account contestants' geographic locations and areas of service when selecting winners. For the announcement of winners, any travel or related expenses to attend an event will be the responsibility of the winner and may not be paid with prize funds.

(ii) Each Aspire Challenge solution plan shall include innovative solutions under the following criteria:

(A) Entrepreneurial Education

(1) Recruitment: Key to testing entrepreneurship training/access to microloans as a tool to reduce recidivism is the outreach to and recruitment of formerly incarcerated individuals. The applicant shall demonstrate how they intend to identify the participants who will receive the services described in this challenge.

(2) Classroom Instruction: A proven, existing intensive entrepreneurship education curriculum designed for starting and growing businesses. Contests shall include how contestants will:

(*i*) Organize participants to meet in-person for classroom instructions that progressively develops over several weeks;

(*ii*) Provide online resources and other components/activities that supplement the in-person curriculum;

[1] *https://www.whitehouse.gov/the-press-office/2015/11/02/fact-sheet-president-obama-announces-new-actions-promote-rehabilitation.*

(*iii*) Guide participants to explore their personal entrepreneurial interests and visions;

(*iv*) Address topics such as process, strategy, financing, marketing, human resources, leadership, contracting and market/product development;

(*v*) Guide all participants, by the end of the training, to refine and draft a complete business plan.

(3) Mentoring:

(*i*) Provide individualized support on developing entrepreneurial skills and strategies.

(4) Community Connections:

(*i*) Opportunities to connect with the local business community and social service providers to increase participants' financial literacy.

(B) *Access to Capital*

(1) Access to micro-lending and other capital/funding opportunities:[2] (*i*) Link participants with participating microlenders, including SBA Microloan Intermediaries, when appropriate, to fund and grow new businesses;

(*ii*) Provide Assistance to prepare to meet with capital providers, preparing proper documentation, matchmaking events with local lenders and funders, or business pitch events to angel investors, for example.

(7) *Applicable Law:* This Competition is being conducted by SBA pursuant to the America Competes Act (15 U.S.C. 3719) and is subject to all applicable federal laws and regulations. By participating in this competition, each contestant gives its full and unconditional agreement to the Official Rules, located on *www.challenge.gov* and the related administrative decisions described in this notice, which are final and binding in all matters related to the competition. A contestant's eligibility for a prize award is contingent upon its fulfilling all requirements identified in this notice and in the Official Rules. Publication of this notice is not an obligation of funds on the part of SBA. SBA reserves the right to modify or cancel this competition, in whole or in part, at any time prior to the award of prizes.

(8) *Conflicts of Interest:* No individual acting as a judge at any stage of this competition may have personal or financial interests in, or be an employee, officer, director, or agent of any contestant or have a familial or financial relationship with a contestant.

[2] In 2015, the SBA published a final rule for its Microloan Program allowing microloans to be made by SBA Microloan Intermediaries to small businesses owners currently on probation or parole. 13 CFR 120.707(a). The SBA's Microloan Program is focused on new businesses and other underserved markets and provides loans up to $50,000.

(9) *Intellectual Property Rights:*

(i) All entries submitted in response to this competition will remain the sole intellectual property of the individuals or organizations that developed them. By registering and entering a submission, each contestant represents and warrants that it is the sole author and copyright owner of the submission, and that the submission is an original work of the contestant, or if the submission is a work based on an existing application, that the contestant has acquired sufficient rights to use and to authorize others to use the submission, and that the submission does not infringe upon any copyright or upon any other third party rights of which the contestant is aware.

(ii) The winning contestant will, in consideration of the prize to be awarded, grant to SBA an irrevocable, royalty-free, exclusive worldwide license to reproduce, distribute, copy, display, create derivative works, and publicly post, link to, and share the solutions or parts thereof that are to be developed as a result of winning this competition or for any official SBA purpose.

(10) *Publicity Rights:* By registering and entering a submission, each contestant consents to SBA's and its agents' use, in perpetuity, of its name, likeness, photograph, voice, opinions, and/or hometown and state information for promotional or informational purposes through any form of media, worldwide, without further payment or consideration.

(11) *Liability and Insurance Requirements:* By registering and entering a submission, each contestant agrees to assume any and all risks and waive claims against the Federal Government and its related entities, except in the case of willful misconduct, for any injury, death, damage, or loss of property, revenue, or profits, whether direct, indirect, or consequential, arising from their participation in this competition, whether the injury, death, damage, or loss arises through negligence or otherwise. By registering and entering a submission, each contestant further represents and warrants that it possesses sufficient liability insurance or financial resources to cover claims by a third party for death, bodily injury, or property damage or loss resulting from any activity it carries out in connection with its participation in this competition, or claims by the Federal Government for damage or loss to government property resulting from such an activity. Competition winners shall be prepared to demonstrate proof of insurance or financial responsibility in the event SBA deems it necessary.

(12) *Record Retention and Disclosure:* All submissions and related materials provided to SBA in the course of this competition automatically become SBA records and cannot be returned. Contestants shall identify any confidential commercial information contained in their entries at the time of their submission.

Award Approving Official: Lori Gillen, Deputy Associate Administrator, Office of Entrepreneurial Development, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416.

Authority: America Competes Reauthorization Act of 2010, 15 U.S.C. 3719.

Maria Contreras-Sweet,

Administrator, U.S. Small Business Administration.

[FR Doc. 2016–31455 Filed 12–28–16; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Announcement of InnovateHER: Innovating for Women Business Challenge 2017

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: The U.S. Small Business Administration (SBA) is conducting the third year of the InnovateHER: Innovating for Women Challenge (the Challenge), pursuant to the America Competes Act, for entrepreneurs to create a product or service that has a measurable impact on the lives of women and families, the potential for commercialization, and fills a need in the marketplace.

DATES: The Challenge launches on December 29, 2016. The initial round of the Challenge will take the form of local competitions that will be run across the country beginning December 29, 2016, and ending no later than April 29, 2017. The host organizations running the local competitions must select and submit one winner from each local competition to SBA, along with a nomination package, no later than May 12, 2017. SBA will then select up to ten finalists. The top three winners will be announced no later than July 27, 2017, following a live pitch competition.

FOR FURTHER INFORMATION CONTACT: Simona Duffin, Office of Entrepreneurial Development, U.S. Small Business Administration, 409 Third Street SW., 6th Floor,

Washington, DC 20416, (202) 205–4401, *womenbusiness@sba.gov.*

SUPPLEMENTARY INFORMATION:

1. *Subject of Challenge Competition:* The SBA is looking for innovative products and services that help impact and empower the lives of women and families. We know that our workforce looks very different from 50 years ago. Women now make up nearly half of the labor force and play a critical role in our nation's economic prosperity. Most children live in households where all parents work. And as our population ages, families are increasingly caring for aging parents while balancing the needs of work and home. As the demands on women and families grow, the need for products and services that address these unique challenges increases. This Challenge will provide a platform to fulfill that need.

Contestants must develop a product or service that meets the following competition criteria:

- Has a measurable impact on the lives of women and families (30%);
- Has the potential for commercialization (40%); and
- Fills a need in the marketplace (30%).

2. *Eligibility Rules for Participating in the Challenge:* This Challenge is open only to: (a) Citizens or permanent residents of the United States who are at least eighteen (18) years of age at the time of their submission of an entry (or teams of such individuals); and (b) private entities, such as corporations or other organizations, that are incorporated in and maintain a primary place of business in the United States. Individuals submitting on behalf of corporations, nonprofits, or groups of individuals (such as an academic class or other team) must meet the eligibility requirements for individual contestants. An individual may belong to more than one team submitting an entry in this Challenge. SBA employees are not eligible, nor are Federal entities or other Federal employees acting within the scope of their employment. Individuals or organizations that are currently suspended or disbarred by the federal government are not eligible for this Challenge.

3. *Registration Process for Participants:* The Challenge launches on December 29, 2016. The initial round of the Challenge will take the form of local competitions that will be run across the country from December 29, 2016, and ending no later than April 29, 2017, by host organizations such as universities, accelerators, clusters, scale-up communities, and SBA Resource Partners. For more information regarding these local competitions as it becomes available, please visit *www.sba.gov/InnovateHER.* SBA will continue to update the list of local competitions as details are confirmed. While these local competitions will be identified as part of the national InnovateHER Challenge and will be conducted in a manner that is consistent with these Challenge rules, they will be administered solely by the local host organizations and will be judged by individuals selected by each host in their sole discretion. At a minimum, however, each application must contain a business plan covering the contestant's proposed product or service and must satisfy the Challenge criteria identified by SBA in this notice.

Following the completion of the local competitions, each host organization will identify one winner that will advance to the semi-final round of the Challenge. For a winning entry that has been submitted by a team of competitors, the host organization must list the team's self-identified project leader as the winner who will advance to the semi-final round. No later than May 12, 2017, each host organization will submit a nomination package containing the winning individual/team's business plan and other required information to SBA, which will administer the semi-final and final rounds of the Challenge. Selection as a semi-finalist following a local competition is the only means of registering for the Challenge. All nominations will be screened by SBA for eligibility. Contestants cannot submit entries directly to SBA.

4. *Prize for Winners:* Cash prizes totaling $70,000 will be awarded to the three highest-rated contestants in the final round of the competition in the following amounts:

1st Place—$40,000
2nd Place—$20,000
3rd Place—$10,000

For winning entries submitted by teams of competitors, prize money will be awarded to the self-identified project leader for distribution to the rest of the team at their discretion and independently from SBA.

5. *Process for Host Organizations:*

Initial Round—Local Competitions. Organizations that wish to host a local competition as part of the initial round of this Challenge must send a request to the SBA at *womenbusiness@sba.gov* no later than March 10, 2017, with the following information:

a. The organization's official legal name, street address, city, state;

b. Web site of the organization (if applicable);

c. The name of the organization's designated Point of Contact (POC) for the competition, his/her email address, and phone number.

SBA will evaluate all requests to host a local InnovateHER competition in its sole discretion and will confirm a host's participation in writing. Additionally, with some exceptions, organizations that wish to host an InnovateHER competition will be required to agree to the terms of a Co-sponsorship Agreement with the SBA that defines the scope of the relationship for the purposes of InnovateHER and outlines the co-promotion and marketing terms. SBA will notify prospective hosts if such agreement is required. SBA will reject any nomination package submitted to the SBA by an organization that has not been officially confirmed by SBA to participate in the InnovateHER Challenge. Additionally, each host organization will determine the type of local competition, conducted in a manner that is consistent with these Challenge Rules, that will best identify the most innovative and entrepreneurial business ideas, including the type of application that individuals need to prepare in order to compete, and will publicize the competition locally. Host organizations should also notify SBA of the date and location of the local competitions for the purposes of publication at *sba.gov/InnovateHER.*

Semi-Final Round—Submission of Local Winners. No later than May 12, 2017, host organizations must select and submit one winner from the local competition along with a nomination package to SBA through the *www.Challenge.gov* Web site. The nomination package must contain all of the following items:

(a) A single cover page detailing—

(i) The Name of the winning individual (in the case of a winning team, please provide the name of the team's self-identified project lead); Company name (if applicable); Product/Service Name; Company Address, City, State, and Place of Incorporation (if applicable); Product/Service Web site (if applicable); telephone number of winning individual; and his/her email address.

(ii) The host organization's official legal name, street address, city, state, designated POC, and his/her best contact number and email address. (**NOTE:** This information must match the information provided by the organization as part of its request to SBA to host a local competition.);

(iii) A concise, two-sentence description of the product or service. (**NOTE:** This description may also be in

promotional or informational materials in connection with InnovateHER.)

(b) A Business Plan from the winning individual/team (maximum length: 20 pages, including attachments).

(c) A signed Statement of Support prepared by the host organization that explains why the winner of the local competition best satisfied the competition criteria and presented the greatest potential for success (maximum length: 2 pages). Each host organization is responsible for preparing the complete nomination package, including obtaining a copy of the relevant Business Plan from the winner and ensuring that the full package is timely submitted to the SBA via the *www.Challenge.gov* Web site.

6. *Selection of Winners.*

Semi-Final Round. In the semi-final round of the Challenge, SBA will review the semi-finalist nomination packages submitted by the local competition host organizations and select up to 10 finalists whose products or services, in SBA's sole judgment, best satisfy the competition criteria identified in Paragraph 1 of this Challenge announcement and present the greatest potential for success. In addition, in order to achieve nationwide distribution of prizes for the purpose of stimulating the growth and development of new products and services across the entire United States and across a diverse range of project types, SBA may take into account nominees' geographic locations when selecting winners, including support to geographic regions that traditionally have limited access to capital, as well as diversity in the types of products and services. Finalists selected by SBA will be required to sign a form certifying that they meet the eligibility requirements identified in Paragraph 2 above and have complied with these Challenge Rules.

Final Round. Each finalist will be offered the opportunity to participate in the InnovateHER Final Challenge to be held on July 27, 2017 where they will make a live marketing pitch to a panel of expert judges drawn from the private sector. The panel of judges will select the three finalists whose pitches, in their sole judgment, best satisfy the competition criteria and present the greatest potential for success and rank them in descending order. Finalists will be responsible for covering their own travel costs for the national competition.

7. *Applicable Law:* This Challenge is being conducted by SBA pursuant to the America Competes Act (15 U.S.C. 3719) and is subject to all applicable federal laws and regulations. By participating in this Challenge, each contestant gives its full and unconditional agreement to the Challenge Rules and the related administrative decisions described in this notice, which are final and binding in all matters related to the Challenge. A contestant's eligibility for a prize award is contingent upon their fulfilling all requirements identified in this notice. Publication of this notice is not an obligation of funds on the part of SBA. All prize monies are funded through private sector sources. SBA, however, will coordinate with the private sector source regarding instructions for award of the prize purse. SBA reserves the right to modify or cancel this Challenge, in whole or in part, at any time prior to the award of prizes.

8. *Conflicts of Interest:* No individual acting as a judge at any stage of this Challenge may have personal or financial interests in, or be an employee, officer, director, or agent of any contestant or have a familial or financial relationship with a contestant.

9. *Intellectual Property Rights:* All entries submitted in response to this Challenge will remain the sole intellectual property of the individuals or organizations that developed them. By registering and entering a submission, each contestant represents and warrants that it is the sole author and copyright owner of the submission, and that the submission is an original work of the contestant, or if the submission is a work based on an existing application, that the contestant has acquired sufficient rights to use and to authorize others to use the submission, and that the submission does not infringe upon any copyright or upon any other third party rights of which the contestant is aware.

10. *Publicity Rights:* By registering and entering a submission, each contestant consents to SBA's and its agents' use, in perpetuity, of its name, likeness, photograph, voice, opinions, and/or hometown and state information for promotional or informational purposes through any form of media, worldwide, without further payment or consideration. In addition, SBA may share the contact information of a contestant with its offices and agents in cases where it believes a contestant may benefit from, or be positioned to assist with, an activity or program sponsored or co-sponsored by SBA.

11. *Liability and Insurance Requirements:* By registering and entering a submission, each contestant agrees to assume any and all risks and waive claims against the Federal Government and its related entities, except in the case of willful misconduct, for any injury, death, damage, or loss of property, revenue, or profits, whether direct, indirect, or consequential, arising from their participation in this Challenge, whether the injury, death, damage, or loss arises through negligence or otherwise. By registering and entering a submission, each contestant further represents and warrants that it possesses sufficient liability insurance or financial resources to cover claims by a third party for death, bodily injury, or property damage or loss resulting from any activity it carries out in connection with its participation in this Challenge, or claims by the Federal Government for damage or loss to Government property resulting from such an activity. Contest winners should be prepared to demonstrate proof of insurance or financial responsibility in the event SBA deems it necessary.

12. *Record Retention and Disclosure:* All nomination packages and related materials provided to SBA in the semi-final and final rounds of the Challenge automatically become SBA records and cannot be returned. Contestants should identify any confidential commercial information contained in their entries at the time of their submission to the local Host Organization. SBA will notify contestants of any Freedom of Information Act requests the Agency receives related to their submissions in accordance with 13 CFR part 102.

Award Approving Official: Bruce Purdy, (Acting) Assistant Administrator, Office of Women's Business Ownership, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416.

Authority: America Competes Reauthorization Act of 2010, 15 U.S.C. 3719.

Dated: December 22, 2016.

Bruce Purdy,

(Acting) Assistant Administrator, Office of Women's Business Ownership.

[FR Doc. 2016–31470 Filed 12–28–16; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[License No. 03/03–0264]

Boathouse Capital II, L.P.; Notice Seeking Exemption Under Section 312 of the Small Business Investment Act, Conflicts of Interest

Notice is hereby given that Boathouse Capital II, L.P., 200 West Lancaster Avenue, Suite 206, Wayne, PA 19087, Federal Licensees 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). Boathouse Capital II, L.P. provided financing to Out of Home Holdings, LLC, 330 Roberts Street, Suite 301, East Hartford, CT 06108. The financing was contemplated for the acquisition of Grand Design Media, Inc. and working capital purposes.

The financing is brought within the purview of § 107.730(a)(1) of the Regulations because Boathouse Capital, L.P., an Associate of Boathouse Capital II, L.P., has an equity ownership greater than ten percent of Out of Home Holdings, LLC. Therefore, this transaction is considered financing of an Associate requiring an exemption.

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 Acting Associate Administrator for Investment, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416.

Mark L. Walsh,

Associate Administrator, Office of Investment & Innovation.

[FR Doc. 2016–31510 Filed 12–28–16; 8:45 am]

BILLING CODE P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #14981 and #14982]

Virginia Disaster Number VA–00066

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 1.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the Commonwealth of Virginia (FEMA–4291–DR), dated 11/15/2016.

Incident: Hurricane Matthew.

Incident Period: 10/07/2016 through 10/15/2016.

EFFECTIVE DATE: 12/19/2016.

Physical Loan Application Deadline Date: 01/17/2017.

Economic Injury (EIDL) Loan Application Deadline Date: 08/15/2017.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for Private Non-Profit organizations in the Commonwealth of Virginia, dated 11/15/2016, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: Hampton City.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2016–31454 Filed 12–28–16; 8:45 am]

BILLING CODE 8025–01–P

SOCIAL SECURITY ADMINISTRATION

[Docket No: SSA–2016–0065]

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 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, OLCA, Attn: Reports Clearance Director, 3100 West High Rise, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–966–2830, Email address: *OR.Reports.Clearance@ssa.gov.*

Or you may submit your comments online through *www.regulations.gov,* referencing Docket ID Number [SSA–2016–0065].

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 February 27, 2017. Individuals can obtain copies of the collection instruments by writing to the above email address.

1. Questionnaire About Employment or Self-Employment Outside the United States—20 CFR 404.401(b)(1), 404.415 & 404.417—0960–0050. When a Social Security beneficiary or claimant reports work outside the United States (U.S.), SSA uses Form SSA–7163 to determine if foreign work deductions are applicable. Specifically, SSA uses Form SSA–7163 to determine: (1) Whether work performed by beneficiaries outside the U.S. is cause for deductions from their monthly benefits; (2) which of two work tests (foreign or regular test) is applicable; and (3) the number of months, if any, for SSA-imposed deductions. SSA determines whether the annual earnings test applies to all earnings from work covered by the Social Security Act (Act), including earnings from covered work performed outside the U.S. However, because of the differences in foreign currency values, it is administratively impractical to apply this test to earnings from non-covered work performed outside the U.S. and base it on U.S. dollars. Accordingly, the 45-hour work test provides for deductions from the benefits of employees under full retirement age who engage in non-covered remunerative activity for more than 45 hours in a calendar month. SSA asks beneficiaries working outside the U.S. to complete this form annually or every other year (depending on the country of residence). Respondents are beneficiaries or claimants for Social Security benefits living and working outside the U.S.

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–7163	20,000	1	12	4,000

2. Application for Survivors Benefits—20 CFR 404.611(a) and (c)—0960–0062. Surviving family members of armed services personnel can file for Social Security and veterans' benefits with SSA or at the Veterans Administration (VA). Applicants filing for Title II survivors benfits at the VA complete Form SSA–24, which the VA forwards to SSA for processing. SSA uses the information to determine eligibility for benefits. The respondents are survivors of deceased armed services personnel who are applying for benefits at the VA.

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–24	3,200	1	15	800

II. SSA submitted the information collection below to OMB for clearance. Your comments regarding the information collection 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 January 30, 2017. Individuals can obtain copies of the OMB clearance package by writing to *OR.Reports.Clearance@ssa.gov.*

Continuing Disability Review Report—20 CFR 404.1589, 416.989—0960–0072. Sections 221(i), 1614(a)(3)(H)(ii)(I) and 1633(c)(1) of the Act require SSA to periodically review the cases of individuals who receive benefits under Title II or Title XVI based on disability, to determine if disability continues. SSA uses Form SSA–454, Continuing Disability Review Report, to complete the review for continued disability. SSA considers adults eligible for payment if they continue to be unable to do substantial gainful activity because of their impairments; and we consider Title XVI children eligible for payment if they have marked and severe functional limitations due to their impairments. SSA also uses Form SSA–454 to obtain information on sources of medical treatment; participation in vocational rehabilitation programs (if any); attempts to work (if any); and the opinions of individuals regarding whether their conditions have improved. The respondents are Title II or Title XVI disability recipients or their representatives.

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–454–BK (Paper version)	270,500	1	60	270,500
Electronic Disability Collect System	270,500	1	60	270,500
Totals	541,000	.....	.....	541,000

Dated: December 23, 2016.

Naomi R. Sipple,

Reports Clearance Officer, Social Security Administration.

[FR Doc. 2016–31632 Filed 12–28–16; 8:45 am]

BILLING CODE 4191–02–P

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA 2016–0056]

Notice on Penalty Inflation Adjustments for Civil Monetary Penalties

AGENCY: Social Security Administration.

ACTION: Notice announcing updated penalty inflation adjustments for civil monetary penalties for 2017.

SUMMARY: The Social Security Administration is providing notice of its adjusted maximum civil monetary penalties. These amounts are effective beginning January 15, 2017. These figures represent an annual adjustment for inflation. The updated figures and notification are required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 Act).[1]

FOR FURTHER INFORMATION CONTACT: Joseph E. Gangloff, Chief Counsel to the Inspector General, Room 3–ME–1, 6401 Security Boulevard, Baltimore, MD 21235–6401, (410) 966–4440, both directly and for IPTTY. For information on eligibility or filing for benefits, call the Social Security Administration's national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778, or visit the Social Security Administration's Internet site, Social Security Online, at *http://www.socialsecurity.gov.*

SUPPLEMENTARY INFORMATION: On June 27, 2016, we published an interim final rule to adjust the maximum level of civil monetary penalties (CMP) under sections 1129 and 1140 of the Social Security Act, 42 U.S.C. 1320a–8 and 1320b–10, with an initial ''catch-up''

[1] *See https://www.congress.gov/bill/114th-congress/house-bill/1314/text. See also https://www.regulations.gov/document?D=SSA-2016-0009-0001.*

adjustment effective August 1, 2016.[2] We announced in the interim final rule that for any future adjustments, we will publish a notice in the **Federal Register** with the new amounts. The annual inflation adjustment in subsequent years must be a cost-of-living adjustment based on any increases in the October Consumer Price Index for All Urban Consumers (CPI–U) (not seasonally adjusted) each year.[3] In addition, inflation adjustment increases must be rounded to the nearest multiple of $1.[4] Based on Office of Management and Budget (OMB) guidance, the information below serves as public notice of the new maximum penalty amounts for 2017. The adjustments result in the following new maximum penalties, which will be effective January 15, 2017.

Section 1129 CMPs (42 U.S.C. 1320a–8):

$7,500.00 (current maximum for fraud facilitators in a position of trust) × 1.01636 (OMB-issued inflationary adjustment multiplier) = $7,622.70. When rounded to the nearest dollar, the new maximum penalty is $7,623.00.

$7,954.00 (current maximum for all other violators) × 1.01636 (OMB-issued inflationary adjustment multiplier) = $8,084.13. When rounded to the nearest dollar, the new maximum penalty is $8,084.00.

Section 1140 CMPs (42 U.S.C. 1320b–10):

$49,467.00 (current maximum per broadcast, telecast, or dissemination, viewing, or accessing of an electronic and/or internet communication) × 1.01636 (OMB-issued inflationary adjustment multiplier) = $50,276.28. When rounded to the nearest dollar, the new maximum penalty is $50,276.00.

$9,893.00 (current maximum for all other violations) × 1.01636 (OMB-issued inflationary adjustment multiplier) = $10,054.85. When rounded to the nearest dollar, the new maximum penalty is $10,055.00.

Dated: December 21, 2016.

Gale Stallworth Stone,

Acting Inspector General of Social Security.

[FR Doc. 2016–31423 Filed 12–28–16; 8:45 am]

BILLING CODE 4191–02–P

[2] *https://www.regulations.gov/document?D=SSA-2016-0009-0001.*

[3] *See* OMB Memorandum, Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, M–16–06, p. 1 (February 24, 2016), *https://www.whitehouse.gov/sites/default/files/omb/memoranda/2016/m-16-06.pdf. See also https://www.regulations.gov/document?D=SSA-2016-0009-0001.*

[4] OMB Memorandum, Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, M–16–06, p. 3 (February 24, 2016), *https://www.whitehouse.gov/sites/default/files/omb/memoranda/2016/m-16-06.pdf.*

DEPARTMENT OF STATE

[Public Notice: 9822]

Regional Meeting of the Binational Bridges and Border Crossings Group in Fort Worth, Texas

ACTION: Notice.

SUMMARY: Delegates from the United States and Mexican governments, the states of Texas and New Mexico, and the Mexican states of Chihuahua, Coahuila, Nuevo Leon, and Tamaulipas will participate in a regional meeting of the U.S.-Mexico Binational Bridges and Border Crossings Group on Wednesday, January 25, 2017 in Fort Worth, Texas. The purpose of this meeting is to discuss operational matters involving existing and proposed international bridges and border crossings and their related infrastructure and to exchange technical information as well as views on policy. This meeting will include a public session on Wednesday, January 25, 2017, from 8:45 a.m. until 10:45 a.m. This session will allow proponents of proposed bridges and border crossings and related projects to make presentations to the delegations and members of the public.

FOR FURTHER INFORMATION CONTACT: For further information on the meeting and to attend the public session, please contact Linda Neilan in the Office of Mexican Affairs' Border Affairs Unit via email at *WHABorderAffairs@state.gov,* by phone at 202–647–9894, or by mail at Office of Mexican Affairs—Room 3924, Department of State, 2201 C St. NW., Washington, DC 20520.

Vaida Vidugiris,

Office of Mexican Affairs, Department of State.

[FR Doc. 2016–31421 Filed 12–28–16; 8:45 am]

BILLING CODE 4710–29–P

SURFACE TRANSPORTATION BOARD

Release of Waybill Data

The Surface Transportation Board has received a request from RSI Logistics (WB16–57–12/21/16) for permission to use certain unmasked data from the Board's 2014 Carload Waybill Sample. A copy of this request may be obtained from the Office of Economics.

The waybill sample contains confidential railroad and shipper data; therefore, if any parties object to these requests, they should file their objections with the Director of the Board's Office of Economics within 14 calendar days of the date of this notice. The rules for release of waybill data are codified at 49 CFR 1244.9.

Contact: Alexander Dusenberry, (202) 245–0319.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2016–31462 Filed 12–28–16; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2016–130]

Petition for Exemption; Summary of Petition Received; Leading Edge Associates, Inc.

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Title 14 of the Code of Federal Regulations. The purpose of this notice is to improve the public's awareness of, and participation in, the FAA's exemption process. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before January 18, 2017.

ADDRESSES: Send comments identified by docket number FAA–2016–9423 using any of the following methods:

- *Federal eRulemaking 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 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to

http://www.regulations.gov, as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

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: Dan Ngo, (202) 267–4264, 800 Independence Avenue SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on December 21, 2016.

Lirio Liu,

Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2016–9423.

Petitioner: Leading Edge Associates, Inc.

Section(s) of 14 CFR Affected: §§ 61.23(a) and (c), 61.101(e)(4) and (5), 61.113(a) and (b), 61.315(a), 91.7(a), 91.119(c), 91.121, 91.151(a)(1) and (b), 91.405(a), 91.407(a)(1), 91.409(a)(1) and (2), 91.417(a) and (b), 137.19(c); 137.19(d); 137.19(e)(2)(ii), (iii), and (v); 137.31(a); 137.31(b); 137.33(a); and 137.42

Description of Relief Sought: The petitioner is requesting relief in order to operate the PrecisionVision 10 UAS for mosquito adulticiding and larvaciding in the vector markets using EPA approved, Federally labeled and registered products in the NAS.

[FR Doc. 2016–31502 Filed 12–28–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2016–0128]

Petition for Exemption; Summary of Petition Received; Skylift Global, Inc.

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Title 14 of the Code of Federal Regulations. The purpose of this notice is to improve the public's awareness of, and participation in, the FAA's exemption process. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before January 18, 2017.

ADDRESSES: Send comments identified by docket number FAA–2015–7197 using any of the following methods:

- *Federal eRulemaking 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 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

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: Dan Ngo, (202) 267–4264, 800 Independence Avenue SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on December 21, 2016.

Lirio Liu,

Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2015–7197.

Petitioner: Skylift Global, Inc.

Section(s) of 14 CFR Affected: Part 27, subpart B §§ 61.23(a) and (c), 61.101(e)(4) and (5), 61.113(a) and (b), 61.315(a), 91.7(a), 91.119(c), 91.121, 91.151(a)(1) and (b), 91.405(a), 91.407(a)(1), 91.409(a)(1) and (2), 91.417(a) and (b)

Description of Relief Sought: The petitioner is requesting an amendment to Exemption No. 16683 in order to fly the Phase II UAS, which can carry payloads over 200 pounds to fly in designated testing areas.

[FR Doc. 2016–31504 Filed 12–28–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2016–0131]

Petition for Exemption; Summary of Petition Received; Brewster Fresh Produce

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Title 14 of the Code of Federal Regulations. The purpose of this notice is to improve the public's awareness of, and participation in, the FAA's exemption process. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before January 18, 2017.

ADDRESSES: Send comments identified by docket number FAA–2016–4931 using any of the following methods:

- *Federal eRulemaking 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 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking

process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

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: Dan Ngo, (202) 267–4264, 800 Independence Avenue SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on December 21, 2016.

Lirio Liu,

Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2016–4931.

Petitioner: Brewster Fresh Produce.

Section(s) of 14 CFR Affected: §§ 45.27(a), 61.23(a) and (c), 61.101(e)(4) and (5), 61.113(a) and (b), 61.315(a), 91.7(a), 91.119(c), 91.121, 91.151(a)(1) and (b), 91.405(a), 91.407(a)(1), 91.409(a)(1) and (2), 91.417(a) and (b), 137.19(d), 137.19(e)(2)(ii)(iii)(v), 137.31(a)(b), 137.33(a), and 137.42.

Description of Relief Sought: The petitioner is requesting relief in order to fly the HSE–UAV AG–V6A+ v2 aircraft, which has a maximum payload weight over 55 pounds, to conduct precision crop spraying.

[FR Doc. 2016–31501 Filed 12–28–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2016–126]

Petition for Exemption; Summary of Petition Received; Yamaha Motor Corporation

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Title 14 of the Code of Federal Regulations. The purpose of this notice is to improve the public's awareness of, and participation in, the FAA's exemption process. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before January 18, 2017.

ADDRESSES: Send comments identified by docket number FAA–2014–0397 using any of the following methods:

- *Federal eRulemaking 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 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

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: Dan Ngo, (202) 267–4264, 800 Independence Avenue SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on December 21, 2016.

Lirio Liu,

Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2014–0397.

Petitioner: Yamaha Motor Corporation.

Section(s) of 14 CFR Affected: Parts 21 and 27; and §§ 61.23(a) and (c), 61.101(e)(4) and (5), 61.113(a) and (b), 61.315(a), 91.7(a), 91.119(c), 91.121, 91.151(a)(1) and (b), 91.405(a), 91.407(a)(1), 91.409(a)(1) and (2), 91.417(a) and (b), 137.19(c); 137.19(d); 137.19(e)(2)(ii), (iii), and (v); 137.31(a); 137.31(b); 137.33(a); and 137.42.

Description of Relief Sought: The petitioner is requesting relief in order to operate the FAZER UAS (over 55 pounds) for agricultural spraying under part 137, as well as for airborne data collection, research and development, and flight crew training.

[FR Doc. 2016–31506 Filed 12–28–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2016–0129]

Petition for Exemption; Summary of Petition Received; SkyFly Cinema, LLC

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Title 14 of the Code of Federal Regulations. The purpose of this notice is to improve the public's awareness of, and participation in, the FAA's exemption process. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before January 18, 2017.

ADDRESSES: Send comments identified by docket number FAA–2015–7598 using any of the following methods:

- *Federal eRulemaking 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 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

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

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

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: Dan Ngo, (202) 267–4264, 800 Independence Avenue SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on December 21, 2016.

Lirio Liu,

Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2015–7598.

Petitioner: SkyFly Cinema, LLC.

Section(s) of 14 CFR Affected: Part 21; §§ 43.7; 43.11; 45.11; 45.27; 45.29; 61.23(a) and (c), 61.101(e)(4) and (5), 61.113(a) and (b), 61.315(a), 91.7(a), 91.119(c), 91.121, 91.151(a)(1) and (b), 91.405(a), 91.407(a)(1), 91.409(a)(1) and (2), 91.417(a) and (b).

Description of Relief Sought: The petitioner is requesting an amendment to Exemption No. 16842 in order to operate the Copterworks Af25b UAS at its full takeoff weight of 71 pounds for the purposes of aerial photography, videography, and cinematography.

[FR Doc. 2016–31503 Filed 12–28–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2016–0127]

Petition for Exemption; Summary of Petition Received; Alaska Aerial Media LLC

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Title 14 of the Code of Federal Regulations. The purpose of this notice is to improve the public's awareness of, and participation in, the FAA's exemption process. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before January 18, 2017.

ADDRESSES: Send comments identified by docket number FAA–2015–0173 using any of the following methods:

• *Federal eRulemaking 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 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

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

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

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: Dan Ngo, (202) 267–4264, 800 Independence Avenue SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on December 21, 2016.

Lirio Liu,

Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2015–0173.

Petitioner: Alaska Aerial Media LLC.

Section(s) of 14 CFR Affected: 14 CFR 61.23(a) and (c), 61.101(e)(4) and (5), 61.113(a) and (b), 61.315(a), 91.7(a), 91.119(c), 91.121, 91.151(a)(1) and (b), 91.405(a), 91.407(a)(1), 91.409(a)(1) and (2), 91.417(a) and (b).

Description of Relief Sought: The petitioner is requesting an amendment to Exemption No. 11426 in order to operate the Shotover U1 UAV, at a max takeoff weight of 66 pounds, for the purposes of aerial data collection and closed-set motion picture applications.

[FR Doc. 2016–31505 Filed 12–28–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–1999–5748; FMCSA–1999–6156; FMCSA–2000–7006; FMCSA–2000–7165; FMCSA–2000–7363; FMCSA–2002–12294; FMCSA–2002–12844; FMCSA–2004–17195; FMCSA–2004–18885; FMCSA–2004–19477; FMCSA–2006–24783; FMCSA–2006–26066; FMCSA–2008–0106; FMCSA–2008–0231; FMCSA–2008–0292; FMCSA–2010–0187; FMCSA–2010–0201; FMCSA–2010–0287; FMCSA–2010–0327; FMCSA–2010–0354; FMCSA–2010–0385; FMCSA–2012–0278; FMCSA–2012–0279; FMCSA–2014–0010; FMCSA–2014–0296; FMCSA–2014–0298; FMCSA–2014–0299]

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 exemptions for 128 individuals from the vision requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) for interstate commercial motor vehicle (CMV) drivers. The exemptions enable these individuals to continue to operate CMVs in interstate commerce without meeting the vision requirement in one eye.

DATES: Each group of renewed exemptions was effective on the dates stated in the discussions below and will expire on the dates stated in the discussions below. Comments must be received on or before January 30, 2017.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, 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., e.t., Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Services, telephone (202) 366–9826.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket No. FMCSA–1999–5748; FMCSA–1999–6156; FMCSA–2000–7006; FMCSA–2000–7165; FMCSA–2000–7363; FMCSA–2002–12294; FMCSA–2002–12844; FMCSA–2004–17195; FMCSA–2004–18885; FMCSA–2004–19477; FMCSA–2006–24783; FMCSA–2006–26066; FMCSA–2008–0106; FMCSA–2008–0231; FMCSA–2008–0292; FMCSA–2010–0187; FMCSA–2010–0201; FMCSA–2010–0287; FMCSA–2010–0327; FMCSA–2010–0354; FMCSA–2010–0385; FMCSA–2012–0278; FMCSA–2012–0279; FMCSA–2014–0010; FMCSA–2014–0296; FMCSA–2014–0298; FMCSA–2014–0299 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building 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., e.t., Monday through Friday, except Federal Holidays.
- *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket number(s) 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., e.t., 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 online.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

I. Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption for two years 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 statute also allows the Agency to renew exemptions at the end of the two-year period.

The physical qualification standard for drivers regarding vision found in 49 CFR 391.41(b)(10) states that a person is physically qualified to drive a CMV if that person:

> Has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of a least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing red, green, and amber.

The 128 individuals listed in this notice have requested renewal of their exemptions from the vision standard in 49 CFR 391.41(b)(10), in accordance with FMCSA procedures. Accordingly, FMCSA has evaluated these applications for renewal on their merits and decided to extend each exemption for a renewable two-year period

II. Request for Comments

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.

III. 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. In accordance with 49 U.S.C. 31136(e) and 31315, each of the 128 applicants has satisfied the renewal conditions for obtaining an exemption from the vision requirement (64 FR 40404; 64 FR 54948; 64 FR 66962; 65 FR 159; 65 FR 20245; 65 FR 33406; 65 FR 45817; 65 FR 57230; 65 FR 77066; 66 FR 66966; 67 FR 10475; 67 FR 46016; 67 FR 57266; 67 FR 57267; 67 FR 67234; 67 FR 68719; 67 FR 71610; 68 FR 2629; 69 FR 8260; 69 FR 17263; 69 FR 26206; 69 FR 31447; 69 FR 52741; 69 FR 53493; 69 FR 62741; 69 FR 62742; 69 FR 64806; 69 FR 64810; 69 FR 71098; 69 FR 71100; 70 FR 2705; 70 FR 44946; 71 FR 19604; 71 FR 26602; 71 FR 27033; 71 FR 32183; 71 FR 41310; 71 FR 43557; 71 FR 53489; 71 FR 62147; 71 FR 62148; 71 FR 63379; 71 FR 66217; 72 FR 185; 72 FR 1050; 72 FR 1051; 72 FR 1053; 72 FR 1054; 72 FR 1056; 73 FR 27017; 73 FR 35198; 73 FR 36954; 73 FR 36955; 73 FR 42403; 73 FR 48275; 73 FR 51336; 73 FR 54889; 73 FR 60398; 73 FR 61922; 73 FR 61925; 73 FR 74563; 73 FR 74565; 73 FR 75806; 73 FR 75807; 73 FR 76439; 73 FR 76440; 73 FR 78421; 73 FR 78422; 73 FR 78423; 75 FR 27261; 75 FR 36779; 75 FR 38602; 75 FR 44051; 75 FR 47883; 75 FR 50799; 75 FR 52062; 75 FR 54958; 75 FR 59237; 75 FR 63255; 75 FR 65057; 75 FR 66423; 75 FR 69737; 75 FR 70078; 75 FR 72863; 75 FR 77492; 75 FR 77590; 75 FR 77591; 75 FR 77949; 75 FR 77951; 75 FR 79079; 75 FR 79081; 75 FR 79083; 75 FR 79084; 75 FR 80887; 76 FR 1499; 76 FR 2190; 76 FR 5425; 77 FR 38384; 77 FR 46153; 77 FR 52389; 77 FR 59248; 77 FR 60008; 77 FR 68199; 77 FR 68200; 77 FR 68202; 77 FR 70537; 77 FR 71669; 77 FR 71671; 77 FR 74273; 77 FR 74730; 77 FR 74733; 77 FR 74734; 77 FR 75496; 77 FR 76166; 77 FR 76167; 78 FR 800; 79 FR 38661; 79 FR 51643; 79 FR 58856; 79 FR 59348; 79 FR 59357; 79 FR 64001; 79 FR 65759; 79 FR 65760; 79 FR 69985; 79 FR 72754; 79 FR 72756; 79 FR 73397; 79 FR 73686; 79 FR 73687; 79 FR 73689; 79 FR 74168; 79 FR 74169; 80 FR 603; 80 FR 8927; 80 FR 9304). They have 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.

In accordance with 49 U.S.C. 31136(e) and 31315, the following groups of drivers received renewed exemptions in the month of July and are discussed below:

As of January 3, 2017, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 29 individuals have satisfied the conditions for obtaining a renewed exemption from the vision requirements (64 FR 40404; 64 FR 54948; 64 FR 66962; 65 FR 159; 65 FR 20245; 65 FR 33406; 65 FR 45817; 65 FR 57230; 65 FR 77066; 66 FR 66969; 67 FR 10475; 67 FR 57266; 67 FR 71610; 69 FR 8260; 69 FR 17263; 69 FR 26206; 69 FR 31447; 69 FR 52741; 69 FR 53493; 69 FR 62741; 69 FR 62742; 69 FR 64810; 71 FR 19604; 71 FR 26602; 71 FR 27033; 71 FR 62147; 71 FR 66217; 72 FR 185; 73 FR 27017; 73 FR 35198; 73 FR 36954; 73 FR 36955; 73 FR 46973; 73 FR 48275; 73 FR 51336; 73 FR 54889; 73 FR 60398; 73 FR 75806; 73 FR 75807; 75 FR 27621; 75 FR 36779; 75 FR 44051; 75 FR 47883; 75 FR 50799; 75 FR 52062; 75 FR 54958; 75 FR 63255; 75 FR 65057; 75 FR 70078; 75 FR 77590; 75 FR 77951; 75 FR 79081; 77 FR 38384; 77 FR 46153; 77 FR 52389; 77 FR 60008; 77 FR 68200; 77 FR 68202; 77 FR 70537; 77 FR 71671; 77 FR 74730; 79 FR 38661; 79 FR 51643; 79 FR 58856; 79 FR 59348; 79 FR 59357; 79 FR 64001; 79 FR 65759; 79 FR 65760; 79 FR 69985; 79 FR 72754; 79 FR 73689; 80 FR 8927):

Terry A. Adler (SD)
Jeffrey L. Bendix (SD)
James Bierschbach (MN)
Larry D. Brown (MD)
Nathan A. Buckles (IN)
David D. Bungori, Jr. (MD)
Robert J. Clarke (NY)
Donald O. Clopton (AL)
David R. Cox (OR)
Deurice K. Dean (MD)
Craig E. Dorrance (MT)
Donald D. Dunphy (VA)
Bradley J. Gaspard (LA)
Paul A. Gregerson (IA)
Victor B. Hawks (VA)
Robert T. Hill (AL)
William A. Hill III (OH)
Jesse P. Jamison (TN)
Oscar Juarez (ID)
Mearl C. Kennedy (OH)
Laine Lewin (MN)
Bruce J. Lewis (RI)
John C. McLaughlin (SD)
Timothy L. O'Neill (NY)
Jeffrey S. Pennell (VT)
Shannon L. Puckett (KY)
Calvin J. Schaap (MN)
Larry D. Wedekind (TX)
Rick A. Young (IN)

The drivers were included in one of the following dockets: Docket Nos. FMCSA–1999–5748; FMCSA–1999–6156; FMCSA–2000–7006; FMCSA–2000–7165; FMCSA–2000–7363; FMCSA–2004–18885; FMCSA–2008–0106; FMCSA–2008–0231; FMCSA–2008–0292; FMCSA–2010–0187; FMCSA–2010–0201; FMCSA–2010–0327; FMCSA–2012–0279; FMCSA–2014–0010; FMCSA–2014–0296; FMCSA–2014–0298. Their exemptions are effective as of January 3, 2017, and will expire on January 3, 2019.

As of January 9, 2017, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 20 individuals have satisfied the conditions for obtaining a renewed exemption from the vision requirements (71 FR 63379; 72 FR 1051; 73 FR 78423; 75 FR 79083; 77 FR 59248; 77 FR 71669; 77 FR 74734; 79 FR 73686):

Dennis M. Boggs (OH)
David L. Cattoor (NV)
Jose S. Chavez (AZ)
Cesar A. Cruz (IL)
Arthur L. Dolengewicz (NY)
Wayne A. Elkins, II (OH)
Barry J. Ferdinando (NH)
Guadalupe J. Hernandez (IN)
Kenneth Liuzza (LA)
Samson B. Margison (OH)
Michael W. McClain (CO)
Terrence L. McKinney (TX)
Ellis T. McKneely (LA)
Ronald C. Morris (NV)
Randal C. Schmude (WI)
Steven M. Scholfield (KY)
David C. Stitt (KS)
Kevin L. Truxell (FL)
Bruce A. Walker (WI)
Lee A. Wiltjer (IL)

The drivers were included in one of the following dockets: Docket No. FMCSA–2006–26066; FMCSA–2012–0278. Their exemptions are effective as of January 9, 2017, and will expire on January 9, 2019.

As of January 10, 2017, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 21 individuals have satisfied the conditions for obtaining a renewed exemption from the vision requirements (75 FR 69737; 76 FR 1499; 77 FR 74733; 79 FR 72756; 79 FR 73397; 80 FR 9304):

Michael L. Boersma (ND)
Bryan K. DeBorde (WA)
Roger P. Dittrich (IL)
Michael K. Engemann (MO)
Ralph V. Graven (OR)
Michael D. Halferty (IA)
Eric C. Hammer (MO)
Robert K. Ipock (NC)
Perry D. Jensen (WI)
Joseph L. Jones (MD)
Jesse L. Lichtenberger (PA)
David J. Nocton (MN)
James G. Pitchford (OH)
Frederick E. Schaub (IA)
Michael G. Somma (NY)
Mark J. Stanley (CA)
Jason E. Thomas (ND)
Richard L. Totels (TX)
Diane L. Wedebrand (IA)
Eddie L. Wilkins (VA)
James B. Woolwine (VA)

The drivers were included on the following docket: Docket No. FMCSA–2010–0287; FMCSA–2014–0299. Their exemptions are effective as of January 10, 2017, and will expire on January 10, 2019.

As of January 12, 2017, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 21 individuals have satisfied the conditions for obtaining a renewed exemption from the vision requirements (65 FR 20245; 65 FR 57230; 67 FR 67234; 69 FR 53493; 69 FR 62741; 69 FR 64742; 71 FR 62147; 71 FR 62148; 73 FR 61925; 73 FR 74565; 75 FR 59327; 75 FR 66423; 75 FR 72863; 76 FR 2190; 77 FR 68199; 77 FR 74273; 79 FR 73687):

Charles H. Akers, Jr. (VA)
Kurtis A. Anderson (SD)
Terry L. Anderson (PA)
Timothy Bradford (TN)
Marvin R. Daly (SC)
Douglas K. Esp (MT)
Jevont D. Fells (AL)
Gary A. Golson (AL)
Donald L. Hamrick (KS)
Gary L. Killian (NC)
Timothy R. McCullough (FL)
Marcus L. McMillin (FL)
George C. Milks (NY)
Thomas L. Oglesby (GA)
Jonathan C. Rollings (IA)
Preston S. Salisbury (MT)
Victor M. Santana (CA)
Kevin W. Schaffer (IL)
George A. Teti (FL)
David W. Ward (NC)
Ralph W. York (NM)

The drivers were included on the following docket: Docket No. FMCSA–2000–7006; FMCSA–2000–7363; FMCSA–2002–12294; FMCSA–2004–18885; FMCSA–2006–24783; FMCSA–2006–26066; FMCSA–2010–0354. Their exemptions are effective as of January 12, 2017, and will expire on January 12, 2019.

As of January 13, 2017, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 5 individuals have satisfied the conditions for obtaining a renewed exemption from the vision requirements (65 FR 45817; 65 FR 77066; 67 FR 46016; 67 FR 57267; 67 FR

71610; 69 FR 71098; 71 FR 32183; 71 FR 41310; 71 FR 63379; 72 FR 1050; 72 FR 1054; 73 FR 75806; 73 FR 78421; 75 FR 79079; 77 FR 76166; 79 FR 73687):

David S. Brumfield (KY)
Arthur A. Sappington (IN)
David W. Skillman (WA)
William H. Smith (AL)
Edward C. Williams (AL)

The drivers were included on the following docket: Docket No. FMCSA–2000–7363; FMCSA–2002–12294; FMCSA–2006–24783; FMCSA–2006–26006. Their exemptions are effective as of January 13, 2017, and will expire on January 13, 2019.

As of January 14, 2017, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 10 individuals have satisfied the conditions for obtaining a renewed exemption from the vision requirements (69 FR 64806; 70 FR 2705; 72 FR 1056; 73 FR 76439; 75 FR 65057; 75 FR 79081; 75 FR 79084; 77 FR 75496; 79 FR 74169):

Charles L. Alsager, Jr. (IA)
Ross E. Burroughs (NJ)
Christopher L. Depuy (OH)
John B. Etheridge (GA)
Larry J. Folkerts (IA)
Paul W. Hunter (AL)
Ray P. Lenz (IA)
Francis M. McMullin (PA)
Norman Mullins (OH)
David J. Triplett (KY)

The drivers were included on the following docket: Docket No. FMCSA–2004–19477; FMCSA–2010–0327. Their exemptions are effective as of January 14, 2017, and will expire on January 14, 2019.

As of January 17, 2017, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 5 individuals have satisfied the conditions for obtaining a renewed exemption from the vision requirements (67 FR 68719; 68 FR 2629; 69 FR 71100; 72 FR 1053; 73 FR 76440; 75 FR 80887; 77 FR 76167; 79 FR 74168):

Howard F. Breitkreutz (MN)
John E. Evenson (WI)
Craig M. Landry (LA)
Kenneth E. Vigue, Jr. (WA)
Richard A. Winslow (MN)

The drivers were included on the following docket: Docket No. FMCSA–2002–12844. Their exemptions are effective as of January 17, 2017, and will expire on January 17, 2019.

As of January 31, 2017, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 17 individuals have satisfied the conditions for obtaining a renewed exemption from the vision requirements (69 FR 17263; 69 FR 314477; 70 FR 44946; 71 FR 43557; 71 FR 63379; 72 FR 1050; 73 FR 42403; 73 FR 78422; 75 FR 38602; 75 FR 54958; 75 FR 96737; 75 FR 70078; 75 FR 72863; 75 FR 77492; 75 FR 79079; 76 FR 1499; 76 FR 2190; 76 FR 5425; 77 FR 60008; 77 FR 68202; 77 FR 71671; 77 FR 74733; 78 FR 800; 80 FR 603):

Gary Alvarez (MA)
Donald G. Brock, Jr. (NC)
Leon C. Flynn (TX)
Brett K. Hasty (GA)
Garry Layton (TX)
Jimmy R. Mauldin (OK)
Patrick J. McMillen (WI)
Anthony Miller (OH)
Rocky Moorhead (NM)
Gary L. Nicholas (MI)
Jose M. Saurez (TX)
Lynn R. Schraeder (IA)
Ranjodh Singh (CA)
Myron A. Smith (MN)
Ricky Watts (FL)
Olen L. Williams, Jr. (TN)
Richard L. Zacher (OR)

The drivers were included on the following docket: Docket No. FMCSA–2004–17195; FMCSA–2006–26066; FMCSA–2010–0201; FMCSA–2010–0287; FMCSA–2010–0354; FMCSA–2010–0385; FMCSA–2012–0279. Their exemptions are effective as of January 31, 2017, and will expire on January 31, 2019.

Conditions and Requirements

The exemptions are extended subject to the following conditions: (1) Each driver must undergo an annual physical examination (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 certified Medical Examiner, as defined by 49 CFR 390.5, who attests that the driver is otherwise physically qualified under 49 CFR 391.41; (2) each driver must provide a copy of the ophthalmologist's or optometrist's report to the Medical Examiner at the time of the annual medical examination; and (3) each driver must 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. 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.

IV. Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with this exemption with respect to a person operating under the exemption.

VI. Conclusion

Based upon its evaluation of the 128 exemption applications, FMCSA renews the exemptions of the aforementioned drivers from the vision requirement in 49 CFR 391.41(b)(10), subject to the requirements cited above (49 CFR 391.64(b)). In accordance with 49 U.S.C. 31136(e) and 31315, each exemption will be valid for two years unless revoked earlier by FMCSA.

Issued on: December 19, 2016.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2016–31557 Filed 12–28–16; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2016–0381]

Qualification of Drivers; Exemption Applications; Diabetes Mellitus

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation.

ACTION: Notice of applications for exemptions; request for comments.

SUMMARY: FMCSA announces receipt of applications from 41 individuals for exemption from the prohibition against persons with insulin-treated diabetes mellitus (ITDM) operating commercial motor vehicles (CMVs) in interstate commerce. If granted, the exemptions would enable these individuals with ITDM to operate CMVs in interstate commerce.

DATES: Comments must be received on or before January 30, 2017.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket No. FMCSA–2016–0381 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., e.t., 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., e.t., 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: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–113, Washington, DC 20590–0001. Office hours are 8:30 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

I. 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.'' The statute also allows the Agency to renew exemptions at the end of the 2-year period. The 41 individuals listed in this notice have recently requested such an exemption from the diabetes prohibition in 49 CFR 391.41(b)(3), which applies to drivers of CMVs in interstate commerce. Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by statute.

II. Qualifications of Applicants

Donald Austin

Mr. Austin, 63, has had ITDM since 2012. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Austin understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Austin meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Georgia.

Estil L. Baker, Jr.

Mr. Baker, 58, has had ITDM since 2016. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Baker understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Baker meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Illinois.

Thomas M. Bard

Mr. Bard, 41, has had ITDM since 2016. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Bard understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Bard meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Illinois.

Mark W. Birch

Mr. Birch, 46, has had ITDM since 2014. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Birch understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Birch meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2016 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from Texas.

Richard Bollhardt

Mr. Bollhardt, 56, has had ITDM since 2013. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Bollhardt understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Bollhardt meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds an operator's license from New Jersey.

Bryan R. Breaw

Mr. Breaw, 48, has had ITDM since 1987. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in

the last 5 years. His endocrinologist certifies that Mr. Breaw understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Breaw meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Minnesota.

Trini L. Brisson

Mr. Brisson, 48, has had ITDM since 2016. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Brisson understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Brisson meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds an operator's license from Michigan.

Keith M. Carpenter

Mr. Carpenter, 51, has had ITDM since 2014. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Carpenter understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Carpenter meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds an operator's license from Pennsylvania.

Alan W. Carstensen

Mr. Carstensen, 72, has had ITDM since 2014. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Carstensen understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Carstensen meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Minnesota.

Russell L. Clapp

Mr. Clapp, 56, has had ITDM since 2012. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Clapp understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Clapp meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from Maine.

Allan J. Clune

Mr. Clune, 73, has had ITDM since 2013. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Clune understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Clune meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds an operator's license from New Jersey.

Ryan F. Curtis

Mr. Curtis, 27, has had ITDM since 1996. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Curtis understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Curtis meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds an operator's license from New Jersey.

Jeffrey S. Daniels

Mr. Daniels, 50, has had ITDM since 2013. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Daniels understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Daniels meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2016 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class C CDL from Iowa.

Andrew M.M. Danner

Mr. Danner, 21, has had ITDM since 2011. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Danner understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Danner meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds an operator's license from Virginia.

George P. Diedrich, Jr.

Mr. Diedrich, 74, has had ITDM since 2016. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Diedrich understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Diedrich meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from New Jersey.

Wilson E. Donnell

Mr. Donnell, 63, has had ITDM since 2016. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Donnell understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Donnell meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Maine.

Michael W. Erick

Mr. Erick, 62, has had ITDM since 2016. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Erick understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Erick meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Connecticut.

Eric Fedor

Mr. Fedor, 56, has had ITDM since 2016. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Fedor understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Fedor meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Pennsylvania.

Juanita C. Gaines

Ms. Gaines, 54, has had ITDM since 2002. Her endocrinologist examined her in 2016 and certified that she has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. Her endocrinologist certifies that Ms. Gaines understands diabetes management and monitoring has stable control of her diabetes using insulin, and is able to drive a CMV safely. Ms. Gaines meets the requirements of the vision standard at 49 CFR 391.41(b)(10). Her optometrist examined her in 2016 and certified that she does not have diabetic retinopathy. She holds a Class B CDL from Texas.

Buckley E. Grant

Mr. Grant, 44, has had ITDM since 2015. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Grant understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Grant meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Kansas.

Connor J. Grossaint

Mr. Grossaint, 23, has had ITDM since 2006. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Grossaint understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Grossaint meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds an operator's license from Utah.

Brian A. Hagenhoff

Mr. Hagenhoff, 44, has had ITDM since 1989. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Hagenhoff understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Hagenhoff meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2016 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from Missouri.

Jeffrey D.S. Hosman

Mr. Hosman, 23, has had ITDM since 1998. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Hosman understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV

safely. Mr. Hosman meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from Arkansas.

Terry P. Kelly

Mr. Kelly, 50, has had ITDM since 2016. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Kelly understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Kelly meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class D CDL from Kentucky.

David M. Kerr

Mr. Kerr, 58, has had ITDM since 2016. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Kerr understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Kerr meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Pennsylvania.

Michael P. Kruimer

Mr. Kruimer, 62, has had ITDM since 2012. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Kruimer understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Kruimer meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from New Jersey.

Salvatore Longo

Mr. Longo, 45, has had ITDM since 2016. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Longo understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Longo meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Illinois.

Alan Mills

Mr. Mills, 62, has had ITDM since 2011. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Mills understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Mills meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2016 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from Oregon.

John R. Paulus

Mr. Paulus, 69, has had ITDM since 1974. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Paulus understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Paulus meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Wisconsin.

Bruce D. Peterson

Mr. Peterson, 65, has had ITDM since 2016. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Peterson understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Peterson meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2016 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from Wisconsin.

Nicholas J. Powden

Mr. Powden, 30, has had ITDM since 2015. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Powden understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Powden meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds an operator's license from Vermont.

Dennis A. Roisum

Mr. Roisum, 59, has had ITDM since 2001. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or

more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Roisum understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Roisum meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2016 and certified that he has stable nonproliferative diabetic retinopathy. He holds an operator's license from Wisconsin.

Jeffrey P. Roskopf

Mr. Roskopf, 61, has had ITDM since 2016. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Roskopf understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Roskopf meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Wisconsin.

David M. Ryea

Mr. Ryea, 36, has had ITDM since 2001. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Ryea understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Ryea meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds an operator's license from Connecticut.

Edward G. Smith, Jr.

Mr. Smith, 58, has had ITDM since 2013. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Smith understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Smith meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from North Dakota.

Ralph H. Talmadge

Mr. Talmadge, 71, has had ITDM since 2016. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Talmadge understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Talmadge meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from New Jersey.

Jerry R. Thomason

Mr. Thomason, 57, has had ITDM since 2016. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Thomason understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Thomason meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Georgia.

Melvin E. Turner

Mr. Turner, 62, has had ITDM since 2015. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Turner understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Turner meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Tennessee.

Lash L. Walker

Mr. Walker, 64, has had ITDM since 2006. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Walker understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Walker meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2016 and certified that he has stable nonproliferative and stable proliferative diabetic retinopathy. He holds an operator's license from Tennessee.

Donald E. Walstrom

Mr. Walstrom, 57, has had ITDM since 2016. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Walstrom understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Walstrom meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Iowa.

Ronald A. Williams

Mr. Williams, 66, has had ITDM since 2010. His endocrinologist examined him in 2016 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Williams understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Williams meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2016 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Oregon.

III. 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. We will consider all comments received before the close of business on the closing date indicated in the date section of the notice.

FMCSA notes that section 4129 of the Safe, Accountable, Flexible and Efficient Transportation Equity Act: A Legacy for Users requires the Secretary to revise its diabetes exemption program established on September 3, 2003 (68 FR 52441) [1]. The revision must provide for individual assessment of drivers with diabetes mellitus, and be consistent with the criteria described in section 4018 of the Transportation Equity Act for the 21st Century (49 U.S.C. 31305).

Section 4129 requires: (1) Elimination of the requirement for 3 years of experience operating CMVs while being treated with insulin; and (2) establishment of a specified minimum period of insulin use to demonstrate stable control of diabetes before being allowed to operate a CMV.

In response to section 4129, FMCSA made immediate revisions to the diabetes exemption program established by the September 3, 2003 notice. FMCSA discontinued use of the 3-year driving experience and fulfilled the requirements of section 4129 while continuing to ensure that operation of CMVs by drivers with ITDM will achieve the requisite level of safety required of all exemptions granted under 49 U.S.C.. 31136 (e).

Section 4129(d) also directed FMCSA to ensure that drivers of CMVs with ITDM are not held to a higher standard than other drivers, with the exception of limited operating, monitoring and medical requirements that are deemed medically necessary.

The FMCSA concluded that all of the operating, monitoring and medical requirements set out in the September 3, 2003 notice, except as modified, were in compliance with section 4129(d). Therefore, all of the requirements set out in the September 3, 2003 notice, except as modified by the notice in the **Federal Register** on November 8, 2005 (70 FR 67777), remain in effect.

IV. 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–2016–0381 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. FMCSA may issue a final determination at any time after the close of the comment period.

V. Viewing Comments and Documents

To view comments, as well as any documents mentioned in this preamble, go to *http://www.regulations.gov* and in the search box insert the docket number FMCSA–2016–0381 and click ''Search.'' Next, click ''Open Docket Folder'' and you will find all documents and comments related to this notice.

Issued on: December 19, 2016.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2016–31546 Filed 12–28–16; 8:45 am]

BILLING CODE 4910–EX–P

[1] Section 4129(a) refers to the 2003 notice as a ''final rule.'' However, the 2003 notice did not issue a ''final rule'' but did establish the procedures and standards for issuing exemptions for drivers with ITDM.

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2014–0216]

Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew exemptions of three individuals from the requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) that interstate commercial motor vehicle (CMV) drivers have ''no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a CMV.'' The exemptions enable these individuals who have had one or more seizures and are taking anti-seizure medication to continue to operate CMVs in interstate commerce.

DATES: The renewed exemptions were effective on November 4, 2016. The renewed exemptions will expire on November 4, 2018. Comments must be received on or before January 30, 2017.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, 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., e.t., Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Services, telephone (202) 366–9826.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket No. FMCSA–2014–0216 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200

New Jersey Avenue SE., West Building 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., e.t., Monday through Friday, except Federal Holidays.

• *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket number(s) 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., e.t., 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 online.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

I. Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption for two years 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 statute also allows the Agency to renew exemptions at the end of the two-year period.

The physical qualification standard for drivers regarding epilepsy found in 49 CFR 391.41(b)(8) states that a person is physically qualified to drive a CMV if that person:

> Has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause the loss of consciousness or any loss of ability to control a CMV.

In addition to the regulations, FMCSA has published advisory criteria to assist Medical Examiners in determining whether drivers with certain medical conditions are qualified to operate a CMV in interstate commerce. [49 CFR part 391, Appendix A to Part 391—Medical Advisory Criteria, section H. Epilepsy: § 391.41(b)(8), paragraphs 3, 4, and 5.]

The three individuals listed in this notice have requested renewal of their exemptions from the Epilepsy and Seizure Disorders prohibition in 49 CFR 391.41(b)(8), in accordance with FMCSA procedures. Accordingly, FMCSA has evaluated these applications for renewal on their merits and decided to extend each exemption for a renewable two-year period.

II. Request for Comments

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.

III. 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. In accordance with 49 U.S.C. 31136(e) and 31315, each of the three applicants has satisfied the conditions for obtaining an exemption from the Epilepsy and Seizure Disorder requirements and were published in the **Federal Register** (80 FR 17542). In addition, for Commercial Driver's License (CDL) holders, the Commercial Driver's License Information System (CDLIS) and the Motor Carrier Management Information System (MCMIS) are searched for crash and violation data. For non-CDL holders, the Agency reviews the driving records from the State Driver's Licensing Agency (SDLA). These factors provide an adequate basis for predicting each driver's ability to continue to safely operate a CMV in interstate commerce.

The three drivers in this notice remain in good standing with the Agency, have maintained their medical monitoring and have not exhibited any medical issues that would compromise their ability to safely operate a CMV during the previous two-year exemption period. FMCSA has concluded that renewing the exemptions for each of these applicants is likely to achieve a level of safety equal to that existing without the exemption. Therefore, FMCSA has decided to renew each exemption for a two-year period. In accordance with 49 U.S.C. 31136(e) and 31315, each driver has received a renewed exemption.

As of November 4, 2016, the following three individuals have satisfied the renewal conditions for obtaining an exemption from the Epilepsy and Seizure Disorders prohibition in 49 CFR 391.41(b)(8), from driving CMVs in interstate commerce (80 FR 17542): Ronald Bland (OH); Joseph Celedonia (MD); and Thomas Mitchell (MS). These drivers were included in FMCSA–2014–0216. The exemptions were effective on November 4, 2016, and will expire on November 4, 2018.

IV. Conditions and Requirements

The exemptions are extended subject to the following conditions: (1) Each driver must remain seizure-free and maintain a stable treatment during the two-year exemption period; (2) each driver must submit annual reports from their treating physicians attesting to the stability of treatment and that the driver has remained seizure-free; (3) each driver must undergo an annual medical examination by a certified Medical Examiner, as defined by 49 CFR 390.5; and (4) each driver must provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy of his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the exemption when driving, for presentation to a duly authorized Federal, State, or local enforcement official. 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.

V. Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with this exemption with respect to a person operating under the exemption.

VI. Conclusion

Based upon its evaluation of the three exemption applications, FMCSA renews the exemptions of the aforementioned drivers from the Epilepsy and Seizure

Disorders requirement in 49 CFR 391.41(b)(8). In accordance with 49 U.S.C. 31136(e) and 31315, each exemption will be valid for two years unless revoked earlier by FMCSA.

Issued on: December 19, 2016.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2016–31558 Filed 12–28–16; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2008–0071; FMCSA–2012–0044; FMCSA–2012–0107; FMCSA–2014–0015; FMCSA–2014–0016]

Qualification of Drivers; Exemption Applications; Diabetes

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 of 78 individuals from its rule prohibiting persons with insulin-treated diabetes mellitus (ITDM) from operating commercial motor vehicles (CMVs) in interstate commerce. FMCSA has statutory authority to exempt individuals from this rule 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 CMV drivers.

DATES: Each group of renewed exemptions are effective from the dates stated in the discussions below. Comments must be received on or before January 30, 2017.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) numbers: Docket No. FMCSA–2008–0071; FMCSA–2012–0044; FMCSA–2012–0107; FMCSA–2014–0015; FMCSA–2014–0016, 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., e.t., 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: Ms. Christine A. Hydock, Chief, Medical Programs Division, 202–366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–113, Washington, DC 20590–0001. Office hours are from 8 a.m. to 5:30 p.m., e.t., 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 Federal Motor Carrier Safety Regulations 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.'' The statute also allows the Agency to renew exemptions at the end of the 2-year period. The 78 individuals listed in this notice have recently become eligible for a renewed exemption from the diabetes prohibition in 49 CFR 391.41(b)(3), which applies to drivers of CMVs in interstate commerce. The drivers remain in good standing with the Agency, have maintained their required medical monitoring and have not exhibited any medical issues that would compromise their ability to safely operate a CMV during the previous 2-year exemption period.

Exemption Decision

This notice addresses 78 individuals who have requested renewal of their exemptions in accordance with FMCSA procedures. These 78 drivers remain in good standing with the Agency, have maintained their required medical monitoring and have not exhibited any medical issues that would compromise their ability to safely operate a CMV during the previous 2-year exemption period. Therefore, FMCSA has decided to extend each exemption for a renewable two-year period. Each individual is identified according to the renewal date.

The exemptions are renewed subject to the following conditions: (1) That each individual submit a quarterly monitoring checklist completed by the treating endocrinologist as well as an annual checklist with a comprehensive medical evaluation; (2) that each individual reports within 2 business days of occurrence, all episodes of severe hypoglycemia, significant complications, or inability to manage diabetes; also, any involvement in an accident or any other adverse event in a CMV or personal vehicle, whether or not it is related to an episode of hypoglycemia; (3) that each individual submit an annual ophthalmologist's or optometrist's report; and (4) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the certification when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

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. The following groups of drivers received renewed exemptions in the month of June and are discussed below.

As of June 3, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the

following 10 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce. (73 FR 16946; 73 FR 31734):

Edward F. Connole (MA)
Gary D. Coonfield (MO)
Francis W. Devine (NJ)
Shannon D. Hanson (SD)
Aundra Menefield (MS)
James T. Rothwell (TN)
Randy A. Shannon (MT)
Dalton T. Smith, Jr. (IL)
Marvin D. Webster (KY)
Travis S. Wolfe (WV)

The drivers were included in Docket No. FMCSA–2008–0071. Their exemptions are effective as of June 3, 2016, and will expire on June 3, 2018.

As of June 5, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 10 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce. (77 FR 20876; 77 FR 33264):

Steven W. Beaty (SD)
David D. Brown (MI)
Evan P. Hansen (WI)
Todd A. Heitschmidt (WA)
John M. Kennedy, Jr. (NC)
Jeremy A. Ludolph (KS)
Gerald N. Martinson (ND)
Glenn D. Taylor (NY)
Thomas R. Toews (OR)
James E. Waller, III (GA)

The drivers were included in Docket No. FMCSA–2012–0044. Their exemptions are effective as of June 5, 2016, and will expire on June 5, 2018.

As of June 12, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following individual, John C. Fisher, Jr. (PA) has satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce (79 FR 22573; 79 FR 35855).

The driver was included in Docket No. FMCSA–2014–0015. The exemption is effective as of June 12, 2016, and will expire on June 12, 2018.

As of June 20, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following individual, Gary R. Harper (IN) has satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce (79 FR 29484; 79 FR 42628).

The driver was included in Docket No. FMCSA–2014–0016. The exemption is effective as of June 20, 2016, and will expire on June 20, 2018.

As of June 24, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 46 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce. (79 FR 22573; 79 FR 35855):

Joshua T. Adams (OH)
Dennis W. Athey II (KS)
John M. Behan, Jr. (MD)
Peterson Benally (NM)
Kirk B. Berridge (KS)
Francis P. Bourgeois (LA)
Randall T. Buffkin (NC)
Terry S. Bunge (WI)
Heladio Castillo (WA)
Purvis J. Chesson (VA)
Bonnie F. Craig (OR)
Jeff T. Enbody (WA)
Larry S. Gibson, II (NC)
James M. Halapchuk (PA)
Jeffery A. Hall (ME)
Henry W. Hartman (NY)
Marlin R. Hein (IA)
Clifford E. Hill (WA)
Robert E. Hunt (MT)
Vincenzo Ingrassellino (NY)
Davis Jansen van Beek (MT)
Baek J. Kim (MD)
Shawn N. Kimble (PA)
Darrel G. Klauer (WI)
Stephen D. Lewis (NY)
Kerry W. McCarthy (IN)
Alvin McClain (OR)
Kenneth D. Mehmen (IA)
Kyle B. Mitchell (CA)
Thomas R. Moore, Jr. (AZ)
Michael A. Murrell (KY)
Ryan R. Ong (CA)
Gregory Paradiso (OH)
Brian K. Patenaude (MA)
Traci L. Patterson (CA)
Chad A. Powell (MO)
Richard C. Schendel (MN)
William A. Schimpf (CA)
Frank J. Sciulli (PA)
Bryan J. Smith (ND)
Edward L. Stauffer (PA)
William H. Stone, Sr. (FL)
Kyle G. Streit (TX)
Joseph D. Stutzman (PA)
Raymond J. Vaillancourt (OH)
Robert L. Weiland (PA)

The drivers were included in Docket No. FMCSA–2014–0015. Their exemptions are effective as of June 24 2016, and will expire on June 24, 2018.

As of June 26, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following individual, Tommy R. Riley (IL) has satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce (79 FR 29484; 79 FR 42628).

The driver was included in Docket No. FMCSA–2014–0016. The exemption is effective as of June 26, 2016, and will expire on June 26, 2018.

As of June 27, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 9 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce. (77 FR 27842; 77 FR 38383):

Matthew R. Bagwell (NY)
Eric J. Bright (IL)
Kyle D. Dale (MO)
Frank E. Glenn (IL)
Kevin N. Mitchell (GA)
Gerald Perkins (CA)
Donald L. Philpott (WA)
John Randolph (OK)
Courtney R. Schiebout (IA)

The drivers were included in Docket No. FMCSA–2012–0107. Their exemptions are effective as of June 27, 2016, and will expire on June 27, 2018.

Each of the 78 drivers in the aforementioned groups qualifies for a renewal of the exemption. They have maintained their required medical monitoring and have not exhibited any medical issues that would compromise their ability to safely operate a CMV during the previous 2-year exemption period.

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 of the 78 drivers for a period of two years is likely to achieve a level of safety equal to that existing without the exemption. The drivers were included in docket numbers FMCSA–2008–0071; FMCSA–2012–0044; FMCSA–2012–0107; FMCSA–2014–0015; FMCSA–2014–0016.

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 January 30, 2017.

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 78 individuals from rule prohibiting

persons with ITDM from operating CMVs in interstate commerce in 49 CFR 391.41(b)(3). 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 medical condition of each applicant for an exemption from rule prohibiting persons with ITDM from operating CMVs in interstate commerce. 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–2008–0071; FMCSA–2012–0044; FMCSA–2012–0107; FMCSA–2014–0015; FMCSA–2014–0016 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. FMCSA may issue a final determination 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, go to *http://www.regulations.gov* and in the search box insert the docket number FMCSA–2008–0071; FMCSA–2012–0044; FMCSA–2012–0107; FMCSA–2014–0015; FMCSA–2014–0016 and click ''Search.'' Next, click ''Open Docket Folder'' and you will find all documents and comments related to this notice.

Issued on: December 19, 2016.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2016–31545 Filed 12–28–16; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2016–0209]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to exempt 12 individuals from the vision requirement in the Federal Motor Carrier Safety Regulations (FMCSRs). 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. The Agency has concluded that granting these exemptions will provide a level of safety that is equivalent to or greater than the level of safety maintained without the exemptions for these CMV drivers.

DATES: The exemptions were granted November 11, 2016. The exemptions expire on November 11, 2018.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–113, Washington, DC 20590–0001. Office hours are 8:30 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Services, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at *http://www.regulations.gov.*

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* and/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., e.t., Monday through Friday, except Federal holidays.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

II. Background

On October 11, 2016, FMCSA published a notice of receipt of exemption applications from certain individuals, and requested comments from the public (81 FR 70251). That notice listed 12 applicants' case histories. The 12 individuals applied for exemptions from the vision requirement in 49 CFR 391.41(b)(10), for drivers who operate CMVs in interstate commerce.

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption 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.'' The statute also allows the Agency to renew exemptions at the end of the 2-year period. Accordingly, FMCSA has evaluated the 12 applications on their merits and made a determination to grant exemptions to each of them.

III. Vision and Driving Experience of the Applicants

The vision requirement in the FMCSRs provides:

A person is physically qualified to drive a commercial motor vehicle if that person has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of a least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices

showing red, green, and amber (49 CFR 391.41(b)(10)).

FMCSA recognizes that some drivers do not meet the vision requirement but have adapted their driving to accommodate their limitation and demonstrated their ability to drive safely. The 12 exemption applicants listed in this notice are in this category. They are unable to meet the vision requirement in one eye for various reasons, including age-related macular degeneration, amblyopia, complete loss of vision, corneal scar, prosthetic eye, retinal scar, and strabismus. In most cases, their eye conditions were not recently developed. Seven of the applicants were either born with their vision impairments or have had them since childhood.

The 5 individuals that sustained their vision conditions as adults have had it for a range of 3 to 17 years.

Although each applicant has one eye which does not meet the vision requirement in 49 CFR 391.41(b)(10), each has at least 20/40 corrected vision in the other eye, and in a doctor's opinion, has sufficient vision to perform all the tasks necessary to operate a CMV. Doctors' opinions are supported by the applicants' possession of valid commercial driver's licenses (CDLs) or non-CDLs to operate CMVs. Before issuing CDLs, States subject drivers to knowledge and skills tests designed to evaluate their qualifications to operate a CMV.

All of these applicants satisfied the testing requirements for their State of residence. By meeting State licensing requirements, the applicants demonstrated their ability to operate a CMV, with their limited vision, to the satisfaction of the State.

While possessing a valid CDL or non-CDL, these 12 drivers have been authorized to drive a CMV in intrastate commerce, even though their vision disqualified them from driving in interstate commerce. They have driven CMVs with their limited vision in careers ranging for 4 to 43 years. In the past three years, no drivers were involved in crashes and no drivers were convicted of moving violations in a CMV.

The qualifications, experience, and medical condition of each applicant were stated and discussed in detail in the October 11, 2016 notice (81 FR 70251).

IV. Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the vision requirement in 49 CFR 391.41(b)(10) if the exemption is likely to achieve an equivalent or greater level of safety than would be achieved without the exemption. Without the exemption, applicants will continue to be restricted to intrastate driving. With the exemption, applicants can drive in interstate commerce. Thus, our analysis focuses on whether an equal or greater level of safety is likely to be achieved by permitting each of these drivers to drive in interstate commerce as opposed to restricting him or her to driving in intrastate commerce.

To evaluate the effect of these exemptions on safety, FMCSA considered the medical reports about the applicants' vision as well as their driving records and experience with the vision deficiency.

To qualify for an exemption from the vision requirement, FMCSA requires a person to present verifiable evidence that he/she has driven a commercial vehicle safely with the vision deficiency for the past 3 years. Recent driving performance is especially important in evaluating future safety, according to several research studies designed to correlate past and future driving performance. Results of these studies support the principle that the best predictor of future performance by a driver is his/her past record of crashes and traffic violations. Copies of the studies may be found at Docket Number FMCSA–1998–3637.

FMCSA believes it can properly apply the principle to monocular drivers, because data from the Federal Highway Administration's (FHWA) former waiver study program clearly demonstrate the driving performance of experienced monocular drivers in the program is better than that of all CMV drivers collectively (See 61 FR 13338, 13345, March 26, 1996). The fact that experienced monocular drivers demonstrated safe driving records in the waiver program supports a conclusion that other monocular drivers, meeting the same qualifying conditions as those required by the waiver program, are also likely to have adapted to their vision deficiency and will continue to operate safely.

The first major research correlating past and future performance was done in England by Greenwood and Yule in 1920. Subsequent studies, building on that model, concluded that crash rates for the same individual exposed to certain risks for two different time periods vary only slightly (See Bates and Neyman, University of California Publications in Statistics, April 1952). Other studies demonstrated theories of predicting crash proneness from crash history coupled with other factors. These factors—such as age, sex, geographic location, mileage driven and conviction history—are used every day by insurance companies and motor vehicle bureaus to predict the probability of an individual experiencing future crashes (See Weber, Donald C., ''Accident Rate Potential: An Application of Multiple Regression Analysis of a Poisson Process,'' Journal of American Statistical Association, June 1971). A 1964 California Driver Record Study prepared by the California Department of Motor Vehicles concluded that the best overall crash predictor for both concurrent and nonconcurrent events is the number of single convictions. This study used 3 consecutive years of data, comparing the experiences of drivers in the first 2 years with their experiences in the final year.

Applying principles from these studies to the past 3-year record of the 12 applicants, no drivers were involved in crashes and no drivers were convicted of a moving violations in a CMV. All the applicants achieved a record of safety while driving with their vision impairment, demonstrating the likelihood that they have adapted their driving skills to accommodate their condition. As the applicants' ample driving histories with their vision deficiencies are good predictors of future performance, FMCSA concludes their ability to drive safely can be projected into the future.

We believe that the applicants' intrastate driving experience and history provide an adequate basis for predicting their ability to drive safely in interstate commerce. Intrastate driving, like interstate operations, involves substantial driving on highways on the interstate system and on other roads built to interstate standards. Moreover, driving in congested urban areas exposes the driver to more pedestrian and vehicular traffic than exists on interstate highways. Faster reaction to traffic and traffic signals is generally required because distances between them are more compact. These conditions tax visual capacity and driver response just as intensely as interstate driving conditions. The veteran drivers in this proceeding have operated CMVs safely under those conditions for at least 3 years, most for much longer. Their experience and driving records lead us to believe that each applicant is capable of operating in interstate commerce as safely as he/she has been performing in intrastate commerce. Consequently, FMCSA finds that exempting these applicants from the vision requirement in 49 CFR 391.41(b)(10) is likely to achieve a level of safety equal to that existing without the exemption. For this reason, the Agency is granting the exemptions for

the 2-year period allowed by 49 U.S.C. 31136(e) and 31315 to the 12 applicants listed in the notice of October 11, 2016 (81 FR 70251.

We recognize that the vision of an applicant may change and affect his/her ability to operate a CMV as safely as in the past. As a condition of the exemption, therefore, FMCSA will impose requirements on the 12 individuals consistent with the grandfathering provisions applied to drivers who participated in the Agency's vision waiver program.

Those requirements are found at 49 CFR 391.64(b) and include the following: (1) That each individual be physically examined every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the requirement 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 provide 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, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must have a copy of the certification when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

V. Discussion of Comments

FMCSA received no comments in this proceeding.

IV. Conclusion

Based upon its evaluation of the 12 exemption applications, FMCSA exempts the following drivers from the vision requirement in 49 CFR 391.41(b)(10), subject to the requirements cited above 49 CFR 391.64(b):

Robert A. Andersen (CA), Daniel L. Bawden (IL), Kelly L. Ewing (PA), Joseph G. Fischer (MO), Nylo K. Helberg (ND), J. Willard Keener (PA), Billy R. McLaurin (DE), Jason R. Raml (SD), Alfred L. Robinson (AR), Jerry L. Smith (VA), Danny R. Tate (VA), Larry K. Zielinski (OR).

In accordance with 49 U.S.C. 31136(e) and 31315, each exemption will be valid for 2 years unless revoked earlier by FMCSA. The exemption will be revoked 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 and 31315.

If the exemption is still effective at the end of the 2-year period, the person may apply to FMCSA for a renewal under procedures in effect at that time.

Issued on: December 15, 2016.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2016–31556 Filed 12–28–16; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–1998–3637; FMCSA–2000–7006; FMCSA–2000–7363; FMCSA–2004–18885; FMCSA–2005–21254; FMCSA–2006–24783; FMCSA–2008–0106; FMCSA–2008–0231; FMCSA–2008–0266; FMCSA–2008–0292; FMCSA–2009–0219; FMCSA–2010–0082; FMCSA–2010–0114; FMCSA–2010–0161; FMCSA–2010–0187; FMCSA–2010–0327; FMCSA–2011–0124; FMCSA–2011–0380; FMCSA–2012–0160; FMCSA–2012–0214; FMCSA–2012–0215; FMCSA–2012–0279; FMCSA–2012–0280; FMCSA–2014–0003; FMCSA–2014–0005; FMCSA–2014–0006; FMCSA–2014–0010; FMCSA–2014–0011; FMCSA–2014–0296; FMCSA–2014–0298]

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 75 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: Each group of renewed exemptions was effective from the dates stated in the discussions below. Comments must be received on or before January 30, 2017.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) numbers: [Docket No. FMCSA–1998–3637; FMCSA–2000–7006; FMCSA–2000–7363; FMCSA–2004–18885; FMCSA–2005–21254; FMCSA–2006–24783; FMCSA–2008–0106; FMCSA–2008–0231; FMCSA–2008–0266; FMCSA–2008–0292; FMCSA–2009–0219; FMCSA–2010–0082; FMCSA–2010–0114; FMCSA–2010–0161; FMCSA–2010–0187; FMCSA–2010–0327; FMCSA–2011–0124; FMCSA–2011–0380; FMCSA–2012–0160; FMCSA–2012–0214; FMCSA–2012–0215; FMCSA–2012–0279; FMCSA–2012–0280; FMCSA–2014–0003; FMCSA–2014–0005; FMCSA–2014–0006; FMCSA–2014–0010; FMCSA–2014–0011; FMCSA–2014–0296; FMCSA–2014–0298], 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., e.t., 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., e.t., 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: Ms. Christine A. Hydock, Chief, Medical Programs Division, 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., e.t., 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 75 individuals who have requested renewal of their exemptions in accordance with FMCSA procedures. FMCSA has evaluated these 75 applications for renewal on their merits and decided to extend each exemption for a renewable two-year period. Each individual is identified according to the renewal date.

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. The following group(s) of drivers will receive renewed exemptions effective in the month of December and are discussed below.

As of December 3, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 31 individuals have satisfied the conditions for obtaining a renewed exemption from the vision requirements (65 FR 20245; 65 FR 57230; 67 FR 57266; 69 FR 62741; 70 FR 30999; 70 FR 46567; 71 FR 32183; 71 FR 41310; 71 FR 62147; 72 FR 40359; 73 FR 36955; 73 FR 46973; 73 FR 51689; 73 FR 54888; 73 FR 63047; 73 FR 74565; 74 FR 65842; 75 FR 9478; 75 FR 19674; 75 FR 25918; 75 FR 34211; 75 FR 36779; 75 FR 39725; 75 FR 39729; 75 FR 47883; 75 FR 47888; 75 FR 52063; 75 FR 61833; 75 FR 63257; 75 FR 64396; 75 FR 66423; 76 FR 34136; 76 FR 55463; 77 FR 13689; 77 FR 17109; 77 FR 27845; 77 FR 29447; 77 FR 36338; 77 FR 38381; 77 FR 40945; 77 FR 46793; 77 FR 51846; 77 FR 52381; 77 FR 52388; 77 FR 56262; 77 FR 59245; 77 FR 60008; 77 FR 60010; 77 FR 64582; 77 FR 64841; 77 FR 68199; 77 FR 71671; 79 FR 14331; 79 FR 14571; 79 FR 23797; 79 FR 27681; 79 FR 28588; 79 FR 35212; 79 FR 35220; 79 FR 38649; 79 FR 38661; 79 FR 40945; 79 FR 41740; 79 FR 47175; 79 FR 51643; 79 FR 56097; 79 FR 56099; 79 FR 56104; 79 FR 58856; 79 FR 64001; 79 FR 65760; 79 FR 68199; 79 FR 70928; 79 FR 72754):

Kerry L. Baxter (UT)
Robert S. Bowen (GA)
Jerry W. Brinson (GA)
John M. Brown (KY)
Jonathan E. Carriaga (NM)
Irvin L. Eaddy (SC)
Terry J. Edwards (MO)
Christopher K. Foot (NV)
Billy R. Gibbs (MD)
Harlan L. Gunter (VA)
Hazel L. Hopkins, Jr. (MD)
Ivaylo V. Kanchev (FL)
Christopher M. Keen (KS)
Tom A. McCarty (NM)
Robert L. McClain (MI)
Mark Meacham (NC)
Timothy L. Miller (IA)
Johnny Montemayor (TX)
William L. Moore (FL)
Christopher S. Morgan (LA)
Ray E. Myers II (MD)
Billy R. Oguynn (AL)
Neville E. Owens (NC)
Ronald W. Patten (ME)
John J. Pribanic (TX)
Benito Saldana (TX)
James D. St. Peter (NC)
Sherman L. Taylor (FL)
Max A. Thurman (IL)
Drake M. Vendsel (ND)
David L. Von Hagen (IA)

The drivers were included in one of the following dockets: Docket Nos. FMCSA–2000–7006; FMCSA–2005–21254; FMCSA–2006–24783; FMCSA–2008–0231; FMCSA–2008–0266; FMCSA–2009–0291; FMCSA–2010–0082; FMCSA–2010–0114; FMCSA–2010–0161; FMCSA–2010–0187; FMCSA–2011–0124; FMCSA–2011–0380; FMCSA–2012–0160; FMCSA–2012–0214; FMCSA–2012–0215; FMCSA–2012–0279; FMCSA–2014–0003; FMCSA–2014–0005; FMCSA–2014–0006; FMCSA–2014–0010; FMCSA–2014–0011; FMCSA–2014–0296. Their exemptions are effective as of December 3, 2016, and will expire on December 3, 2018.

As of December 8, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 13 individuals have satisfied the conditions for obtaining a renewed exemption from the vision requirements (63 FR 30285; 63 FR 54519; 65 FR 45817; 65 FR 77066; 65 FR 77069; 67 FR 71610; 69 FR 53493; 69 FR 62742; 69 FR 64810; 71 FR 62148; 71 FR 66217; 73 FR 35194; 73 FR 35199; 73 FR 48273; 73 FR 48275; 73 FR 61922; 73 FR 61925; 73 FR 74565; 75 FR 52062; 75 FR 72868; 75 FR 77949; 77 FR 52389; 77 FR 68202; 79 FR 65759):

Timothy S. Ballard (NC)
Stephen R. Daugherty (IN)
Ronald W. Garner (WA)
Nelson V. Jaramillo (MA)
Leslie A. Landschoot (NY)
Bruce T. Loughary (AR)
Kenny Y. Louie (CA)
Wayne R. Mantela (KY)
Carl M. McIntire (OH)
Bernice R. Parnell (NC)
Patrick W. Shea (MA)
Roy F. Varnado, Jr. (LA)
Michael J. Welle (MN)

The drivers were included in one of the following dockets: Docket No. FMCSA–1998–3637; FMCSA–2000–7363; FMCSA–2004–18885; FMCSA–2008–0106; FMCSA–2008–0292. Their exemptions are effective as of December 8, 2016, and will expire on December 8, 2018.

As of December 17, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 7 individuals have satisfied the conditions for obtaining a

renewed exemption from the vision requirements (73 FR 51689; 73 FR 61922; 73 FR 63047; 73 FR 74563; 75 FR 65057; 75 FR 77590; 75 FR 77949; 75 FR 79081; 77 FR 60008; 77 FR 68202; 77 FR 70537; 77 FR 71671):

Dale H. Dattler (NY)
Raymundo Flores (TX)
Benjamin P. Hall (NY)
John N. Lanning (CA)
Charles M. McDaris (GA)
Kevin L. Quastad (IA)
Frederick C. Schultz, Jr. (NY)

The drivers were included in one of the following dockets: Docket No. FMCSA–2008–0266; FMCSA–2008–0292; FMCSA–2010–0327; FMCSA–2012–0279. Their exemptions are effective as of December 17, 2016, and will expire on December 17, 2018.

As of December 20, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 7 individuals have satisfied the conditions for obtaining a renewed exemption from the vision requirements (77 FR 64389; 77 FR 75494; 79 FR 73393):

Ronald J. Bergman (OH)
Noah E. Bowen (OH)
William J. Hall (WA)
Lawrence D. Malecha (MN)
Paul B. Overman (WA)
Jerry M. Puckett (OH)
Emin Toric (GA)

The drivers were included in one of the following dockets: Docket No. FMCSA–2012–0280. Their exemptions are effective as of December 20, 2016, and will expire on December 20, 2018.

As of December 24, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 17 individuals have satisfied the conditions for obtaining a renewed exemption from the vision requirements (79 FR 69985; 80 FR 8927):

Peter H. Bailey (MI)
Dewey E. Ballard, Jr. (SC)
Thurman T. Clayton (LA)
Tig G. Cornell (ID)
Jon R. Davidson (CO)
Edwin T. Condaldson (PA)
William W. R. Dunn (PA)
Timothy J. Fisher (FL)
Perry D. Hamilton (TN)
Keith C. Lendt (MN)
Richard B. McMaster (AR)
Joseph McTear (TX)
Martin Montanez (IL)
Lee A. Mosier (IA)
John W. Randels (CO)
Carl W. Russell (OK)
Daniel R. Thompson (PA)

The drivers were included in one of the following dockets: Docket No. FMCSA–2014–0298. Their exemptions are effective as of December 25, 2016, and will expire on December 25, 2018.

Each of the 75 applicants listed in the groups above 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 January 30, 2017.

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 75 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–1998–3637; FMCSA–2000–7006; FMCSA–2000–7165; FMCSA–2000–8203; FMCSA–2001–10578; FMCSA–2002–12294; FMCSA–2004–18885; FMCSA–2008–0106; FMCSA–2008–0231; FMCSA–2008–0266; FMCSA–2010; FMCSA–1998–3637; FMCSA–2000–7006; FMCSA–2000–7363; FMCSA–2004–18885; FMCSA–2005–21254; FMCSA–2006–24783; FMCSA–2008–0106; FMCSA–2008–0231; FMCSA–2008–0266; FMCSA–2008–0292; FMCSA–2009–0219; FMCSA–2010–0082; FMCSA–2010–0114; FMCSA–2010–0161; FMCSA–2010–0187; FMCSA–2010–0327; FMCSA–2011–0124; FMCSA–2011–0380; FMCSA–2012–0160; FMCSA–2012–0214; FMCSA–2012–0215; FMCSA–2012–0279; FMCSA–2012–0280; FMCSA–2014–0003; FMCSA–2014–0005; FMCSA–2014–0006; FMCSA–2014–0010; FMCSA–2014–0011; FMCSA–2014–0296; FMCSA–2014–0298 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. 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, go to *http://www.regulations.gov* and in the search box insert the docket number FMCSA–1998–3637; FMCSA–2000–7006; FMCSA–2000–7363; FMCSA–2004–18885; FMCSA–2005–21254; FMCSA–2006–24783; FMCSA–2008–0106; FMCSA–2008–0231; FMCSA–2008–0266; FMCSA–2008–0292; FMCSA–2009–0219; FMCSA–2010–0082; FMCSA–2010–0114; FMCSA–2010–0161; FMCSA–2010–0187; FMCSA–2010–0327; FMCSA–2011–0124; FMCSA–2011–0380; FMCSA–2012–0160; FMCSA–2012–0214; FMCSA–2012–0215; FMCSA–2012–0279; FMCSA–2012–0280; FMCSA–2014–0003; FMCSA–2014–0005; FMCSA–2014–0006; FMCSA–2014–0010; FMCSA–2014–0011; FMCSA–2014–0296; FMCSA–2014–0298 and click ''Search.'' Next, click ''Open Docket Folder'' and you will find all documents and comments related to this notice.

Issued on: December 21, 2016.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2016–31555 Filed 12–28–16; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2010–0355; FMCSA–2010–0386; FMCSA–2012–0347; FMCSA–2012–0348; FMCSA–2014–0310; FMCSA–2014–0311]

Qualification of Drivers; Exemption Applications; Diabetes

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 of 130 individuals from its rule prohibiting persons with insulin-treated diabetes mellitus (ITDM) from operating commercial motor vehicles (CMVs) in interstate commerce. FMCSA has statutory authority to exempt individuals from this rule 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 CMV drivers.

DATES: Each group of renewed exemptions are effective from the dates stated in the discussions below. Comments must be received on or before January 30, 2017.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) numbers: Docket No. FMCSA–2010–0355; FMCSA–2010–0386; FMCSA–2012–0347; FMCSA–2012–0348; FMCSA–2014–0310; FMCSA–2014–0311 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., e.t., 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., e.t., 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: Ms. Christine A. Hydock, Chief, Medical Programs Division, 202–366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–113, Washington, DC 20590–0001. Office hours are from 8 a.m. to 5:30 p.m. e.t., 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 Federal Motor Carrier Safety Regulations 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.'' The statute also allows the Agency to renew exemptions at the end of the 2-year period. The 130 individuals listed in this notice have recently become eligible for a renewed exemption from the diabetes prohibition in 49 CFR 391.41(b)(3), which applies to drivers of CMVs in interstate commerce. The drivers remain in good standing with the Agency, have maintained their required medical monitoring and have not exhibited any medical issues that would compromise their ability to safely operate a CMV during the previous 2-year exemption period.

Exemption Decision

This notice addresses 130 individuals who have requested renewal of their exemptions in accordance with FMCSA procedures. These 130 drivers remain in good standing with the Agency, have maintained their required medical monitoring and have not exhibited any medical issues that would compromise their ability to safely operate a CMV during the previous 2-year exemption period. Therefore, FMCSA has decided to extend each exemption for a renewable two-year period. Each individual is identified according to the renewal date.

The exemptions are renewed subject to the following conditions: (1) That each individual submit a quarterly monitoring checklist completed by the treating endocrinologist as well as an annual checklist with a comprehensive medical evaluation; (2) that each individual reports within 2 business days of occurrence, all episodes of severe hypoglycemia, significant complications, or inability to manage diabetes; also, any involvement in an accident or any other adverse event in a CMV or personal vehicle, whether or not it is related to an episode of hypoglycemia; (3) that each individual

submit an annual ophthalmologist's or optometrist's report; and (4) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the certification when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

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. The following groups of drivers received renewed exemptions in the month of January and are discussed below.

As of January 9, 2017, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 7 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce (77 FR 65931; 78 FR 1926):

Thomas L. Graber (PA)
Jeremiah S. Johnson (ND)
Henry P. Musgrove, Jr. (WA)
Henry W. Rutschow (OH)
Michael L. Sabin (IL),
Patrick E. Snyder (NY)
Odell Williams (NC)

The drivers were included in Docket No. FMCSA–2012–0347. Their exemptions are effective as of January 9, 2017 and will expire on January 9, 2019.

As of January 10, 2017, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 9 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce (75 FR 69734; 76 FR 1495):

Jerry A. Barber (NY)
Julie A. Brandvold (ND)
Terry D. Cunningham (OH)
Dean A. Dalessandro (MA)
Albert H. Feldt (MO)
Christopher J. Grause (SD)
Shannon A. Griffin (MO)
Mathew M. Rollins (SC)
James H. Smith (DC)

The drivers were included in Docket No. FMCSA–2010–0355. Their exemptions are effective as of January 10, 2017 and will expire on January 10, 2019.

As of January 15, 2017, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 40 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce (79 FR 74159; 80 FR 8926):

Eric D. Ambler (WI)
Clay B. Anderson (IL)
Gregory C. Bartley (PA)
Aaron M. Batts (NC)
Nathan R. Batzel (MN)
Michael R. Bell (MD)
Jerry A. Cox, Sr. (LA)
Lloyd F. Cuckow (CO)
Kenneth B. Dennard (GA)
Eric Q. Dickerson (IN)
James P. Dreifuerst (WI)
Domenic R. Folino (PA)
Howard M. Hammel (NJ)
Derrick D. Harris (IL)
Kevin R. Johnson (MI)
David J. Long (PA)
David P. Magee (MO)
Gary F. Marson (WI)
James A. Meridith (MI)
Richard A. Moore (PA)
Keith B. Muehler (ND)
John K. Murray (NY)
John D. Pede, Jr. (PA)
John F. Prophet (FL)
Dominic F. Quartullo (WI)
Michael E. Reed (IA)
Carlos B. Rodriguez (NY)
David J. Sierra (NJ)
Roger E. Smith (IA)
Terrell W. Smith (PA)
Anthony L. Spratto (WI)
Timothy R. Stephens (KS)
Howard C. Stines (TN)
Christopher E. Swanson (CA)
Diana C. Tabala (NY)
Brewster E. Thurston (VT)
Phillip J. Ulmer (LA)
Charles A. Walker (IL)
John D. Weaver (WY)
Leroy D. Yost (IA)

The drivers were included in Docket No. FMCSA–2014–0310. Their exemptions are effective as of January 15, 2017 and will expire on January 15, 2019.

As of January 25, 2017, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 16 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce (77 FR 70530; 78 FR 5559):

Randle A. Badertscher (WY)
Jerol G. Fox (DE)
Michael S. Freeman (OR)
Harold D. Grimes (MI)
Douglas W. Hunderman (MI)
Robert L. Johnson, Jr. (VA)
George R. Miller III (PA)
Ronald G. Monroe (IN)
Israel Ramos (NY)
Jed Ramsey (ID)
Raymond E. Richardson (MD)
Craig W. Schafer (DE)
Stephen L. Schug (FL)
Shawn M. Seeley (CT)
Mark S. Shepherd (MA)
L. Everett Stamper (IN)

The drivers were included in Docket No. FMCSA–2012–0348. Their exemptions are effective as of January 25, 2017 and will expire on January 25, 2019.

As of January 28, 2017, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 9 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce (75 FR 77947; 76 FR 5243):

James T. Bezold (KY)
Allen C. Cornelius, Jr. (DE)
Eugene M. Johnson (NY)
Michael A. McHenry (IN)
Gregory S. Myers (PA)
Richard D. Peterson, Jr. (MN)
Rudolph Q. Redd (IL)
Chad A. Sanders (IN)
Mark A. Sawyer (IN)

The drivers were included in Docket No. FMCSA–2012–0386. Their exemptions are effective as of January 28, 2017 and will expire on January 28, 2019.

As of January 31, 2017, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 49 individuals have satisfied the renewal conditions for obtaining an exemption from the rule prohibiting drivers with ITDM from driving CMVs in interstate commerce (79 FR 78938; 80 FR 12545):

Joseph L. Allen (TX)
Wayne A. Aukes (MN)
Freddie W. Bermudez, Jr. (IL)
Darrell K. Blanton (NC)
Richard A. Boor (VA)
Stephen R. Brown (NH)
Kenneth E. Chastain (TN)
Jeffery C. Colbert (AR)
Kenny L. Dickerson (GA)
James M. DiClaudio (NJ)
Steven A. Dion (NY)
Dean R. Duquette (ME)
Joseph J. Eckstrom (NY)
Morgan D. Hale, Jr. (KY)
James J. Hartman (SD)
Dale H. Hintz (WI)
Benjamin D. Horton (VA)
Danny R. Jackson, Jr. (OR)
Brian C. Jagdman (MD)
Terry J. Johnson (MD)
Robert L. Johnson, Jr. (OK)
Michael W. Jones (NJ)
Carl J. Kern, Jr. (PA)
Monte J. Lakosky (MI)
Aaron J. Larson (WI)
Jeffrey G. Lawrence (AR)
Leo D. Maggioli (MA)
Ryan M. McClatchey (TN)
Carl A. Mears, Jr. (VT)

Robert P. Miller (WI)
Nicholas M. Palocy (VT)
John D. Patterson (OH)
Michael W. Perez (OH)
Jerry Platero (NM)
Darrell K. Rau (IA)
Andrew B. Renninger (PA)
Ryan T. Rock (ID)
Wilfredo Rodriguez (NY)
Mark A. Santana (PA)
Donald E. Scovil (NH)
David E. Shinen (CA)
Patrick A. Shryock (AR)
Joshua C. Thompson (AZ)
Jeffrey D. Thomson (WI)
Marshall L. Wainwright (IL)
Glenn P. Whitehouse (PA)
Jennifer R. Williams (PA)
John E. Yates (IN)
Jeffrey S. Zimmer (NH)

The drivers were included in Docket No. FMCSA–2014–0311. Their exemptions are effective as of January 31, 2017 and will expire on January 31, 2019.

Each of the 130 drivers in the aforementioned groups qualifies for a renewal of the exemption. They have maintained their required medical monitoring and have not exhibited any medical issues that would compromise their ability to safely operate a CMV during the previous 2-year exemption period.

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 of the 130 drivers for a period of two years is likely to achieve a level of safety equal to that existing without the exemption. The drivers were included in docket numbers FMCSA–2010–0355; FMCSA–2010–0386; FMCSA–2012–0347; FMCSA–2012–0348; FMCSA–2014–0310; FMCSA–2014–0311.

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 January 30, 2017.

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 130 individuals from rule prohibiting persons with ITDM from operating CMVs in interstate commerce in 49 CFR 391.41(b)(3). 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 medical condition of each applicant for an exemption from rule prohibiting persons with ITDM from operating CMVs in interstate commerce. 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–2010–0355; FMCSA–2010–0386; FMCSA–2012–0347; FMCSA–2012–0348; FMCSA–2014–0310; FMCSA–2014–0311 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. FMCSA may issue a final determination 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, go to *http://www.regulations.gov* and in the search box insert the docket number FMCSA–2010–0355; FMCSA–2010–0386; FMCSA–2012–0347; FMCSA–2012–0348; FMCSA–2014–0310; FMCSA–2014–0311 and click ''Search.'' Next, click ''Open Docket Folder'' and you will find all documents and comments related to this notice.

Issued on: December 15, 2016.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2016–31552 Filed 12–28–16; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[FMCSA Docket No. FMCSA–2016–0222]

Qualification of Drivers; Exemption Applications; Diabetes Mellitus

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT

ACTION: Notice of final disposition.

SUMMARY: FMCSA confirms its decision to exempt 43 individuals from its rule prohibiting persons with insulin-treated diabetes mellitus (ITDM) from operating commercial motor vehicles (CMVs) in interstate commerce. The exemptions enable these individuals to operate CMVs in interstate commerce.

DATES: The exemptions were effective on November 22, 2016. The exemptions expire on November 22, 2018.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–113, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

I. Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at: *http://www.regulations.gov.*

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* and/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., e.t., Monday through Friday, except Federal holidays.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

II. Background

On October 20, 2016, FMCSA published a notice of receipt of Federal diabetes exemption applications from 43 individuals and requested comments from the public (81 FR 72652. The public comment period closed on November 21, 2016, and two comments were received.

FMCSA has evaluated the eligibility of the 43 applicants and determined that granting the exemptions to these individuals would achieve a level of safety equivalent to or greater than the level that would be achieved by complying with the current regulation 49 CFR 391.41(b)(3).

Diabetes Mellitus and Driving Experience of the Applicants

The Agency established the current requirement for diabetes in 1970 because several risk studies indicated that drivers with diabetes had a higher rate of crash involvement than the general population. The diabetes rule provides that ''A person is physically qualified to drive a commercial motor vehicle if that person has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control'' (49 CFR 391.41(b)(3)).

FMCSA established its diabetes exemption program, based on the Agency's July 2000 study entitled ''A Report to Congress on the Feasibility of a Program to Qualify Individuals with Insulin-Treated Diabetes Mellitus to Operate in Interstate Commerce as Directed by the Transportation Act for the 21st Century.'' The report concluded that a safe and practicable protocol to allow some drivers with ITDM to operate CMVs is feasible. The September 3, 2003 (68 FR 52441), **Federal Register** notice in conjunction with the November 8, 2005 (70 FR 67777), **Federal Register** notice provides the current protocol for allowing such drivers to operate CMVs in interstate commerce.

These 43 applicants have had ITDM over a range of 1 to 35 years. These applicants report no severe hypoglycemic reactions resulting in loss of consciousness or seizure, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning symptoms, in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the past 5 years. In each case, an endocrinologist verified that the driver has demonstrated a willingness to properly monitor and manage his/her diabetes mellitus, received education related to diabetes management, and is on a stable insulin regimen. These drivers report no other disqualifying conditions, including diabetes-related complications. Each meets the vision requirement at 49 CFR 391.41(b)(10).

The qualifications and medical condition of each applicant were stated and discussed in detail in the October 20, 2016, **Federal Register** notice and they will not be repeated in this notice.

III. Discussion of Comments

FMCSA received two comments in this proceeding. Shantel Barnes stated she is in favor of granting Dion A. Harris a diabetes exemption. Charlies Jones stated he is in favor of granting William D. Lusk a diabetes exemption.

IV. Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the diabetes requirement in 49 CFR 391.41(b)(3) if the exemption is likely to achieve an equivalent or greater level of safety than would be achieved without the exemption. The exemption allows the applicants to operate CMVs in interstate commerce.

To evaluate the effect of these exemptions on safety, FMCSA considered medical reports about the applicants' ITDM and vision, and reviewed the treating endocrinologists' medical opinion related to the ability of the driver to safely operate a CMV while using insulin.

Consequently, FMCSA finds that in each case exempting these applicants from the diabetes requirement in 49 CFR 391.41(b)(3) is likely to achieve a level of safety equal to that existing without the exemption.

V. Conditions and Requirements

The terms and conditions of the exemption will be provided to the applicants in the exemption document and they include the following: (1) that each individual submit a quarterly monitoring checklist completed by the treating endocrinologist as well as an annual checklist with a comprehensive medical evaluation; (2) that each individual reports within 2 business days of occurrence, all episodes of severe hypoglycemia, significant complications, or inability to manage diabetes; also, any involvement in an accident or any other adverse event in a CMV or personal vehicle, whether or not it is related to an episode of hypoglycemia; (3) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (4) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the certification when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

VI. Conclusion

Based upon its evaluation of the 43 exemption applications, FMCSA exempts the following drivers from the diabetes requirement in 49 CFR 391.41(b)(3), subject to the requirements cited above 49 CFR 391.64(b):

Christopher Albano (PA)
Gregory A. Behm (NE)
Helena R. Berry (GA)
Kenneth W. Blizzard (NJ)
Larry A. Brabson, Jr. (OH)
Jeffrey Campbell (IN)
Gregory A. Carroll (MD)
Kent H. Carter (IN)
Archie Chischilly (AZ)
Loren Curtis (MO)
Scott E. Ennis (NY)
Jackson E. Graham, Jr. (NJ)
Patrick E. Gratts (TX)
Alex J. Gravunder (WI)
Dion A. Harris (OK)
Henry C. Hinton III (IN)
Harry L. Hiser III (WV)
George E. Huften (CT)
Patrick L. Jackson (GA)
Antonio J. Katzdorn (ID)
Terry J. Koontz (IL)
Richard H. LaDue (NY)
William D. Lusk (NC)
Clavenda L. Mason (MD)
Kenneth E. McCain (IL)
Glenn J. Michalek (IL)
Christopher M. Minor (OH)
William J. Navickas (PA)
Troi A. Palmer (MD)
Corey M. Planck (MO)
Ronald J. Pomella, Jr. (FL)
Ivan A. Pruss (NJ)
John M. Rawlinson (IN)

Darryl L. Reasby (WI)
Michael A. Roosa (MA)
Gary W. Seal (TN)
Garey W. Smith (TN)
John E. Steltz (MN)
James E. Vaughan, Jr. (TN)
Robert W. Wagner II (OH)
Todd A. Waller (MO)
Kevin A. Warren (OH)
Kevin L. Wendt (WY)

In accordance with 49 U.S.C. 31136(e) and 31315 each exemption is valid for two years unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (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. If the exemption is still effective at the end of the 2-year period, the person may apply to FMCSA for a renewal under procedures in effect at that time.

Issued on: December 15, 2016.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2016–31548 Filed 12–28–16; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2014–0102]

Qualification of Drivers; Exemption Applications; Hearing

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 exemption for one individual from the hearing requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) for interstate commercial motor vehicle (CMV) drivers. The exemption enables hard of hearing and deaf individuals to continue to operate CMVs in interstate commerce.

DATES: The renewed exemption was effective on May 21, 2016. The renewed exemption will expire on May 21, 2018. Comments must be received on or before January 30, 2017.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, 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., e.t., Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Services, telephone (202) 366–9826.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket No. FMCSA–2014–0102] using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building 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. e.t., Monday through Friday, except Federal Holidays.
- *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket number(s) 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 online.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

I. Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption for two years 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 statute also allows the Agency to renew exemptions at the end of the two-year period.

The physical qualification standard for drivers regarding hearing found in 49 CFR 391.41(b)(11) states that a person is physically qualified to drive a CMV if that person:

> First perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard (formerly ASA Standard) Z24.5–1951.

49 CFR 391.41(b)(11) was adopted in 1970, with a revision in 1971 to allow drivers to be qualified under this standard while wearing a hearing aid, 35 FR 6458, 6463 (April 22, 1970) and 36 FR 12857 (July 3, 1971).

The individual listed in this notice has requested a renewal of his exemption from the hearing standard in 49 CFR 391.41(b)(11), in accordance with FMCSA procedures. Accordingly, FMCSA has evaluated this application for renewal on its merits and decided to extend each exemption for a renewable two-year period.

II. Request for Comments

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.

III. 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. In accordance with 49 U.S.C. 31136(e) and 31315, this applicant has satisfied the renewal conditions for obtaining an exemption from the hearing requirement (80 FR 22768). In addition, for Commercial Driver's License (CDL) holders, the Commercial Driver's

License Information System (CDLIS) and the Motor Carrier Management Information System (MCMIS) are searched for crash and violation data. For non-CDL holders, the Agency reviews the driving records from the State Driver's Licensing Agency (SDLA). These factors provide an adequate basis for predicting each driver's ability to continue to safely operate a CMV in interstate commerce.

The driver in this notice remains in good standing with the Agency and has not exhibited any medical issues that would compromise his ability to safely operate a CMV during the previous two-year exemption period. FMCSA has concluded that renewing the exemption for this applicant is likely to achieve a level of safety equal to that existing without the exemption. Therefore, FMCSA has decided to renew each exemption in accordance with 49 U.S.C. 31136(e) and 31315 for a two-year period.

As of May 21, 2016, Timothy Gallagher (PA) has satisfied the renewal conditions for obtaining an exemption from the hearing requirement in 49 CFR 391.41(b)(11), from driving CMVs in interstate commerce. This driver was included in FMCSA–2014–0102. This exemption was effective on May 21, 2016, and will expire on May 21, 2018.

IV. Conditions and Requirements

The exemptions are extended subject to the following conditions: (1) Each driver must report any crashes or accidents as defined in 49 CFR 390.5; and (2) report all citations and convictions for disqualifying offenses under 49 CFR part 383 and 49 CFR 391 to FMCSA. In addition, the driver must also have a copy of the exemption when driving, for presentation to a duly authorized Federal, State, or local enforcement official. The driver is prohibited from operating a motorcoach or bus with passengers in interstate commerce. The exemption does not exempt the individual from meeting the applicable CDL testing requirements. 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.

IV. Conclusion

Based upon its evaluation of this exemption application, FMCSA renews the exemption of the aforementioned driver from the hearing requirement in 49 CFR 391.41(b)(11). In accordance with 49 U.S.C. 31136(e) and 31315, the exemption will be valid for two years unless revoked earlier by FMCSA.

Issued on: December 21, 2016.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2016–31553 Filed 12–28–16; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[FMCSA Docket No. FMCSA-[2016–0223]

Qualification of Drivers; Exemption Applications; Diabetes Mellitus

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA confirms its decision to exempt 46 individuals from its rule prohibiting persons with insulin-treated diabetes mellitus (ITDM) from operating commercial motor vehicles (CMVs) in interstate commerce. The exemptions enable these individuals to operate CMVs in interstate commerce.

DATES: The exemptions were effective on November 22, 2016. The exemptions expire on November 22, 2018.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–113, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

I. Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at: *http://www.regulations.gov.*

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* and/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., e.t., Monday through Friday, except Federal holidays.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

II. Background

On October 20, 2016, FMCSA published a notice of receipt of Federal diabetes exemption applications from 46 individuals and requested comments from the public (81 FR 72644. The public comment period closed on November 21, 2016, and no comments were received.

FMCSA has evaluated the eligibility of the 46 applicants and determined that granting the exemptions to these individuals would achieve a level of safety equivalent to or greater than the level that would be achieved by complying with the current regulation 49 CFR 391.41(b)(3).

Diabetes Mellitus and Driving Experience of the Applicants

The Agency established the current requirement for diabetes in 1970 because several risk studies indicated that drivers with diabetes had a higher rate of crash involvement than the general population. The diabetes rule provides that ''A person is physically qualified to drive a commercial motor vehicle if that person has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control'' (49 CFR 391.41(b)(3)).

FMCSA established its diabetes exemption program, based on the Agency's July 2000 study entitled ''A Report to Congress on the Feasibility of a Program to Qualify Individuals with Insulin-Treated Diabetes Mellitus to Operate in Interstate Commerce as Directed by the Transportation Act for the 21st Century.'' The report concluded that a safe and practicable protocol to allow some drivers with ITDM to operate CMVs is feasible. The September 3, 2003 (68 FR 52441), **Federal Register** notice in conjunction with the November 8, 2005 (70 FR 67777), **Federal Register** notice provides the current protocol for allowing such drivers to operate CMVs in interstate commerce.

These 46 applicants have had ITDM over a range of 1 to 40 years. These applicants report no severe hypoglycemic reactions resulting in loss of consciousness or seizure, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning symptoms, in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the past 5

years. In each case, an endocrinologist verified that the driver has demonstrated a willingness to properly monitor and manage his/her diabetes mellitus, received education related to diabetes management, and is on a stable insulin regimen. These drivers report no other disqualifying conditions, including diabetes-related complications. Each meets the vision requirement at 49 CFR 391.41(b)(10).

The qualifications and medical condition of each applicant were stated and discussed in detail in the October 20, 2016, **Federal Register** notice and they will not be repeated in this notice.

III. Discussion of Comments

FMCSA received no comments in this proceeding.

IV. Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the diabetes requirement in 49 CFR 391.41(b)(3) if the exemption is likely to achieve an equivalent or greater level of safety than would be achieved without the exemption. The exemption allows the applicants to operate CMVs in interstate commerce.

To evaluate the effect of these exemptions on safety, FMCSA considered medical reports about the applicants' ITDM and vision, and reviewed the treating endocrinologists' medical opinion related to the ability of the driver to safely operate a CMV while using insulin.

Consequently, FMCSA finds that in each case exempting these applicants from the diabetes requirement in 49 CFR 391.41(b)(3) is likely to achieve a level of safety equal to that existing without the exemption.

V. Conditions and Requirements

The terms and conditions of the exemption will be provided to the applicants in the exemption document and they include the following: (1) That each individual submit a quarterly monitoring checklist completed by the treating endocrinologist as well as an annual checklist with a comprehensive medical evaluation; (2) that each individual reports within 2 business days of occurrence, all episodes of severe hypoglycemia, significant complications, or inability to manage diabetes; also, any involvement in an accident or any other adverse event in a CMV or personal vehicle, whether or not it is related to an episode of hypoglycemia; (3) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (4) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the certification when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

VI. Conclusion

Based upon its evaluation of the 46 exemption applications, FMCSA exempts the following drivers from the diabetes requirement in 49 CFR 391.41(b)(3), subject to the requirements cited above 49 CFR 391.64(b):

Colter E. Allen (MT)
Bert F. Asa (CO)
Brandon D. Baird (TN)
Glenn C. Blank (PA)
Michael H. Blosser (WA)
Francis A. Boadu (MA)
John K. Brown (KY)
Timothy L. Dahlberg (WI)
Randy S. Dorn (WI)
Troy E. Dreisbach (PA)
Janice K. Epperson (MO)
Chase L. Fugere (ND)
Richard A. Geiger (IL)
Kenneth B. Golden, Jr. (NY)
Todd K. Grama (NY)
Rick L. Hendrickson (ND)
Glenn E. Hoffman (FL)
Jeffrey S. Horvath (OH)
Herbert S. Johnson, II (IA)
Randall L. Johnson (GA)
Gary D. Jones (IA)
Charles C. Kennedy (UT)
John A. Larson (MN)
Jose A. Lucero (AZ)
Gerry A. Lutz (IA)
Gary P. Marquez (CA)
George F. McCrory (MO)
Richard R. McDonald (NY)
William P. McLemore, Jr. (IL)
Jason M. Moch (ND)
George K. Namauu, Jr. (HI)
Ashby J. Nuckols (VA)
Encarnacion Oranday, Jr. (TX)
Jonathan P. Preissler (MA)
Charles R. Quilty (IL)
Joseph M. Rowe (MO)
Donald G. Runyon (IN)
John B. Simpson (NH)
Ronnie J. Smith (NC)
Troy Smith (OH)
Mitchell A. Thomas (MN)
James M. Vavao (CA)
Steven A. Vilardo (KY)
Joseph H. Wamsley (WV)
Richelle Y. Wyatt (PA)
Roy O. Young (PA)

In accordance with 49 U.S.C. 31136(e) and 31315 each exemption is valid for two years unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (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. If the exemption is still effective at the end of the 2-year period, the person may apply to FMCSA for a renewal under procedures in effect at that time.

Issued on: December 15, 2016.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2016–31549 Filed 12–28–16; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2016–0313]

Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of applications for exemption; request for comments.

SUMMARY: FMCSA announces receipt of applications from eight individuals for an exemption from the prohibition in the Federal Motor Carrier Safety Regulations (FMCSRs) against persons with a clinical diagnosis of epilepsy or any other condition that is likely to cause a loss of consciousness or any loss of ability to control a commercial motor vehicle (CMV) to drive in interstate commerce. If granted, the exemptions would enable these individuals who have had one or more seizures and are taking anti-seizure medication to operate CMVs in interstate commerce.

DATES: Comments must be received on or before January 30, 2017.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket No. FMCSA–2016–0313 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building 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. e.t., Monday through Friday, except Federal Holidays.

• *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket number(s) 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., e.t., 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 online.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov* as described in the system records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, 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 8:30 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Services, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the FMCSRs 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 statute also allows the Agency to renew exemptions at the end of the two-year period.

The eight individuals listed in this notice have requested an exemption from the epilepsy prohibition in 49 CFR 391.41(b)(8). Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by statute.

The physical qualification standard for drivers regarding epilepsy found in 49 CFR 391.41(b)(8) states that a person is physically qualified to drive a CMV if that person:

> Has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause the loss of consciousness or any loss of ability to control a CMV.

In addition to the regulations, FMCSA has published advisory criteria [1] to assist Medical Examiners in determining whether drivers with certain medical conditions are qualified to operate a CMV in interstate commerce. [49 CFR part 391, APPENDIX A TO PART 391—MEDICAL ADVISORY CRITERIA, section *H. Epilepsy: § 391.41(b)(8),* paragraphs 3, 4, and 5.]

The advisory criteria state the following:

If an individual has had a sudden episode of a non-epileptic seizure or loss of consciousness of unknown cause that did not require anti-seizure medication, the decision whether that person's condition is likely to cause the loss of consciousness or loss of ability to control a CMV should be made on an individual basis by the Medical Examiner in consultation with the treating physician. Prior to considering certification, it is suggested there be a six-month waiting period from the time of the episode. Following the waiting period, it is suggested that the individual undergo a complete neurological examination. If the results of the examination are negative and anti-seizure medication is not required, the driver may be qualified.

In those individual cases where a driver had a seizure or an episode of loss of consciousness that resulted from a known medical condition (*e.g.,* drug reaction, high temperature, acute infectious disease, dehydration, or acute metabolic disturbance), certification should be deferred until the driver has recovered fully from that condition, has no existing residual complications, and is not taking anti-seizure medication.

Drivers who have a history of epilepsy/seizures, off anti-seizure medication and seizure-free for 10 years, may be qualified to operate a CMV in interstate commerce. Interstate drivers who have had a single unprovoked seizure may be qualified to drive a CMV in interstate commerce if seizure-free and off anti-seizure medication for five years or more.

As a result of Medical Examiners misinterpreting advisory criteria as regulation, numerous drivers have been prohibited from operating a CMV in interstate commerce based on the fact that they have had one or more seizures and are taking anti-seizure medication, rather than an individual analysis of their circumstances by a qualified Medical Examiner based on the physical qualification standards and medical best practices.

On January 15, 2013, in a Notice of Final Disposition entitled, ''Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders,'' (78 FR 3069), FMCSA announced its decision to grant requests from 22 individuals for exemptions from the regulatory requirement that interstate CMV drivers have ''no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a CMV.'' Since the January 15, 2013 notice, the Agency has published additional notices granting requests from individuals for exemptions from the regulatory requirement regarding epilepsy found in 49 CFR 391.41(b)(8).

To be considered for an exemption from the epilepsy prohibition in 49 CFR 391.41(b)(8), applicants must meet the criteria in the 2007 recommendations of the Agency's Medical Expert Panel (MEP) (78 FR 3069).

II. Qualifications of Applicants

James Connelly

Mr. Connelly is a 62 year-old class B CDL holder in New Jersey. He has a history of a seizure disorder and his last seizure was in 2000. He takes anti-seizure medication with the dosage and frequency remaining the same since that time. His physician states that he is supportive of Mr. Connelly receiving an exemption.

Ricky Leon Conway Jr.

Mr. Conway is a 42 year-old driver in Missouri. He has a history of a seizure disorder and his last seizure was in 2000. He takes anti-seizure medication with the dosage and frequency remaining the same since that time. His physician states that he is supportive of Mr. Conway receiving an exemption.

[1] See *http://www.ecfr.gov/cgi-bin/text-idx?SID=e47b48a9ea42dd67d999246e23d97970&mc=true&node=pt49.5.391&rgn=div5#ap49.5.391_171.a* and *https://www.gpo.gov/fdsys/pkg/CFR-2015-title49-vol5/pdf/CFR-2015-title49-vol5-part391-appA.pdf.*

John Darden

Mr. Darden is a 41 year-old driver in California. He has a history of a seizure disorder and his last seizure was in 1996. He takes anti-seizure medication with the dosage and frequency remaining the same since that time. His physician states that he is supportive of Mr. Darden receiving an exemption.

William Harden

Mr. Harden is a 32 year-old driver in New York. He has a history of a seizure disorder and his last seizure was in 2001. He takes anti-seizure medication with the dosage and frequency remaining the same since that time. His physician states that he is supportive of Mr. Harden receiving an exemption.

Bradley H. Hollister

Mr. Hollister is a 59 year-old class A CDL holder in Pennsylvania. He has a history of a seizure disorder and his last seizure was in 1989. He takes anti-seizure medication with the dosage and frequency remaining the same since that time. His physician states that he is supportive of Mr. Hollister receiving an exemption.

Michael Merical

Mr. Merical is a 27 year-old class A CDL holder in New York. He has a history of epilepsy and his last seizure was in 2006. He takes anti-seizure medication with the dosage and frequency remaining the same since that time. His physician states that he is supportive of Mr. Merical receiving an exemption.

Elvin Paul Morgan

Mr. Morgan is a 49 year-old class B CDL holder in California. He has a history of a seizure disorder and his last seizure was in 2000. He takes anti-seizure medication with the dosage and frequency remaining the same since that time. His physician states that he is supportive of Mr. Morgan receiving an exemption.

Clarence D. Jones

Mr. Jones is a 74 year-old class A CDL holder in Virginia. He has a history of a seizure disorder and his last seizure was in 1996. He has been off of anti-seizure medication since that time. His physician states that he is supportive of Mr. Jones receiving an exemption.

III. 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. We will consider all comments received before the close of business on the closing date indicated in the dates section of the notice.

IV. 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–2016–0313'' 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 materials received during the comment period. FMCSA may issue a final determination any time after the close of the comment period.

V. Viewing Comments and Documents

To view comments, as well as any documents mentioned in this preamble, go to *http://www.regulations.gov* and in the search box insert the docket number FMCSA–2016–0313 and click ''Search.'' Next, click ''Open Docket Folder'' and you will find all documents and comments related to this notice.

Issued on: December 21, 2016.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2016–31544 Filed 12–28–16; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2016–0208]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to exempt 20 individuals from the vision requirement in the Federal Motor Carrier Safety Regulations (FMCSRs). 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. The Agency has concluded that granting these exemptions will provide a level of safety that is equivalent to or greater than the level of safety maintained without the exemptions for these CMV drivers.

DATES: The exemptions were granted November 11, 2016. The exemptions expire on November 11, 2018.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–113, Washington, DC 20590–0001. Office hours are 8:30 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Services, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at *http://www.regulations.gov.*

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* and/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., e.t., Monday through Friday, except Federal holidays.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

II. Background

On October 11, 2016, FMCSA published a notice of receipt of exemption applications from certain individuals, and requested comments from the public (81 FR 70253). That notice listed 20 applicants' case

histories. The 20 individuals applied for exemptions from the vision requirement in 49 CFR 391.41(b)(10), for drivers who operate CMVs in interstate commerce.

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption 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.'' The statute also allows the Agency to renew exemptions at the end of the 2-year period. Accordingly, FMCSA has evaluated the 20 applications on their merits and made a determination to grant exemptions to each of them.

III. Vision and Driving Experience of the Applicants

The vision requirement in the FMCSRs provides:

A person is physically qualified to drive a commercial motor vehicle if that person has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of a least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing red, green, and amber (49 CFR 391.41(b)(10)).

FMCSA recognizes that some drivers do not meet the vision requirement but have adapted their driving to accommodate their limitation and demonstrated their ability to drive safely. The 20 exemption applicants listed in this notice are in this category. They are unable to meet the vision requirement in one eye for various reasons, including amblyopia, central retinal vein occlusion, central vision loss, chronic microcystic edema, complete loss of vision, corneal scarring, optic neuritis, glaucoma, macular scar, and prosthetic eye. In most cases, their eye conditions were not recently developed. Fourteen of the applicants were either born with their vision impairments or have had them since childhood.

The 6 individuals that sustained their vision conditions as adults have had it for a range of 7 to 48 years.

Although each applicant has one eye which does not meet the vision requirement in 49 CFR 391.41(b)(10), each has at least 20/40 corrected vision in the other eye, and in a doctor's opinion, has sufficient vision to perform all the tasks necessary to operate a CMV. Doctors' opinions are supported by the applicants' possession of valid commercial driver's licenses (CDLs) or non-CDLs to operate CMVs. Before issuing CDLs, States subject drivers to knowledge and skills tests designed to evaluate their qualifications to operate a CMV.

All of these applicants satisfied the testing requirements for their State of residence. By meeting State licensing requirements, the applicants demonstrated their ability to operate a CMV, with their limited vision, to the satisfaction of the State.

While possessing a valid CDL or non-CDL, these 20 drivers have been authorized to drive a CMV in intrastate commerce, even though their vision disqualified them from driving in interstate commerce. They have driven CMVs with their limited vision in careers ranging for 3 to 50 years. In the past three years, 1 driver was involved in a crash, and 1 driver was convicted of a moving violation in a CMV.

The qualifications, experience, and medical condition of each applicant were stated and discussed in detail in the October 11, 2016 notice (81 FR 70253).

IV. Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the vision requirement in 49 CFR 391.41(b)(10) if the exemption is likely to achieve an equivalent or greater level of safety than would be achieved without the exemption. Without the exemption, applicants will continue to be restricted to intrastate driving. With the exemption, applicants can drive in interstate commerce. Thus, our analysis focuses on whether an equal or greater level of safety is likely to be achieved by permitting each of these drivers to drive in interstate commerce as opposed to restricting him or her to driving in intrastate commerce.

To evaluate the effect of these exemptions on safety, FMCSA considered the medical reports about the applicants' vision as well as their driving records and experience with the vision deficiency.

To qualify for an exemption from the vision requirement, FMCSA requires a person to present verifiable evidence that he/she has driven a commercial vehicle safely with the vision deficiency for the past 3 years. Recent driving performance is especially important in evaluating future safety, according to several research studies designed to correlate past and future driving performance. Results of these studies support the principle that the best predictor of future performance by a driver is his/her past record of crashes and traffic violations. Copies of the studies may be found at Docket Number FMCSA–1998–3637.

FMCSA believes it can properly apply the principle to monocular drivers, because data from the Federal Highway Administration's (FHWA) former waiver study program clearly demonstrate the driving performance of experienced monocular drivers in the program is better than that of all CMV drivers collectively (See 61 FR 13338, 13345, March 26, 1996). The fact that experienced monocular drivers demonstrated safe driving records in the waiver program supports a conclusion that other monocular drivers, meeting the same qualifying conditions as those required by the waiver program, are also likely to have adapted to their vision deficiency and will continue to operate safely.

The first major research correlating past and future performance was done in England by Greenwood and Yule in 1920. Subsequent studies, building on that model, concluded that crash rates for the same individual exposed to certain risks for two different time periods vary only slightly (See Bates and Neyman, University of California Publications in Statistics, April 1952). Other studies demonstrated theories of predicting crash proneness from crash history coupled with other factors. These factors—such as age, sex, geographic location, mileage driven and conviction history—are used every day by insurance companies and motor vehicle bureaus to predict the probability of an individual experiencing future crashes (See Weber, Donald C., ''Accident Rate Potential: An Application of Multiple Regression Analysis of a Poisson Process,'' Journal of American Statistical Association, June 1971). A 1964 California Driver Record Study prepared by the California Department of Motor Vehicles concluded that the best overall crash predictor for both concurrent and nonconcurrent events is the number of single convictions. This study used 3 consecutive years of data, comparing the experiences of drivers in the first 2 years with their experiences in the final year.

Applying principles from these studies to the past 3-year record of the 20 applicants, 1 driver was involved in a crash and 1 driver was convicted of a moving violation in a CMV. All the applicants achieved a record of safety while driving with their vision impairment, demonstrating the likelihood that they have adapted their driving skills to accommodate their condition. As the applicants' ample driving histories with their vision deficiencies are good predictors of future performance, FMCSA concludes

their ability to drive safely can be projected into the future.

We believe that the applicants' intrastate driving experience and history provide an adequate basis for predicting their ability to drive safely in interstate commerce. Intrastate driving, like interstate operations, involves substantial driving on highways on the interstate system and on other roads built to interstate standards. Moreover, driving in congested urban areas exposes the driver to more pedestrian and vehicular traffic than exists on interstate highways. Faster reaction to traffic and traffic signals is generally required because distances between them are more compact. These conditions tax visual capacity and driver response just as intensely as interstate driving conditions. The veteran drivers in this proceeding have operated CMVs safely under those conditions for at least 3 years, most for much longer. Their experience and driving records lead us to believe that each applicant is capable of operating in interstate commerce as safely as he/she has been performing in intrastate commerce. Consequently, FMCSA finds that exempting these applicants from the vision requirement in 49 CFR 391.41(b)(10) is likely to achieve a level of safety equal to that existing without the exemption. For this reason, the Agency is granting the exemptions for the 2-year period allowed by 49 U.S.C. 31136(e) and 31315 to the 20 applicants listed in the notice of October 11, 2016 (81 FR 70253).

We recognize that the vision of an applicant may change and affect his/her ability to operate a CMV as safely as in the past. As a condition of the exemption, therefore, FMCSA will impose requirements on the 20 individuals consistent with the grandfathering provisions applied to drivers who participated in the Agency's vision waiver program.

Those requirements are found at 49 CFR 391.64(b) and include the following: (1) That each individual be physically examined every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the requirement 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 provide 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, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must have a copy of the certification when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

V. Discussion of Comments

FMCSA received 1 comment in this proceeding. Deb Carlson stated that the state of Minnesota has no concerns with granting Randal Aukes and Timothy Dougherty vision exemptions.

IV. Conclusion

Based upon its evaluation of the 20 exemption applications, FMCSA exempts the following drivers from the vision requirement in 49 CFR 391.41(b)(10), subject to the requirements cited above 49 CFR 391.64(b):

Randal D. Aukes (MN)
Joseph A. Baker (KS)
Keith D. Blackwell (TX)
Gerald D. Bowser (PA)
Kathy J. Brown (OH)
Louis J. Cullen, Jr. (NJ)
Edwin P. Davis (OR)
Timothy J. Dougherty (MN)
Stephen R. Ehlenburg (IL)
Stanley W. Goble, Jr. (IA)
William R. Guida (PA)
Thomas H. Gysbers (WI)
Jerry L. Hayden, Jr. (IA)
John T. Mabry (FL)
Peter E. McDonnell (MA)
George P. Mendiola (CA)
Norman D. Mosely (NJ)
Joe W. Restine (OK)
Greg D. Schneckloth (IA)
Allen J. Stolz (WI)

In accordance with 49 U.S.C. 31136(e) and 31315, each exemption will be valid for 2 years unless revoked earlier by FMCSA. The exemption will be revoked 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 and 31315.

If the exemption is still effective at the end of the 2-year period, the person may apply to FMCSA for a renewal under procedures in effect at that time.

Issued on: December 19, 2016.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2016–31560 Filed 12–28–16; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2016–0011]

Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of applications for exemption; request for comments.

SUMMARY: FMCSA announces receipt of applications from six individuals for an exemption from the prohibition in the Federal Motor Carrier Safety Regulations (FMCSRs) against persons with a clinical diagnosis of epilepsy or any other condition that is likely to cause a loss of consciousness or any loss of ability to control a commercial motor vehicle (CMV) to drive in interstate commerce. If granted, the exemptions would enable these individuals who have had one or more seizures and are taking anti-seizure medication to operate CMVs in interstate commerce.

DATES: Comments must be received on or before January 30, 2017.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket No. FMCSA–2016–0011 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building 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. e.t., Monday through Friday, except Federal Holidays.
- *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket number(s) 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., e.t., 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 online.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov* as described in the system records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, 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 8:30 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Services, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the FMCSRs 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 statute also allows the Agency to renew exemptions at the end of the two-year period.

The six individuals listed in this notice have requested an exemption from the epilepsy prohibition in 49 CFR 391.41(b)(8). Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by statute.

The physical qualification standard for drivers regarding epilepsy found in 49 CFR 391.41(b)(8) states that a person is physically qualified to drive a CMV if that person:

> Has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause the loss of consciousness or any loss of ability to control a CMV.

In addition to the regulations, FMCSA has published advisory criteria [1] to assist Medical Examiners in determining whether drivers with certain medical conditions are qualified to operate a CMV in interstate commerce. [49 CFR part 391, APPENDIX A TO PART 391—MEDICAL ADVISORY CRITERIA, section *H. Epilepsy: § 391.41(b)(8),* paragraphs 3, 4, and 5.]

The advisory criteria state the following:

If an individual has had a sudden episode of a non-epileptic seizure or loss of consciousness of unknown cause that did not require anti-seizure medication, the decision whether that person's condition is likely to cause the loss of consciousness or loss of ability to control a CMV should be made on an individual basis by the Medical Examiner in consultation with the treating physician. Prior to considering certification, it is suggested there be a six-month waiting period from the time of the episode. Following the waiting period, it is suggested that the individual undergo a complete neurological examination. If the results of the examination are negative and anti-seizure medication is not required, the driver may be qualified.

In those individual cases where a driver had a seizure or an episode of loss of consciousness that resulted from a known medical condition (e.g., drug reaction, high temperature, acute infectious disease, dehydration, or acute metabolic disturbance), certification should be deferred until the driver has recovered fully from that condition, has no existing residual complications, and is not taking anti-seizure medication.

Drivers who have a history of epilepsy/seizures, off anti-seizure medication and seizure-free for 10 years, may be qualified to operate a CMV in interstate commerce. Interstate drivers who have had a single unprovoked seizure may be qualified to drive a CMV in interstate commerce if seizure-free and off anti-seizure medication for five years or more.

As a result of Medical Examiners misinterpreting advisory criteria as regulation, numerous drivers have been prohibited from operating a CMV in interstate commerce based on the fact that they have had one or more seizures and are taking anti-seizure medication, rather than an individual analysis of their circumstances by a qualified Medical Examiner based on the physical qualification standards and medical best practices.

On January 15, 2013, in a Notice of Final Disposition entitled, ''Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders,'' (78 FR 3069), FMCSA announced its decision to grant requests from 22 individuals for exemptions from the regulatory requirement that interstate CMV drivers have ''no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a CMV.'' Since the January 15, 2013 notice, the Agency has published additional notices granting requests from individuals for exemptions from the regulatory requirement regarding epilepsy found in 49 CFR 391.41(b)(8).

To be considered for an exemption from the epilepsy prohibition in 49 CFR 391.41(b)(8), applicants must meet the criteria in the 2007 recommendations of the Agency's Medical Expert Panel (MEP) (78 FR 3069).

II. Qualifications of Applicants

Ryan D. Babler

Mr. Babler is a 38 year-old driver in Wisconsin. He has a history of epilepsy and his last seizure was in October 2008. He takes anti-seizure medication with the dosage and frequency remaining the same since that time. His physician states that he is supportive of Mr. Babler receiving an exemption.

Craig M. Lasecki

Mr. Lasecki is a 38 year-old driver in Wisconsin. He has a history of a single seizure in 2000. He takes anti-seizure medication with the dosage and frequency remaining the same since that time. His physician states that he is supportive of Mr. Lasecki receiving an exemption.

Larry Dean Nicholson

Mr. Nicholson is a 44 year-old driver in North Carolina. He has a history of a seizure disorder and his last seizure was in 2002. He takes anti-seizure medication with the dosage and frequency remaining the same since that time. His physician states that he is supportive of Mr. Nicholson receiving an exemption.

Ralph Edward Parrish, Jr.

Mr. Parrish is a 50 year-old class B CDL holder in Pennsylvania. He has a history of a seizure disorder and his last seizure was in 1980. He has been off of anti-seizure medication since 1998. His physician states that he is supportive of Mr. Parrish receiving an exemption.

[1] See *http://www.ecfr.gov/cgi-bin/text-idx?SID=e47b48a9ea42dd67d999246e23d97970&mc=true&node=pt49.5.391&rgn=div5#ap49.5.391_171.a* and *https://www.gpo.gov/fdsys/pkg/CFR-2015-title49-vol5/pdf/CFR-2015-title49-vol5-part391-appA.pdf.*

Wayne L. Woebkenberg

Mr. Woebkenberg is a 74 year-old driver in Indiana. He has a history of a seizure disorder and his last seizure was in 1998. He takes anti-seizure medication with the dosage and frequency remaining the same since that time. His physician states that he is supportive of Mr. Woebkenberg receiving an exemption.

Daniel Zielinski

Mr. Zielinski is a 55 year-old driver in Oregon. He has a history of epilepsy and his last seizure was in 1999. He takes anti-seizure medication with the dosage and frequency remaining the same since that time. His physician states that he is supportive of Mr. Zielinski receiving an exemption.

III. 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. We will consider all comments received before the close of business on the closing date indicated in the dates section of the notice.

IV. 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–2016–0011'' 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 materials received during the comment period. FMCSA may issue a final determination any time after the close of the comment period.

V. Viewing Comments and Documents

To view comments, as well as any documents mentioned in this preamble, go to *http://www.regulations.gov* and in the search box insert the docket number FMCSA–2016–0011 and click ''Search.'' Next, click ''Open Docket Folder'' and you will find all documents and comments related to this notice.

Issued on: December 21, 2016.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2016–31547 Filed 12–28–16; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2012–0332; FMCSA–2014–0102; FMCSA–2014–0103]

Qualification of Drivers; Exemption Applications; Hearing

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew exemptions for three individuals from the hearing requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) for interstate commercial motor vehicle (CMV) drivers. The exemptions enable these hard of hearing and deaf individuals to continue to operate CMVs in interstate commerce.

DATES: The renewed exemptions were effective on the dates stated in the discussions below and will expire on the dates stated in the discussions below. Comments must be received on or before January 30, 2017.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, 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., e.t., Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Services, telephone (202) 366–9826.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket No. FMCSA–2012–0332; FMCSA–2014–0102; FMCSA–2014–0103 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building 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 number(s) 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. e.t., 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 online.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

I. Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption for two years 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 statute also allows the Agency to renew exemptions at the end of the two-year period.

The physical qualification standard for drivers regarding hearing found in 49 CFR 391.41(b)(11) states that a person is physically qualified to driver a CMV if that person:

First perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard (formerly ASA Standard) Z24.5—1951.

49 CFR 391.41(b)(11) was adopted in 1970, with a revision in 1971 to allow drivers to be qualified under this standard while wearing a hearing aid, 35 FR 6458, 6463 (April 22, 1970) and 36 FR 12857 (July 3, 1971).

The three individuals listed in this notice have requested renewal of their exemptions from the hearing standard in 49 CFR 391.41(b)(11), in accordance with FMCSA procedures. Accordingly, FMCSA has evaluated these applications for renewal on their merits and decided to extend each exemption for a renewable two-year period.

II. Request for Comments

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.

III. 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. In accordance with 49 U.S.C. 31136(e) and 31315, each of the three applicants has satisfied the renewal conditions for obtaining an exemption from the hearing requirement (78 FR 22772; 80 FR 22768; 80 FR 57032). In addition, for Commercial Driver's License (CDL) holders, the Commercial Driver's License Information System (CDLIS) and the Motor Carrier Management Information System (MCMIS) are searched for crash and violation data. For non-CDL holders, the Agency reviews the driving records from the State Driver's Licensing Agency (SDLA). These factors provide an adequate basis for predicting each driver's ability to continue to safely operate a CMV in interstate commerce.

The three drivers in this notice remain in good standing with the Agency and have not exhibited any medical issues that would compromise their ability to safely operate a CMV during the previous two-year exemption period. FMCSA has concluded that renewing the exemptions for each of these applicants is likely to achieve a level of safety equal to that existing without the exemption. Therefore, FMCSA has decided to renew each exemption for a two-year period. In accordance with 49 U.S.C. 31136(e) and 31315, each driver has received a renewed exemption.

As of August 22, 2016, Byron Smith (TX) has satisfied the renewal conditions for obtaining an exemption from the hearing requirement in 49 CFR 391.41(b)(11), from driving CMVs in interstate commerce (78 FR 22772). This driver was included in FMCSA–2012–0332. The exemption was effective on August 22, 2016, and will expire on August 22, 2018.

As of August 26, 2016, James Dignan (IL) and Ervin Mitchell (AL), have satisfied the renewal conditions for obtaining an exemption from the hearing requirement in 49 CFR 391.41(b)(11), from driving CMVs in interstate commerce (80 FR 22768; 80 FR 57032)). The drivers were included in FMCSA–2014–0102; FMCSA–2014–0103). The exemptions were effective on August 26, 2016, and will expire on August 26, 2018.

IV. Conditions and Requirements

The exemptions are extended subject to the following conditions: (1) Each driver must report any crashes or accidents as defined in 49 CFR 390.5; and (2) report all citations and convictions for disqualifying offenses under 49 CFR part 383 and 49 CFR 391 to FMCSA. In addition, the driver must also have a copy of the exemption when driving, for presentation to a duly authorized Federal, State, or local enforcement official. The driver is prohibited from operating a motorcoach or bus with passengers in interstate commerce. The exemption does not exempt the individual from meeting the applicable CDL testing requirements. 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.

V. Conclusion

Based upon its evaluation of the three exemption applications, FMCSA renews the exemptions of the aforementioned drivers from the hearing requirement in 49 CFR 391.41 (b)(11). In accordance with 49 U.S.C. 31136(e) and 31315, each exemption will be valid for two years unless revoked earlier by FMCSA.

Issued on: December 21, 2016.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2016–31550 Filed 12–28–16; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–1999–5748; FMCSA–1999–6156; FMCSA–2001–11426; FMCSA–2003–16564; FMCSA–2005–22194; FMCSA–2005–23099; FMCSA–2006–23773; FMCSA–2006–24015; FMCSA–2006–24783; FMCSA–2007–0017; FMCSA–2007–0071; FMCSA–2007–29010; FMCSA–2008–0021; FMCSA–2009–0011; FMCSA–2009–0291; FMCSA–2010–0050; FMCSA–2010–0082; FMCSA–2011–0379; FMCSA–2012–0040; FMCSA–2012–0104; FMCSA–2012–0106; FMCSA–2013–0166; FMCSA–2013–0174; FMCSA–2014–0002; FMCSA–2014–0003; FMCSA–2014–0004; FMCSA–2014–0005; FMCSA–2014–0006]

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 exemptions for 88 individuals from the vision requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) for interstate commercial motor vehicle (CMV) drivers. The exemptions enable these individuals to continue to operate CMVs in interstate commerce without meeting the vision requirement in one eye.

DATES: Each group of renewed exemptions was effective on the dates stated in the discussions below and will expire on the dates stated in the discussions below. Comments must be received on or before January 30, 2017.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, 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., e.t., Monday through Friday,

except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Docket Services, telephone (202) 366–9826.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket No. FMCSA–1999–5748; FMCSA–1999–6156; FMCSA–2001–11426; FMCSA–2003–16564; FMCSA–2005–22194; FMCSA–2005–23099; FMCSA–2006–23773; FMCSA–2006–24015; FMCSA–2006–24783; FMCSA–2007–0017; FMCSA–2007–0071; FMCSA–2007–29010; FMCSA–2008–0021; FMCSA–2009–0011; FMCSA–2009–0291; FMCSA–2010–0050; FMCSA–2010–0082; FMCSA–2011–0379; FMCSA–2012–0040; FMCSA–2012–0104; FMCSA–2012–0106; FMCSA–2013–0166; FMCSA–2013–0174; FMCSA–2014–0002; FMCSA–2014–0003; FMCSA–2014–0004; FMCSA–2014–0005; FMCSA–2014–0006 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building 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., e.t., Monday through Friday, except Federal Holidays.
- *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket number(s) 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., e.t., 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 online.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

I. Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption for two years 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 statute also allows the Agency to renew exemptions at the end of the two-year period.

The physical qualification standard for drivers regarding vision found in 49 CFR 391.41(b)(10) states that a person is physically qualified to driver a CMV if that person:

> Has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of a least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing red, green, and amber.

The 88 individuals listed in this notice have requested renewal of their exemptions from the vision standard in 49 CFR 391.41(b)(10), in accordance with FMCSA procedures. Accordingly, FMCSA has evaluated these applications for renewal on their merits and decided to extend each exemption for a renewable two-year period.

II. Request for Comments

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.

III. 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. In accordance with 49 U.S.C. 31136(e) and 31315, each of the 88 applicants has satisfied the renewal conditions for obtaining an exemption from the vision requirement (64 FR 40404; 64 FR 54948; 64 FR 66962; 65 FR 159; 66 FR 63289; 67 FR 10471; 67 FR 10475; 67 FR 19798; 68 FR 64944; 68 FR 74699; 69 FR 8260; 69 FR 10503; 69 FR 19611; 70 FR 57353; 70 FR 67776; 70 FR 72689; 71 FR 4194; 71 FR 6824; 71 FR 6828; 71 FR 6829; 71 FR 13450; 71 FR 14567; 71 FR 19604; 71 FR 26602; 71 FR 30229; 71 FR 32183; 71 FR 41310; 72 FR 58362; 72 FR 64273; 72 FR 67340; 72 FR 67344; 73 FR 1395; 73 FR 6242; 73 FR 11989; 73 FR 15254; 73 FR 15255; 73 FR 15567; 73 FR 16950; 73 FR 27015; 73 FR 27017; 73 FR 27018; 73 FR 28187; 73 FR 36955; 74 FR 62632; 74 FR 65842; 74 FR 65845; 75 FR 9477; 75 FR 9481; 75 FR 9482; 75 FR 14656; 75 FR 19674; 75 FR 20881; 75 FR 20882; 75 FR 22178; 75 FR 25917; 75 FR 25918; 75 FR 27621; 75 FR 28684; 75 FR 36778; 75 FR 36779; 75 FR 39729; 76 FR 70215; 77 FR 7233; 77 FR 10606; 77 FR 13689; 77 FR 15184; 77 FR 17115; 77 FR 23797; 77 FR 23799; 77 FR 23800; 77 FR 27847; 77 FR 27849; 77 FR 27850; 77 FR 33017; 77 FR 33558; 77 FR 36338; 77 FR 38384; 77 FR 38386; 77 FR 44708; 78 FR 62935; 78 FR 64280; 78 FR 76395; 79 FR 1908; 79 FR 10606; 79 FR 14328; 79 FR 14331; 79 FR 14333; 79 FR 14571; 79 FR 17641; 79 FR 18390; 79 FR 18392; 79 FR 22000; 79 FR 22003; 79 FR 23797; 79 FR 27365; 79 FR 27681; 79 FR 28588; 79 FR 29495; 79 FR 29498; 79 FR 35212; 79 FR 35218; 79 FR 35220; 79 FR 37843; 79 FR 38649; 79 FR 47175). They have 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.

In accordance with 49 U.S.C. 31136(e) and 31315, the following groups of drivers received renewed exemptions in the month of July and are discussed below:

As of July 8, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 40 individuals have satisfied the conditions for obtaining a renewed

exemption from the vision requirements (64 FR 40404; 64 FR 66962; 66 FR 63289; 67 FR 10471; 67 FR 19798; 68 FR 64944; 69 FR 19611; 70 FR 57353; 70 FR 67776; 70 FR 72689; 71 FR 26602; 72 FR 58362; 72 FR 64273; 72 FR 67340; 72 FR 67344; 73 FR 1395; 73 FR 6242; 73 FR 15254; 73 FR 15567; 73 FR 16950; 73 FR 27015; 73 FR 27017; 74 FR 62632; 74 FR 65842; 74 FR 65845; 75 FR 9477; 75 FR 9482; 75 FR 14656; 75 FR 19674; 75 FR 20881; 75 FR 27621; 75 FR 28684; 76 FR 70215; 77 FR 7233; 77 FR 10606; 77 FR 13689; 77 FR 17115; 77 FR 23799; 77 FR 23800; 77 FR 27847; 77 FR 27849; 77 FR 33558; 77 FR 38386; 78 FR 62935; 78 FR 64280; 78 FR 76395; 79 FR 1908; 79 FR 10606; 79 FR 14328; 79 FR 14331; 79 FR 14333; 79 FR 14571; 79 FR 17641; 79 FR 18390; 79 FR 18392; 79 FR 22000; 79 FR 22003; 79 FR 23797; 79 FR 27365; 79 FR 27681; 79 FR 28588; 79 FR 29495; 79 FR 29498; 79 FR 38649):

Guy M. Alloway (OR)
Roger E. Anderson (TX)
Alan A. Andrews (NE)
William C. Christy (FL)
David F. Cialdea (MA)
Gerard J. Cormier (MA)
Travis C. Denzler (MN)
Barent H. Eliason (MO)
Sean O. Feeny (FL)
Paul W. Fettig (SD)
Hector O. Flores (MD)
Brian R. Gallagher (TX)
Todd C. Grider (IN)
Jimmy G. Hall (NC)
Taras G. Hamilton (TX)
Donald W. Holt (MA)
William D. Jackson (MN)
Darryl J. Johnson (MN)
Gregory R. Johnson (SC)
Glenn K. Johnson, Jr. (NC)
John Lucas (NC)
Albert E. Malley (MN)
Steven Martin (IL)
Charles E. Meis (TX)
Carlos A. Mendez-Castellon (VA)
Michael R. Moore (MD)
Charles R. Morris, Jr. (OH)
Hassan Ourahou (KY)
James M. Nohl (MN)
Enoc Ramos III (TX)
Jamey D. Reed (OK)
Christopher A. Reineck (OH)
James T. Rohr (MN)
Joe Sanchez (TX)
James S. Seeno (NV)
Steven S. Smith, Jr. (PA)
Thomas L. Tveit (SD)
Kevin R. White (NC)
Richard W. Wylie (CT)
Steven E. Young (MO)

The drivers were included in one of the following dockets: Docket Nos. FMCSA–1999–5748; FMCSA–2001–11426; FMCSA–2005–22194; FMCSA–2007–0017; FMCSA–2007–0071; FMCSA–2007–29019; FMCSA–2008–0021; FMCSA–2009–0291; FMCSA–2010–0050; FMCSA–2012–0040; FMCSA–2012–0104; FMCSA–2013–0166; FMCSA–2013–0174; FMCSA–2014–0002; FMCSA–2014–0003; FMCSA–2014–0004; FMCSA–2014–0005. Their exemptions are effective as of July 8, 2016, and will expire on July 8, 2018.

As of July 12, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 7 individuals have satisfied the conditions for obtaining a renewed exemption from the vision requirements (71 FR 4194; 71 FR 13450; 73 FR 15255; 75 FR 9481; 75 FR 20882; 75 FR 22178; 75 FR 25917; 75 FR 25918; 75 FR 39729; 77 FR 15184; 77 FR 27847; 77 FR 27850; 77 FR 36338; 77 FR 38386; 79 FR 35220):

Walter M. Brown (SC)
Chadwick S. Chambers (AL)
William C. Dempsey, Jr. (MA)
Miguel H. Espinoza (CA)
Ricky P. Hastings (TX)
Leland B. Moss (VT)
Markus Perkins (LA)

The drivers were included in one of the following dockets: Docket No. FMCSA–2005–23099; FMCSA–2009–0011; FMCSA–2010–0082; FMCSA–2011–0379; FMCSA–2012–0104. Their exemptions are effective as of July 12, 2016, and will expire on July 12, 2018.

As of July 20, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 17 individuals have satisfied the conditions for obtaining a renewed exemption from the vision requirements (64 FR 5948; 65 FR 159; 67 FR 10471; 67 FR 10475; 67 FR 19798; 68 FR 74699; 69 FR 8260; 69 FR 10503; 69 FR 19611; 70 FR 57353; 70 FR 72689; 71 FR 6824; 71 FR 6828; 71 FR 6829; 71 FR 14567; 71 FR 19604; 71 FR 26602; 71 FR 30229; 71 FR 32183; 71 FR 41310; 73 FR 11989; 73 FR 15567; 73 FR 27017; 73 FR 27018; 73 FR 28187; 73 FR 36955; 75 FR 36778; 75 FR 36779; 77 FR 38384; 79 FR 35212; 79 FR 35218; 79 FR 47175):

Delmas C. Bergdoll (WV)
Kenneth J. Bernard (LA)
Harvis P. Cosby (MD)
Daniel R. Franks (OH)
Walter D. Hague, Jr. (VA)
William G. Hix (AR)
Timothy B. Hummel (KY)
Clarence H. Jacobsma (IN)
Charles E. Johnston (MO)
Aaron C. Lougher (OR)
William F. Mack (WA)
Patrick E. Martin (WA)
Leland K. McAlhaney (IN)
Ronald M. Price (MD)
Scott D. Russell (WI)
Alton M. Rutherford (FL)
Sandra J. Sperling (WA)

The drivers were included on the following docket: Docket No. FMCSA–1999–6156; FMCSA–2001–11426; FMCSA–2003–16564; FMCSA–2005–22194; FMCSA–2006–23773; FMCSA–2006–24015; FMCSA–2006–24783; FMCSA–2008–0021; FMCSA–2014–0006. Their exemptions are effective as of July 20, 2016, and will expire on July 20, 2018.

As of July 22, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 15 individuals have satisfied the conditions for obtaining a renewed exemption from the vision requirements (79 FR 35212; 79 FR 47175):

Abdulahi Abukar (KY)
Gregory K. Banister (SC)
Amanuel W. Behon (WA)
Kenneth W. Bos (MN)
Brian L. Elliot (MO)
Bradley C. Hansell (OR)
Samuel L. Klaphake (MN)
Timothy L. Klose (PA)
Phillip E. Mason (MO)
Kenneth A. Orrino (WA)
Ruel W. Smith (SD)
Loren Smith (SD)
Seth D. Sweeten (ID)
Ronald L. Weiss (MN)
John T. White, Jr. (NC)

The drivers were included on the following docket: Docket No. FMCSA–2014–0006. Their exemptions are effective as of July 22, 2016, and will expire on July 22, 2018.

As of July 30, 2016, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 9 individuals have satisfied the conditions for obtaining a renewed exemption from the vision requirements (71 FR 32183; 71 FR 41310; 73 FR 36955; 75 FR 25917; 75 FR 36779; 75 FR 39729; 77 FR 33017; 77 FR 36338; 77 FR 38384; 77 FR 44708; 79 FR 37843; 79 FR 38661):

Dale W. Coblentz (MT)
Lester M. Ellingson, Jr.
Damon G. Gallardo (CA)
Daniel L. Grover (KS)
James E. Modaffari (OR)
Larry A. Nienhaus (MI)
Gregory A. Reinert (MN)
Scott J. Schlenker (WA)
Joseph B. Shaw, Jr. (VA)

The drivers were included on the following docket: Docket No. FMCSA–2006–24783; FMCSA–2010–0082; FMCSA–2012–0106. Their exemptions are effective as of July 30, 2016, and will expire on July 30, 2018.

Conditions and Requirements

The exemptions are extended subject to the following conditions: (1) Each driver must undergo an annual physical examination (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 certified Medical Examiner, as defined by 49 CFR 390.5, who attests that the driver is otherwise physically qualified under 49 CFR 391.41; (2) each driver must provide a copy of the ophthalmologist's or optometrist's report to the Medical Examiner at the time of the annual medical examination; and (3) each driver must 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. 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.

IV. Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with this exemption with respect to a person operating under the exemption.

VI. Conclusion

Based upon its evaluation of the 88 exemption applications, FMCSA renews the exemptions of the aforementioned drivers from the vision requirement in 49 CFR 391.41(b)(10), subject to the requirements cited above (49 CFR 391.64(b)). In accordance with 49 U.S.C. 31136(e) and 31315, each exemption will be valid for two years unless revoked earlier by FMCSA.

Issued on: December 19, 2016.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2016–31559 Filed 12–28–16; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[Docket No. FTA–2016–0045]

Joint Development: Updated Circular

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of update to joint development circular.

SUMMARY: The Federal Transit Administration (FTA) has issued and placed in the docket and on its Web site updated guidance, in the form of a circular, on joint development projects making use of FTA funds or FTA-funded property. The purpose of the update is to implement recent statutory changes and clarify guidance in FTA Circular 7050.1: *FTA Guidance on Joint Development.* Because the update reflects existing statute and imposes no new requirements on recipients, FTA is not soliciting public comment.

DATES: The prohibition on the outfitting of commercial space as part of FTA-assisted joint development projects ended when the Fixing America's Surface Transportation (FAST) Act (Pub. L. 114–94) took effect on October 1, 2015. The policy guidance regarding the ''fair share of revenue'' for affordable housing as part of FTA-assisted joint development projects will be effective February 13, 2017.

FOR FURTHER INFORMATION CONTACT: For policy guidance questions, Daniel Schned, Office of Budget and Policy, Federal Transit Administration, 1200 New Jersey Ave. SE., Room E52–313, Washington, DC 20590, phone: (202) 366–1652, or email, *daniel.schned@dot.gov.* For legal questions, Christopher T. Hall, Office of Chief Counsel, same address, Room E56–311 phone: (202) 366–5218; or email: *Christopher.Hall@dot.gov.*

SUPPLEMENTARY INFORMATION: This notice provides a summary of the updates to Circular 7050.1. The Circular itself is not included in this notice; instead, an electronic version may be found on FTA's Web site, at *www.transit.dot.gov,* and in the docket, at *www.regulations.gov.* Paper copies of the Circular may be obtained by contacting FTA's Administrative Services Help Desk, at (202) 366–4865.

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I. Overview

FTA is publishing updates to Circular 7050.1, regarding joint development, that affect: (1) the eligibility of outfitting space for commercial use under the FAST Act; and (2) the ''fair share of revenue'' for affordable housing as part of FTA-assisted joint development projects.

II. Updates to Circular 7050.1

A. Outfitting Commercial Space

Section 3002(2)(B) of the FAST Act amended Section 5302 of title 49, United States Code, by striking Section 5302(3)(G)(vi). Section 5302(3)(G)(vi) had specified that, for the purpose of programs under Chapter 53, a capital project for joint development ''does not include outfitting of commercial space (other than an intercity bus or rail station or terminal) or a part of a public facility not related to public transportation.''

FTA has determined that the best way to comply with Section 3002(2)(B) of the FAST Act is to strike Section 5, ''Ineligible Activities,'' of Chapter III of Circular 7050.1 and all references to the section.

B. Affordable Housing

Section 5302(3)(G)(iii) of title 49, United States Code, requires FTA-funded joint development projects to provide a ''fair share of revenue that will be used for public transportation.'' Prior to the effective date of Circular 7050.1 on October 1, 2014, FTA generally deferred to a project sponsor's assessment of what is a ''fair share'' of revenue, and did not require any specific amount of transit funding from a joint development project. With Circular 7050.1, FTA determined that a fair share of revenue means that a joint development project must produce revenue for transit at least equal to the Federal Government's initial investment in the joint development. (79 FR 50,728; 50,731–32 August 25, 2014).

At the same time, FTA recognized that the revenue generated by below-market-rate development would be less compared to market-rate commercial, residential, or mixed-use development. So as not to impede these developments, Circular 7050.1 included an exception for joint development projects that are ''community service'' or ''publicly-operated'' facilities, thereby exempting them from the minimum fair share of revenue requirement. FTA also acknowledges that many transit agencies have incorporated affordable housing goals into their joint development policies. Similar to community service and publicly-operated facilities, affordable housing also may generate less revenue than market-rate development. Accordingly, FTA will allow the fair share of revenue provided by joint development projects including certain affordable housing to be less than the minimum threshold established in Circular 7050.1.

FTA defines the term ''affordable housing'' to mean legally binding affordability restricted housing units available to renters with incomes below 60 percent of the area median income or owners with incomes below the area median.

Given that this update of Circular 7050.1 is a direct implementation of a statutory change and imposes no new requirements on grantees, FTA is not soliciting public comment.

Carolyn Flowers,

Acting Administrator.

[FR Doc. 2016–31443 Filed 12–28–16; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket No.: DOT–OST–2016–0203]

Advisory Committee on Automation in Transportation Meeting Notice

AGENCY: Office of the Secretary, U.S. Department of Transportation (DOT).

ACTION: Notice of open committee meeting.

SUMMARY: The Department of Transportation is publishing this notice to announce the following Federal advisory committee meeting of the Advisory Committee on Automation in Transportation (ACAT). The meeting is open to the public.

DATES: The Committee will meet from 9 a.m. to 12 p.m. EST on January 16, 2017.

ADDRESSES: The meeting will be held at 1200 New Jersey Avenue SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: John Augustine, U.S. Department of Transportation, Office of the Secretary, Office of Policy, Room W84–306, 1200 New Jersey Avenue SE., Washington, DC 20590; phone: (202) 366–5437; or Rachael Sack, U.S. Department of Transportation, Volpe National Transportation Systems Center, Room 1–541, 55 Broadway, Cambridge, MA 02142; phone: 617–494–6352; or by email at: *Automation@dot.gov.*

SUPPLEMENTARY INFORMATION: The committee meeting is being held in accordance with the Federal Advisory Committee Act, 5 U.S.C. App.

Purpose of the Committee: The purpose of the Committee is to provide information, advice, and recommendations to the U.S. Secretary of Transportation on cross-modal matters relating to the development and deployment of automated vehicles and assess the state of Departmental research, policy and regulatory support within this framework. The committee may convene and determine topics and is assembled around subject areas related to transportation aspects including the safety, mobility, environmental sustainability, maintaining state of good repair, human impact, data use and cybersecurity.

Proposed Agenda: This will be the first meeting of the ACAT. The committee will conduct introductions of members, discuss organizational details and logistics, and discuss automated vehicle research, policy, and regulation. Agenda will be as follows:

—Welcome and Mission of ACAT
—Remarks by U.S. Transportation Secretary Anthony Foxx
—Briefing on FACA Rules and Ethics
—Discussion on Automated Vehicles
—Public Comments

Public Accessibility to the Meeting: Pursuant to 5 U.S.C. 552b, as amended, and 41 CFR 102–3.140 through 102–3.165, and subject to the availability of space, this meeting is open to the public. Seating is on a first to arrive basis. Because the meeting of the committee will be held in a Federal Government facility, security screening is required. Attendees are requested to register by submitting their name, affiliation, email address and daytime phone number three business days prior to the meeting by email to: *Automation@dot.gov.* A photo ID is required to enter the premises. Please note that parking is limited. DOT Headquarters is fully accessible to individuals with disabilities. Wheelchair access is available in front at the main entrance of the building. For additional information about public access procedures, contact John Augustine, the committee's Designated Federal Officer, at the email address or telephone number listed in the **FOR FURTHER INFORMATION CONTACT** section.

Written Comments or Statements: Pursuant to 41 CFR 102–3.105(j) and 102–3.140 and section 10(a)(3) of the Federal Advisory Committee Act, the public or interested organizations may submit written comments or statements to the committee in response to the stated agenda of the meeting or in regard to the committee's mission in general. Written comments or statements should be submitted to John Augustine, the committee Designated Federal Officer, via electronic mail, the preferred mode of submission, at the address listed in the **FOR FURTHER INFORMATION CONTACT** section. Each page of the comment or statement must include the author's name, title or affiliation, address, email address and daytime phone number. The Designated Federal Official will review all submitted written comments or statements and provide them to members of the committee for their consideration. Written comments or statements being submitted in response to the agenda set forth in this notice must be received by the Designated Federal Official at least three business days prior to the meeting to be considered by the committee. Written comments or statements received after this date may not be provided to the committee until its next meeting.

Verbal Comments or Statements: Pursuant to 41 CFR 102–3.140d, the Committee is not obligated to allow a member of the public to speak or otherwise address the Committee during the meeting. Members of the public are invited to provide verbal comments or statements during the Committee meeting only at the time and in the manner described below. All requests to speak or otherwise address the Committee during the meeting must be submitted to the committee's Designated Federal Official at least three days prior to the meeting, via electronic mail, the preferred mode of submission, at the address listed in the **FOR FURTHER INFORMATION CONTACT** section. The request should include a brief statement of the subject matter to be addressed by the comment, and should be relevant to the stated agenda of the meeting or in regard to the committee's mission in general. The Designated Federal Official will log each request in the order received. A 30-minute period will be available for verbal public comments, if time allows. Members of the public who have requested to make a verbal comment will be allotted no more than two minutes, and will be invited to speak in the order in which their requests were received by Designated Federal Official.

Minutes: The minutes of this meeting will be available for public review and copying within 90 days at the following Web site: *www.transportation.gov/acat.*

Issued in Washington, DC, on December 23, 2016.

Anthony R. Foxx,

U.S. Department of Transportation Secretary.

[FR Doc. 2016–31668 Filed 12–28–16; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 4422

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 Form 4422, Application for Certificate Discharging Property Subject to Estate Tax Lien.

DATES: Written comments should be received on or before February 27, 2017 to be assured of consideration.

ADDRESSES: Direct all written comments to Tuawana Pinkston, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Sara Covington at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *Sara.L.Covington@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Application for Certificate Discharging Property Subject to Estate Tax Lien.

OMB Number: 1545–0328.

Form Number: 4422.

Abstract: Form 4422 is completed by either an executor, administrator, or other interested party for requesting release of any or all property of an estate from the Estate Tax Lien.

Current Actions: There is no change in the paperwork burden previously approved by OMB. This form is being submitted for renewal purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households, Business or other for-profit, Not-for-profit institutions, Farms, Federal Government, State, Local, or Tribal Gov't.

Estimated Number of Respondents: 3,000.

Estimated Time per Respondent: 30 minutes.

Estimated Total Annual Burden Hours: 1,500.

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: December 20, 2016.

Tuawana Pinkston,

IRS Supervisory Tax Analyst.

[FR Doc. 2016–31609 Filed 12–28–16; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF TREASURY

Internal Revenue Service

Electronic Tax Administration Advisory Committee (ETAAC)

AGENCY: Internal Revenue Service, Department of Treasury.

ACTION: Notice.

SUMMARY: The charter for the Electronic Tax Administration Advisory Committee (ETAAC) was amended on December 13, 2016, in accordance with the Federal Advisory Committee Act (FACA).

FURTHER INFORMATION CONTACT: Michael Deneroff at (202) 317–6851, or send an email to *publicliaison@irs.gov.*

SUPPLEMENTARY INFORMATION: Notice is hereby given that the charter for the Electronic Tax Administration Advisory Committee (ETAAC) was amended on December 13, 2016, in accordance with the Federal Advisory Committee Act (FACA), 5 U.S.C., App. 2.

The establishment and operation of the Electronic Tax Administration Advisory Committee (ETAAC) is required by the Internal Revenue Service (IRS) Restructuring and Reform Act of 1998 (RRA 98), Title II, Section 2001(b)(2).

The purpose of the ETAAC is to provide continued input into the development and implementation of the IRS organizational strategy for electronic tax administration. The ETAAC will provide an organized public forum for discussion of electronic tax administration issues such as prevention of identity theft and refund fraud in support of the overriding goal that paperless filing should be the preferred and most convenient method of filing tax and information returns. The ETAAC members will convey the public's perceptions of IRS electronic tax administration activities, offer constructive observations about current or proposed policies, programs and procedures, and suggest improvements.

Dated: December 21, 2016.

John Lipold,

ETAAC Designated Federal Official.

[FR Doc. 2016–31613 Filed 12–28–16; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0810]

Agency Information Collection Activity: (Foot Conditions Including Flatfoot (Pes Planus) Disability Benefits Questionnaire (VA Form 21–0960M–6)

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision of a currently approved collection, and allow 60 days for public comment in response to the notice.

VA Forms 21–0960M–6 is used to gather necessary information from a claimant's treating physician regarding the results of medical examinations.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before February 27, 2017.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue

NW., Washington, DC 20420 or email to *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0810'' in any correspondence. During the comment period, comments may be viewed online through the FDMS.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 632–8924 or FAX (202) 632–8925.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–21), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: (Foot Conditions Including Flatfoot (Pes Planus) Disability Benefits Questionnaire (VA Form 21–0960M–6).

OMB Control Number: 2900–0810.

Type of Review: Extension of an approved collection.

Abstract: VA Forms 21–0960M–6 is used to gather necessary information from a claimant's treating physician regarding the results of medical examinations.

Affected Public: Individuals or households.

Estimated Annual Burden: 40,000 hours.

Estimated Average Burden per Respondent: 30 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 80,000.

By direction of the Secretary.

Cynthia Harvey-Pryor,

Department Clearance Officer, Office of Privacy and Records Management, Department of Veterans Affairs.

[FR Doc. 2016–31459 Filed 12–28–16; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0808]

Agency Information Collection Activity: Back (Thoracolumbar Spine) Conditions Disability Benefits Questionnaire (VA Form 21–0960M–14)

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision of a currently approved collection, and allow 60 days for public comment in response to the notice.

VA Forms 21–0960M–14 is used to gather necessary information from a claimant's treating physician regarding the results of medical examinations.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before February 27, 2017.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420 or email to *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0808'' in any correspondence. During the comment period, comments may be viewed online through the FDMS.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 632–8924 or FAX (202) 632–8925.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–21), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Back (Thoracolumbar Spine) Conditions Disability Benefits Questionnaire (VA Form 21–0960M–14).

OMB Control Number: 2900–0808.

Type of Review: Extension of an approved collection.

Abstract: VA Forms 21–0960M–14 is used to gather necessary information from a claimant's treating physician regarding the results of medical examinations.

Affected Public: Individuals or households.

Estimated Annual Burden: 37,500 hours.

Estimated Average Burden Per Respondent: 45 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 50,000.

By direction of the Secretary.

Cynthia Harvey-Pryor,

Department Clearance Officer, Office of Privacy and Records Management, Department of Veterans Affairs.

[FR Doc. 2016–31458 Filed 12–28–16; 8:45 am]

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Part II

Department of Energy

10 CFR Parts 429, 430, and 431

Energy Conservation Program for Consumer Products and Certain Commercial and Industrial Equipment: Test Procedures for Consumer and Commercial Water Heaters; Final Rule

DEPARTMENT OF ENERGY

10 CFR Parts 429, 430, and 431

[Docket No. EERE–2015–BT–TP–0007]

RIN 1904–AC91

Energy Conservation Program for Consumer Products and Certain Commercial and Industrial Equipment: Test Procedures for Consumer and Commercial Water Heaters

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Final rule.

SUMMARY: The U.S. Department of Energy (DOE), in this final rule, establishes mathematical conversion factors to translate the current energy conservation standards and the measured values determined under the energy factor, thermal efficiency, and standby loss test procedures for consumer water heaters and certain commercial water heaters to those determined under the more recently adopted uniform energy factor test procedure. As required by the Energy Policy and Conservation Act of 1975 (EPCA), as amended, DOE initially presented proposals for establishing a mathematical conversion factor in a notice of proposed rulemaking (NOPR) published on April 14, 2015 (April 2015 NOPR). Upon further analysis and review of the public comments received in response to the April 2015 NOPR, DOE published a supplemental notice of proposed rulemaking on August 30, 2016 (August 2016 SNOPR). These proposed rulemakings serve as the basis for the final rule.

DATES: The effective date of this rule is December 29, 2016. The conversion factors established in this rule shall apply beginning on December 29, 2016 through December 29, 2017.

ADDRESSES: The docket, which includes **Federal Register** notices, public meeting attendee lists and transcripts, comments, and other supporting documents/materials, is available for review at *www.regulations.gov.* All documents in the docket are listed in the *www.regulations.gov* index. However, not all documents listed in the index may be publicly available, such as those containing information that is exempt from public disclosure.

A link to the docket Web page can be found at *https://www.regulations.gov/docket?DRegulations.gov-Docket* Folder Summary=EERE-2015-BT-TP-0007. The docket Web page contains simple instructions on how to access all documents, including public comments, in the docket.

FOR FURTHER INFORMATION CONTACT: Ms. Ashley Armstrong, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–5B, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–6590. Email: *Ashley.Armstrong@ee.doe.gov.*

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I. Authority and Background

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 a variety of provisions designed to improve energy efficiency and established the Energy Conservation Program for Consumer Products Other Than Automobiles.[2] Consumer water heaters, one subject of this document, are a ''covered product'' under EPCA. (42 U.S.C. 6292(a)(4)) Title III, Part C [3] of EPCA, Public Law 94–163 (42 U.S.C. 6311–6317, as codified), added by Public Law 95–619, Title IV, Sec. 441(a), established the Energy Conservation Program for Certain Industrial Equipment, which includes commercial water heating equipment, another subject of this rulemaking, as ''covered equipment.'' (42 U.S.C. 6311(1)(K))

Under EPCA, DOE's energy conservation program generally consists of four parts: (1) Testing; (2) labeling; (3) energy conservation standards; and (4) certification and enforcement procedures. The testing requirements consist of test procedures that manufacturers of covered products and equipment must use as the basis for certifying to DOE that their products and equipment comply with the applicable energy conservation standards adopted under EPCA, and for making other representations about the efficiency of those products. (42 U.S.C. 6293(c); 42 U.S.C. 6295(s); 42 U.S.C. 6314) Similarly, DOE must use these test procedures to determine whether such products and certain equipment comply with any relevant standards promulgated under EPCA. (42 U.S.C. 6295(s); 42 U.S.C. 6314)

EPCA contains what is known as an ''anti-backsliding'' provision, which prevents the Secretary from prescribing any amended standard that either increases the maximum allowable energy use or decreases the minimum required energy efficiency of a covered product. (42 U.S.C. 6295(o)(1); 6313(a)(6)(B)(iii)(I)) Also, the Secretary may not prescribe an amended or new standard if interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability in the United States of any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States. (42 U.S.C. 6295(o)(4); 6313(a)(6)(B)(iii)(II))

[1] For editorial reasons, upon codification in the U.S. Code, Part B was redesignated Part A.

[2] All references to EPCA in this document refer to the statute as amended through the Energy Efficiency Improvement Act of 2015 (EEIA 2015), Public Law 114–11 (April 30, 2015).

[3] For editorial reasons, upon codification in the U.S. Code, Part C was redesignated Part A–1.

EPCA prescribed the energy conservation standards for consumer water heaters, shown in Table I.1 (42 U.S.C. 6295(e)(1)), and directed DOE to conduct further rulemakings to determine whether to amend these standards. (42 U.S.C. 6295(e)(4)(A)–(B)) DOE notes that under 42 U.S.C. 6295(m), the agency must periodically review its already established energy conservation standards for a covered product. Under this requirement, the next review that DOE would need to conduct must occur no later than six years from the issuance of a final rule establishing or amending a standard for a covered product. DOE also notes that the statutory energy conservation standards apply to both storage and instantaneous consumer water heaters regardless of volume capacity.

TABLE I.1—EPCA INITIAL ENERGY CONSERVATION STANDARDS FOR CONSUMER WATER HEATERS

Product class	Energy factor
Gas Water Heater	0.62 − (0.0019 × Rated Storage Volume in gallons).
Oil Water Heater	0.59 − (0.0019 × Rated Storage Volume in gallons).
Electric Water Heater	0.95 − (0.00132 × Rated Storage Volume in gallons).

The initial test procedures for water heaters were prescribed in a final rule published on October 4, 1977. 42 FR 54110. On October 17, 1990, DOE published a final rule which updated the test procedure from a no-draw test to a six-draw, 24-hour simulated-use test. 55 FR 42162. The effect of this change in test procedure was investigated on a sample of representative units and based on the results of testing on those units, DOE updated the energy conservation standard for electric water heaters to reflect the new test procedure. To account for the change in test procedure for electric water heaters, DOE amended the standard to 0.93-(0.00132 × Rated Storage Volume). *Id.* at 42177.

On April 16, 2010, DOE published a final rule (hereinafter referred to as the ''April 2010 final rule'') that amended the energy conservation standards for specified classes of consumer water heaters, and maintained the existing energy conservation standards for tabletop and electric instantaneous water heaters. 75 FR 20112. The standards adopted by the April 2010 final rule are shown below in Table I.2. These standards apply to all water heater product classes listed in Table I.2 and manufactured in, or imported into, the United States on or after April 16, 2015, for all classes except for tabletop and electric instantaneous. For these latter two classes, compliance with these standards has been required since April 15, 1991. 55 FR 42162 (Oct. 17, 1990). Current energy conservation standards for consumer water heaters can be found in DOE's regulations at 10 CFR 430.32(d).

TABLE I.2—DOE ENERGY CONSERVATION STANDARDS FOR CONSUMER WATER HEATERS

Product class	Rated storage volume ***	Energy factor **
Gas-fired Storage	≥20 gal and ≤55 gal	0.675 − (0.0015 × V_s)
	>55 gal and ≤100 gal	0.8012 − (0.00078 × V_s)
Oil-fired Storage	≤50 gal	0.68 − (0.0019 × V_s)
Electric Storage	≥20 gal and ≤55 gal	0.960 − (0.0003 × V_s)
	>55 gal and ≤120 gal	2.057 − (0.00113 × V_s)
Tabletop *	≥20 gal and ≤120 gal	0.93 − (0.00132 × V_s)
Gas-fired Instantaneous †	<2 gal	0.82 − (0.0019 × V_s)
Electric Instantaneous *	<2 gal	0.93 − (0.00132 × V_s)

* Tabletop and electric instantaneous water heater standards were not updated by the April 2010 final rule.

** V_s is the ''Rated Storage Volume'' (in gallons), as determined by 10 CFR 429.17.

*** Rated Storage Volume limitations result from either a lack of test procedure coverage or from divisions created by DOE when adopting standards. The division at 55 gallons for gas-fired and electric storage water heaters was established in the April 16, 2010 final rule amending energy conservation standards. 75 FR 20112. The other storage volume limitations shown in this table are a result of test procedure applicability and are discussed in the July 2014 final rule. 79 FR 40542 (July 11, 2014).

† The standard for gas-fired instantaneous water heaters applies only to gas-fired instantaneous water heaters with a rated input of greater than 50,000 Btu/h.

The initial Federal energy conservation standards and test procedures for commercial water heating equipment were added to EPCA as an amendment made by the Energy Policy Act of 1992 (EPACT). (42 U.S.C. 6313(a)(5)) These initial energy conservation standards corresponded to the efficiency levels contained in the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) Standard 90.1 (ASHRAE Standard 90.1) in effect on October 24, 1992. The statute provided that if the efficiency levels in ASHRAE Standard 90.1 were amended after October 24, 1992, the Secretary must establish an amended uniform national standard at new minimum levels for each equipment type specified in ASHRAE Standard 90.1, unless DOE determines, through a rulemaking supported by clear and convincing evidence, that national standards more stringent than the new minimum levels would result in significant additional energy savings and be technologically feasible and economically justified. (42 U.S.C. 6313(a)(6)(A)(ii)(I)–(II)) The statute was subsequently amended to require DOE to review its standards for commercial water heaters (and other ''ASHRAE equipment'') every six years. (42 U.S.C. 6313(a)(6)(C)) On January 12, 2001, DOE published a final rule for commercial water heating equipment that amended energy conservation standards by adopting the levels in ASHRAE Standard 90.1–1999 for all types of commercial water heating equipment, except for electric storage water heaters. 66 FR 3336. For electric storage water heaters, the standard in ASHRAE Standard 90.1–1999 was less stringent than the standard prescribed in EPCA and, consequently, would have increased energy consumption, so DOE maintained the standards for electric

storage water heaters at the statutorily prescribed level. DOE published the most recent final rule for commercial water heating equipment standards on July 17, 2015, in which DOE adopted the thermal efficiency level for oil-fired storage water heaters that was included in ASHRAE 90.1–2013. 80 FR 42614. The current standards for commercial water heating equipment are presented in Table I.3.

TABLE I.3—ENERGY CONSERVATION STANDARDS FOR COMMERCIAL WATER HEATING EQUIPMENT

Equipment category	Size	Energy conservation standards *	
		Minimum thermal efficiency (equipment manufactured on and after October 9, 2015) ** † %	Maximum standby loss (equipment manufactured on and after October 29, 2003) ** ††
Electric storage water heaters	All	N/A	0.30 + 27/V_m (%/h)
Gas-fired storage water heaters	≤155,000 Btu/h	80	Q/800 + 110(V_r)½ (Btu/h)
	>155,000 Btu/h	80	Q/800 + 110(V_r)½ (Btu/h)
Oil-fired storage water heaters	≤155,000 Btu/h	† 80	Q/800 + 110(V_r)½ (Btu/h)
	>155,000 Btu/h	† 80	Q/800 + 110(V_r)½ (Btu/h)
Electric instantaneous water heaters †††	<10 gal	80	N/A
	≥10 gal	77	2.30 + 67/V_m (%/h)
Gas-fired instantaneous water heaters and hot water supply boilers.	<10 gal	80	N/A
	≥10 gal	80	Q/800 + 110(V_r) ½ (Btu/h)
Oil-fired instantaneous water heater and hot water supply boilers.	<10 gal	80	N/A
	≥10 gal	78	Q/800 + 110(V_r)½ (Btu/h)
		Minimum thermal insulation	
Unfired hot water storage tank	All	R–12.5	

* V_m is the measured storage volume, and V_r is the rated volume, both in gallons. Q is the nameplate input rate in Btu/h.

** For hot water supply boilers with a capacity of less than 10 gallons: (1) The standards are mandatory for units manufactured on and after October 21, 2005 and (2) units manufactured on or after October 23, 2003, but prior to October 21, 2005, must meet either the standards listed in this table or the applicable standards in Subpart E of 10 CFR 431 for a ''commercial packaged boiler.''

† For oil-fired storage water heaters: (1) The standards are mandatory for equipment manufactured on and after October 9, 2015, and (2) equipment manufactured prior to that date must meet a minimum thermal efficiency level of 78 percent.

†† Water heaters and hot water supply boilers having more than 140 gallons of storage capacity need not meet the standby loss requirement if: (1) The tank surface area is thermally insulated to R–12.5 or more, (2) a standing pilot light is not used, and (3) for gas-fired or oil-fired storage water heaters, they have a fire damper or fan-assisted combustion.

††† Energy conservation standards for electric instantaneous water heaters are included in EPCA. (42 U.S.C. 6313(a)(5)(D)–(E)). The compliance date for these energy conservation standards is January 1, 1994. In a NOPR for energy conservation standards for commercial water heating equipment published on May 31, 2016, DOE proposed to codify these standards for electric instantaneous water heaters in its regulations at 10 CFR 431.110. 81 FR 34440.

On December 18, 2012, the American Energy Manufacturing Technical Corrections Act (AEMTCA), Public Law 112–210, was signed into law. In relevant part, it amended EPCA to require that DOE publish a final rule establishing a uniform efficiency descriptor and accompanying test methods for consumer water heaters and certain commercial water heating equipment [4] within one year of the enactment of AEMTCA. (42 U.S.C. 6295(e)(5)(B)) AEMTCA requires that the final rule must replace the energy factor (EF), thermal efficiency (TE), and standby loss (SL) metrics with a uniform efficiency descriptor. (42 U.S.C. 6295(e)(5)(C)) On July 11, 2014, DOE published a final rule that fulfilled these requirements. 79 FR 40542 (July 2014 final rule). AEMTCA further requires that, beginning one year after the date of publication of DOE's final rule establishing the uniform descriptor (*i.e.,* July 13, 2015), the efficiency standards for the consumer water heaters and residential-duty commercial water heaters identified in the July 2014 final rule must be denominated according to the uniform efficiency descriptor established in that final rule (42 U.S.C. 6295(e)(5)(D)), and that DOE must develop a mathematical conversion for converting the measurement of efficiency from the test procedures and metrics in effect at that time to the uniform efficiency descriptor. (42 U.S.C. 6295(e)(5)(E)(i)–(ii))

EPCA provides that any covered water heater (*i.e.,* under DOE's rulemaking, all consumer water heaters and residential-duty commercial water heaters) manufactured prior to the effective date of the UEF test procedure final rule (*i.e.,* July 13, 2015) that complied with the efficiency standards and labeling requirements applicable at the time of manufacture will be considered to comply with the UEF test procedure final rule and with any revised labeling requirements established by the Federal Trade Commission (FTC) to carry out the UEF test procedure final rule. (42 U.S.C. 6295(e)(5)(K)) DOE's interpretation and application of this provision are discussed in detail in section III.E.

As noted previously, in the July 2014 final rule, DOE amended its test procedure for consumer and certain commercial water heaters. 79 FR 40542. The July 2014 final rule for consumer and certain commercial water heaters satisfied the AEMTCA requirements to develop a uniform efficiency descriptor to replace the EF, TE, and SL metrics. The amended test procedure includes provisions for determining the uniform energy factor (UEF), as well as the annual energy consumption of these products. Furthermore, the uniform descriptor test procedure can be applied

[4] The uniform efficiency descriptor and accompanying test procedure apply to commercial water heating equipment with residential applications defined in the test procedure final rule published July 11, 2014, as a ''residential-duty commercial water heater.'' See 79 FR 40542, 40586.

to: (1) Consumer water heaters (including certain consumer water heaters that are covered products under EPCA's definition of ''water heater'' at 42 U.S.C. 6291(27), but that were not addressed by the previous test method); and (2) commercial water heaters that have residential applications. The major modifications to the EF test procedure to establish the uniform descriptor test method included the use of multiple draw patterns and different draw patterns, and changes to the set-point temperature. In addition, DOE expanded the scope of the test method to include all storage volumes, specifically by including test procedure provisions that are applicable to water heaters with storage volumes between 2 gallons (7.6 L) and 20 gallons (76 L), and to clarify applicability to electric instantaneous water heaters. DOE also established a new definition for ''residential-duty commercial water heater'' and re-categorized certain commercial water heaters into this class.

The Energy Efficiency Improvement Act of 2015 (EEIA 2015) (Pub. L. 114–11) was enacted on April 30, 2015. Among other things, EEIA 2015 added a definition of ''grid-enabled water heater'' to EPCA's energy conservation standards for consumer water heaters. (42 U.S.C. 6295(e)(6)(A)(ii)) These products are intended for use as part of an electric thermal storage or demand response program. One of the criteria in EPCA that defines a ''grid-enabled water heater'' is the requirement that it meet a certain energy factor (specified by a formula set forth in the statute), or an equivalent alternative standard that DOE may prescribe. *Id.* On August 11, 2015, DOE published a final rule in the **Federal Register** to implement the changes to EPCA by placing the energy conservation standards and related definitions in the Code of Federal Regulations (CFR). 80 FR 48004. As the energy conservation standard for grid-enabled water heaters is in terms of energy factor, DOE is addressing these products in this final rule to adopt a mathematical conversion to express the energy conservation standard in terms of UEF.

On September 15, 2016, the Federal Trade Commission (FTC) published a final rule (''FTC 2016 Final Rule'') updating the EnergyGuide label to reflect changes to the DOE test procedure. The effective date of the FTC 2016 Final Rule is June 12, 2017. 81 FR 63634.

This final rule satisfies the requirements of AEMTCA to develop a mathematical conversion factor for converting the EF, TE, and SL metrics to the UEF metric. (42 U.S.C. 6295(e)(5)(E)) DOE published a notice of proposed rulemaking on April 14, 2015 and a supplemental notice of proposed rulemaking on August 30, 2016, which included proposed mathematical conversion factors and the proposed energy conservation standards expressed in terms of the UEF metric. 80 FR 20116 and 81 FR 59736.

II. Summary of the Final Rule

In this final rule, DOE establishes a mathematical conversion factor between the values determined using the EF, TE, and SL test procedures (including the first-hour rating or maximum gallons per minute (GPM) rating, as applicable), and the values that would be determined using the uniform efficiency descriptor test procedure established in the July 2014 final rule (*i.e.,* UEF and first-hour rating or maximum GPM rating).

The mathematical conversion factor required by AEMTCA is a bridge between the efficiency and delivery capacity values obtained through testing under the EF, TE, and SL test procedures and those obtained under the uniform efficiency descriptor test procedure published in the July 2014 final rule. DOE conducted a series of tests on the classes of water heaters included within the scope of this rulemaking (see section III.B for details on the scope) and relied upon that test data and test data submitted by interested parties, along with the approaches summarized in section III.C, to calculate the conversion factors established in this final rule. Subsequently, DOE used the conversion factors to derive minimum energy conservation standards in terms of UEF, as shown in Table II.1 and Table II.2. The standards denominated in UEF are neither more nor less stringent than the EF-denominated standards for consumer water heaters and for commercial water-heating equipment based on the thermal efficiency and standby loss metrics.

TABLE II.1—CONSUMER WATER HEATER ENERGY CONSERVATION STANDARDS DENOMINATED IN UEF

Product class	Rated storage volume and input rating (if applicable)	Draw pattern	Uniform energy factor
Gas-fired Storage Water Heater	≥20 gal and ≤55 gal	Very Small	$0.3456 - (0.0020 \times V_r)$
		Low	$0.5982 - (0.0019 \times V_r)$.
		Medium	$0.6483 - (0.0017 \times V_r)$.
		High	$0.6920 - (0.0013 \times V_r)$.
	>55 gal and ≤100 gal	Very Small	$0.6470 - (0.0006 \times V_r)$.
		Low	$0.7689 - (0.0005 \times V_r)$.
		Medium	$0.7897 - (0.0004 \times V_r)$.
		High	$0.8072 - (0.0003 \times V_r)$.
Oil-fired Storage Water Heater	≤50 gal	Very Small	$0.2509 - (0.0012 \times V_r)$.
		Low	$0.5330 - (0.0016 \times V_r)$.
		Medium	$0.6078 - (0.0016 \times V_r)$.
		High	$0.6815 - (0.0014 \times V_r)$.
Electric Storage Water Heaters	≥20 gal and ≤55 gal	Very Small	$0.8808 - (0.0008 \times V_r)$.
		Low	$0.9254 - (0.0003 \times V_r)$.
		Medium	$0.9307 - (0.0002 \times V_r)$.
		High	$0.9349 - (0.0001 \times V_r)$.
	>55 gal and ≤120 gal	Very Small	$1.9236 - (0.0011 \times V_r)$.
		Low	$2.0440 - (0.0011 \times V_r)$.
		Medium	$2.1171 - (0.0011 \times V_r)$.
		High	$2.2418 - (0.0011 \times V_r)$.
Tabletop Water Heater	≥20 gal and ≤120 gal	Very Small	$0.6323 - (0.0058 \times V_r)$.
		Low	$0.9188 - (0.0031 \times V_r)$.
		Medium	$0.9577 - (0.0023 \times V_r)$.
		High	$0.9884 - (0.0016 \times V_r)$.

TABLE II.1—CONSUMER WATER HEATER ENERGY CONSERVATION STANDARDS DENOMINATED IN UEF—Continued

Product class	Rated storage volume and input rating (if applicable)	Draw pattern	Uniform energy factor
Instantaneous Gas-fired Water Heater**.	<2 gal and >50,000 Btu/h	Very Small	0.80
		Low	0.81.
		Medium	0.81.
		High	0.81.
Instantaneous Electric Water Heater**.	< 2 gal	Very Small	0.91.
		Low	0.91.
		Medium	0.91.
		High	0.92.
Grid-Enabled Water Heater	>75 gal	Very Small	1.0136 − (0.0028 x V_r).
		Low	0.9984 − (0.0014 x V_r).
		Medium	0.9853 − (0.0010 x V_r).
		High	0.9720 − (0.0007 x V_r).

* V_r is the ''Rated Storage Volume'' (in gallons), as determined by 10 CFR 429.17.
** For instantaneous water heaters the standard is represented as a single value rather than as a function of storage volume. Because the UEF standard only applies to models with less than 2 gallons of storage volume, the coefficient becomes zero, and the standard does not vary for models between 0 and 2 gallons.

TABLE II.2—RESIDENTIAL-DUTY COMMERCIAL WATER HEATER ENERGY CONSERVATION STANDARDS DENOMINATED IN UEF

Product class	Draw pattern	Uniform energy factor
Gas-fired Storage	Very Small	$0.2674 - (0.0009 \times V_r)$
	Low	$0.5362 - (0.0012 \times V_r)$
	Medium	$0.6002 - (0.0011 \times V_r)$
	High	$0.6597 - (0.0009 \times V_r)$
Oil-fired Storage	Very Small	$0.2932 - (0.0015 \times V_r)$
	Low	$0.5596 - (0.0018 \times V_r)$
	Medium	$0.6194 - (0.0016 \times V_r)$
	High	$0.6740 - (0.0013 \times V_r)$
Electric Instantaneous**	Very Small	0.80.
	Low	0.80.
	Medium	0.80.
	High	0.80.

* V_r is the ''Rated Storage Volume'' (in gallons), as determined by 10 CFR 429.44.
** For instantaneous water heaters the standard is represented as a single value rather than as a function of storage volume. Because the UEF standard only applies to models with less than 2 gallons of storage volume, the coefficient becomes zero, and the standard does not vary for models between 0 and 2 gallons.

The conversion factor formulas may be used for making representations regarding energy efficiency or energy use until December 29, 2017. After that, all representations regarding energy efficiency or energy use must be based on testing (either directly or through the application of an AEDM, where permitted). In addition, EPCA requires that a water heater be considered to comply with the July 2014 final rule on and after July 13, 2015 (the effective date of the July 2014 final rule) and with any revised labeling requirements established by the FTC to carry out the July 2014 final rule if that water heater basic model was manufactured prior to July 13, 2015, and complied with the applicable efficiency standards and labeling requirements in effect prior to July 13, 2015. (See 42 U.S.C. 6295(e)(5)(K)) Sections III.E and III.F explain that DOE intends to address various issues related to the transition from the metrics in effect prior to July 13, 2015, through the use of enforcement policies.

III. Discussion

A. Purpose

As discussed in section I, this rulemaking establishes mathematical conversion factors that satisfy requirements added to EPCA by AEMTCA. (42 U.S.C. 6295(e)(5)) EPCA requires DOE to establish a uniform efficiency descriptor for consumer water heaters and commercial water heaters, and to establish a mathematical conversion factor to translate from the EF, TE, and SL descriptors to the uniform efficiency descriptor established by DOE. *Id.* In the July 2014 test procedure final rule, DOE established UEF as the uniform efficiency descriptor, and adopted a test method for measuring UEF for consumer and certain commercial water heaters. 79 FR 40542 (July 11, 2014). This final rule addresses the mathematical conversion factor required by EPCA (see 42 U.S.C. 6295(e)(5)(E)) and the requirement that the efficiency standard be denominated according to the uniform efficiency descriptor (*i.e.,* UEF) (see 42 U.S.C. 6295(e)(5)(D)(i)).

As discussed in the August 2016 SNOPR, DOE reviewed the test results used to develop the mathematical conversion factors, and found that different water heaters are impacted in different ways by the new test method and metric, depending on the specific design and characteristics of the water heater. 81 FR 59736, 59741–59742 (August 30, 2016). Water heaters have numerous attributes that impact energy efficiency and performance, and the changes to the test method and metrics impact each water heater model differently, often in ways that are difficult to predict. For example, two electric water heaters with the same rated storage volume, input rating, first-

hour rating, and energy factor rating (all represented values published under the EF test method as indicators of water heater performance) were shown by testing to have different measured first-hour ratings and uniform energy factors when tested under the new test procedure.

Given the number of models currently available in the market (756 unique models at the time of the analysis performed for the August 2016 SNOPR), it would not be practical to analyze each model individually to determine the change in represented values under the new test procedure. Rather, DOE analyzed a subset of models that are representative of the market as a whole. This approach is consistent with the statutory mandate, which instructs DOE to develop ''a mathematical conversion factor.'' (42 U.S.C. 6295(e)(5)(E)) In DOE's view, the phrase ''mathematical conversion factor'' does not require DOE to generate a single number applicable to all water heaters. Rather, DOE believes that, despite the use of the word ''factor,'' in the singular, the statute permits the use of a conversion equation involving several numbers and mathematical operations besides multiplication. Still, the phrasing suggests that DOE should develop a formula that is broadly applicable, rather than generate a table of equivalencies stating the exact UEF equivalent for every individual product on the market.

Because each water heater is impacted differently, it would be impossible to develop a single equation, or reasonable set of equations, that could be used to model the energy performance of every water heater exactly under the new test method. Therefore, DOE interprets the statutory mandate for a ''mathematical conversion factor'' to call for an equation that will be able to reasonably predict a water heater's energy efficiency under the UEF test method based on values measured under the EF, TE, or SL test methods for that model.

Any mathematical conversion of that type will have some amount of residual difference between predicted and measured values that is inherent when applying a mathematical equation (or multiple equations for different types of water heaters) to predict the energy efficiency performance or delivery capacity of a large set of models. In this final rule, DOE sought to reduce the amount of difference between predicted and actual performance in several ways. DOE incorporated as much test data as was practical and available, and which represented models currently on the market. DOE considered several attributes that could have a large impact on the test results under both the new and old metrics, and included those as appropriate when developing the mathematical conversion, which led to a set of equations for water heaters with certain different characteristics (*e.g.,* different fuel types, different nitrogen oxide (NO_X) emissions levels). DOE also explored several options for developing the mathematical conversion equations (see section III.C for a summary of the approaches considered). In addition, DOE sought feedback from interested parties and incorporated suggestions for improving the mathematical conversions when those suggestions resulted in conversion equations that were better predictors of actual measured performance.

As noted previously, this final rule also addresses the requirement that the efficiency standard be denominated in terms of UEF and establishes energy conservation standard levels using the UEF metric. (42 U.S.C. 6295(e)(5)(D)(i)) As discussed in section I, DOE may not adopt a standard that reduces the stringency of the existing standards, due to EPCA's ''anti-backsliding'' provisions. (42 U.S.C. 6295(o)(1); 6313(a)(6)(B)(iii)(I)) Further, EPCA requires that the mathematical conversion factor not affect the minimum efficiency requirements. (42 U.S.C 6295(e)(5)(E)(iii)).

The methodology used for translating the standards ensures equivalent stringency between the existing standards (using EF, TE, and SL metrics) and the converted standards (using UEF). Due to differences in water heater performance under the different test methods discussed in the preceding paragraphs, some models will perform better, and others worse, under the new test method than they did under the previous test method. In principle, a model that was just above the standard level using the old metrics might come out just below the converted standard using the conversion factor, and in principle, one could regard that result as a change in the standard applicable to that particular model. However, such outcomes are unavoidable possibilities if DOE is to prescribe a single equation to convert efficiency measurements across a product class. As noted above, given the complex ways in which detailed design characteristics can affect measurements using both the existing protocols and the UEF test procedure, specifying EF, TE, and SL for a product does not predict UEF for the product with absolute precision. Given that reality, DOE interprets section 325 of EPCA as a whole, including the anti-backsliding provision and the mandate to develop a conversion factor, to permit outcomes in which conversion might shift some products from above to below the standard (and some from below to above)—since this is the natural and foreseeable consequence of using a conversion factor. Because the statute calls for a conversion factor, DOE understands the ''standard,'' in this context, to refer to the efficiency level required on average over a product class. Thus, DOE's goal in developing the conversion factor is to ensure that, on average over a product class, the standard denominated in UEF corresponds to the same maximum energy use and minimum efficiency as the standard denominated in EF, TE, and SL.

B. Scope

This section describes DOE's process for categorizing water heaters and establishing the range of units subject to this mathematical conversion factor final rule. DOE initially outlined the scope of this rulemaking in the April 2015 NOPR. 80 FR 20116, 20122–20124 (April 14, 2015).

1. Storage Volume and Input Capacity Limitations

In the NOPR, DOE stated that it was not including water heaters that were not previously subject to the test procedures or standards for energy factor established in the Code of Federal Regulations in the scope of the conversion factor. *Id.* In the August 2016 SNOPR, DOE proposed to make clear its interpretation that the initial consumer water heater standards in EPCA [5] are applicable to the consumer water heaters listed in Table III.1 and, accordingly, proposed mathematical conversion factors for these water heaters in the August 2016 SNOPR. 81 FR 59736, 59743 (August 30, 2016).

[5] The initial energy factor energy conservation standards for consumer water heaters established in EPCA are found at 42 U.S.C. 6295(e)(1), and require that the energy factor be not less than the following for products manufactured on or after January 1, 1990:

Gas Water Heater—0.62 − (0.0019 × Rated Storage Volume in gallons).

Oil Water Heater—0.59 − (0.0019 × Rated Storage Volume in gallons).

Electric Water Heater—0.95 − (0.00132 × Rated Storage Volume in gallons).

TABLE III.1—CONSUMER WATER HEATERS NOT COVERED IN THE NOPR BY THE MATHEMATICAL CONVERSION FACTOR

Product class	Description of criteria for exclusion from conversion rulemaking
Gas-fired Storage	Rated Storage Volume ≥2 gal and <20 gal or >100 gal.
Oil-fired Storage	Rated Storage Volume >50 gal.
Electric Storage	Rated Storage Volume ≥2 gal and <20 gal or >120 gal.
Tabletop	Rated Storage Volume ≥2 gal and <20 gal or >120 gal.
Gas-fired Instantaneous	Rated Input ≤50,000 Btu/h; Rated Storage Volume ≥2 gal.
Electric Instantaneous	Rated Storage Volume ≥2 gal.
Oil-fired Instantaneous	All.

In the August 2016 SNOPR, DOE noted that the definitions for consumer water heaters added to EPCA under the National Appliance Energy Conservation Act of 1987 (NAECA; Pub. L. 100–12 (March 17, 1987)) do not place any limitation on the storage volume of consumer water heaters and do not place a minimum fuel input rate on gas-fired instantaneous water heaters. (42 U.S.C. 6291(27)) Thus, DOE proposed to make clear its interpretation that the initial standards for water heaters added to EPCA cover all consumer water heaters meeting the definition of ''water heater'' at 42 U.S.C. 6291(27), regardless of the storage volume and without a lower limit on the fuel input rating for gas-fired instantaneous water heaters. 81 FR 59736, 59743 (August 30, 2016).

The Air-Conditioning, Heating, & Refrigeration Institute (AHRI), Bradford White Corporation (Bradford White), A.O. Smith Corporation (A.O. Smith), and Rheem Manufacturing Company (Rheem) submitted comments opposed to the inclusion of the proposed clarification in the August 2016 SNOPR. Those comments were focused primarily on the application of standards to consumer water heaters with storage tanks of more than 2 gallons (7.6 L) and less than 20 gallons (76 L), with commenters stating that the application of standards to these consumer water heaters would be inconsistent with DOE's historical treatment of such water heaters. (AHRI, No. 27 at p. 7; Bradford White, No. 26 at p. 2; A.O. Smith, No. 28 at p. 1; Rheem No. 32 at p. 2.) AHRI asserted that NAECA codified limitations on the applicability of standards for consumer water heaters consistent with the then-current DOE test procedure, including the exclusion of storage-type residential water heaters less than 20 gallons and greater than 120 gallons. (AHRI, No. 27 at pp. 7–8) Rheem stated that the test procedures for consumer water heaters specifically exempted water heaters with storage tanks of more than 2 gallons (7.6 L) and less than 20 gallons (76 L) from being covered prior to the UEF test procedure that was finalized in July 2014 final rule for consumer and certain commercial water heaters. (Rheem, No. 32 at p. 2) Rheem added that the August 2016 SNOPR was a departure from the April 2015 NOPR, which stated that DOE's current consumer water heater test procedures and energy conservation standards are not applicable to gas or electric water heaters with storage tanks that are at or above 2 gallons (7.6 L) and less than 20 gallons (76 L). (Rheem, No. 32 at p. 3) AHRI stated that it understood DOE to be applying standards to these products based on the 1990 final rule that adopted standards established in EPCA under the NAECA amendments (55 FR 42162 (Oct. 17, 1990)) and that application of standards to the specified products as proposed in the SNOPR would be contrary to EPCA. (AHRI, No. 27 at p. 8) Bradford White stated that it does not support using only input capacity to distinguish between consumer and commercial water heaters, and expressed concern that under the proposed clarification, water heaters that are currently marketed as commercial products will have to be eliminated unless they are able to meet the new UEF established for the consumer water heaters. (Bradford White, No. 26 at p. 2)

AHRI also asserted that it is contrary to administrative law and unfair to include a proposal to apply the standards to these products (*i.e.,* consumer gas-fired storage water heaters with a rated storage volume greater than 100 [6] gallons and consumer electric storage water heaters with a rated storage volume greater than 2 gallons and less than 20 gallons) at the ''11th hour.'' (AHRI, No. 27 at p. 9) AHRI stated that given the thirty-day comment period and DOE's prior statements on this issue, manufacturers did not foresee the need to spend time or resources to conduct testing and analysis on this particular class of products, but instead, the industry devoted its limited time and available resources to testing the many products which DOE initially identified. (AHRI, No. 27 at p. 9) Rheem stated that based on past practice and DOE's statements in the NOPR, it did not anticipate the current rulemaking addressing the UEF for the specified consumer water heaters, and as a result, the commenter urged DOE to address this matter in a separate rulemaking. (Rheem No. 32 at pp. 2–4) A.O. Smith also questioned whether the clarification in the August 2016 SNOPR may violate the letter if not the spirit of the Administrative Procedures Act (APA). A.O. Smith viewed the August 2016 test procedure SNOPR to represent a change of position, which has placed manufacturers in the position of having to respond within thirty days to new efficiency standards without knowing if they can meet the standards. (A.O. Smith No. 28, pp. 2–3)

DOE acknowledges that it has not previously implemented the standards established by NAECA with respect to gas or electric water heaters with storage tanks between 2 and 20 gallons in capacity or other water heaters listed in Table III.1. However, after careful consideration of both the statutory provisions and the comments received, DOE is reaffirming its interpretation in the August 2016 SNOPR that the standards established in EPCA are applicable to the water heaters listed in Table III.1. As such, the standards initially established by Congress in EPCA are applicable to consumer water heaters identified in the August 2016 SNOPR, including those with storage tanks that are at or above 2 gallons (7.6 L) and less than 20 gallons (76 L). As explained in the following paragraphs, this interpretation is based on the plain language of EPCA that establishes definitions for consumer water heaters and the scope of the statutorily-prescribed standards for consumer water heaters, and a review of the legislative history reveals no congressional intent to the contrary. Nonetheless, as discussed in more detail, DOE will not enforce those standards until such time as conversion factors and converted standards are

[6] AHRI's comment stated 120 gallons; however, the upper limit on storage volume for the energy conservation standards found in 10 CFR 430.32(d) for consumer gas-fired storage water heaters is 100 gallons.

adopted, which DOE is declining to do in this final rule.

EPCA, through the amendments made by NAECA, defines ''water heater'' for the purpose of delineating which consumer products are subject to energy conservation standards. (42 U.S.C. 6291(27); see also 101 Stat. 103, 104–105) The statutory definition specifies input ratings at or below which water heaters are to be classified as consumer water heaters (*e.g.,* 75,000 Btu/h for gas-fired storage water heaters; 12 kW for electric storage water heaters and electric instantaneous water heaters; 210,000 Btu/h for oil-fired instantaneous water heaters). The statutory definition of ''water heater'' does not provide for any limitation based on storage volume. (42 U.S.C. 6291(27)) The NAECA amendments also established standards for gas-fired consumer water heaters, oil-fired consumer water heaters, and electric consumer water heaters, once again without any limitation in terms of storage volume. (42 U.S.C. 6295(e)(1); see also 101 Stat. 103, 110)

AHRI argued that the NAECA amendments imposing standards for water heaters do not apply to water heaters smaller than 20 gallons because DOE had no test procedures for such products when NAECA was enacted. According to AHRI, NAECA ''codified'' DOE's existing test procedures ''into law,'' and the NAECA standards were ''based on the pre-existing EF test procedure.'' DOE does not agree with AHRI's argument that Congress intended its statutory standards to be somehow constrained by DOE's existing test procedure applicability. DOE had, and retains, the discretion to change the test procedures. The provision that AHRI cited as ''codif[ying]'' DOE's test procedures—which DOE takes to mean adopting them as statute, and thus restricting DOE's authority to alter them—did no such thing. AHRI referred to 42 U.S.C. 6293(a); but, as amended by NAECA, that provision simply says that ''[a]ll test procedures and related determinations . . . which are in effect on the date of enactment of [NAECA] shall remain in effect until the Secretary amends such test procedures and related determinations.'' The point of this provision was to avoid, in a statute that substantially revised the substance of DOE's authority to develop test procedures, any suggestion that the changes would invalidate pre-existing test procedures. The text of the sentence itself makes clear that it did not freeze the test procedures into statute; they remained in effect only until the Secretary ''amends such test procedures.''

The NAECA amendments also do not support AHRI's contention that the section 6295(e)(1) standards were based specifically on the existing test procedure. The statute does not explicitly say the standards depended solely on that version of the test procedure. AHRI seems to rely on the facts that section 6295(e)(1) prescribed minimum values of ''energy factor'' and that the NAECA amendments defined ''efficiency descriptor,'' which for water heaters was to be expressed as energy factor, as the ratio of output and input ''determined using the test procedures prescribed under section 323.'' The argument appears to be that, for water heaters, ''the test procedures prescribed under section 323'' meant the test procedures as they existed when NAECA was enacted. Thus, AHRI infers, the water heater standards in section 6295(e)(1) were minimums for energy factor as the extant test procedures determined that value. However, DOE believes it is sounder to read the definition of ''efficiency descriptor'' as referring to DOE's test procedures as they change over time. Section 323 authorized DOE to amend or revise test procedures in appropriate circumstances. It would be odd and counterproductive if the concept of ''efficiency descriptor'' excluded such updates.

Fundamentally, if Congress had intended the section 6295(e)(1) standards to apply only to products for which DOE had already developed test procedures, it could easily have said so. Instead, the statute defined ''water heaters'' without a minimum storage capacity; it prescribed standards without mention of any minimum; and it invoked a metric, energy factor, that was to be measured using test procedures that the statute authorized DOE to revise. DOE concludes, therefore, that the section 6295(e)(1) were to apply to the full scope of ''water heaters'' as soon as DOE issued test procedures reaching that scope. Based upon changes in the market and the availability of additional data, DOE determined in the July 2014 test procedure final rule (79 FR 40542, 40545–40549 (July 11, 2014)) that it was appropriate to expand the applicability of the water heaters test procedure and thereby embrace the full scope of the authority provided by Congress. (42 U.S.C. 6295(e)(1); see also 101 Stat. 103, 110).

Based on the foregoing discussion, DOE is reaffirming its interpretation in the August 2016 SNOPR that the statutory standards apply to the water heaters listed in Table III.1, including those with storage volumes between 2 and 20 gallons. DOE acknowledges that its long delay in issuing test procedures for such products as well as statements it has made in the past may have caused confusion about this issue. Coming into compliance with the statutory standards immediately would be quite burdensome for industry.

DOE also received voluminous comments regarding the technical merits of the conversion factors and of the converted standards expressed in UEF for the water heaters listed in Table III.1, for which DOE is going to defer finalizing and implementing these statutory standards and further consider the comments. Since DOE is declining to adopt mathematical conversion factors and converted standards in UEF in this final rule for the water heaters listed in Table III.1, DOE will not enforce the statutory standards applicable to the consumer water heaters listed in Table III.1 until some point after DOE finalizes the conversion factor and the converted standards applicable to those products. In doing so, DOE will work with industry on making this transition.

2. Water Temperature Limitations

A.O. Smith expressed concern with DOE's position (adopted in the November 2016 commercial water heater test procedure final rule; see 81 FR 79261, 79286 (Nov. 10, 2016)) that electric water heaters with inputs of 12 kW or less are consumer water heaters, regardless of the outlet water temperature delivered. A.O. Smith argued that the 180 °F delineation serves an important function in the marketplace to distinguish between consumer and commercial water heaters. (A.O. Smith, No. 28 at p. 2)

As explained in further detail in the November 10, 2016 commercial water heater test procedure final rule, DOE relies on the temperature threshold when determining how to distinguish a commercial water heater that may be used to serve residential applications (*i.e.,* a ''residential-duty commercial water heater'') and commercial water heaters generally. 81 FR 79261, 79286. Outlet water temperature is one of several dividing criteria between those types of commercial models. 79 FR 40542, 40546 (July 11, 2014). However, DOE has interpreted the statute to distinguish between water heaters that are commercial equipment under EPCA and those that are consumer products on the basis of the rated input, not the delivery temperature. The November 2016 final rule explained DOE's interpretation on this point, and DOE is not revisiting the issue in this final rule. The application of the conversion factor

to residential-duty commercial water heaters is discussed section III.B.4. If manufacturers of water heaters have additional inquiries they should contact Ashley Armstrong directly using the contact information in the **ADDRESSES** section of this final rule.

3. Grid-Enabled Water Heaters

As noted in section I, EPCA was recently amended to define and set efficiency requirements for grid-enabled water heaters in terms of EF (see 42 U.S.C. 6295(e)(6)). EPCA provides that the conversion factor may exclude certain covered water heaters from the uniform efficiency descriptor if the Secretary determines that the category of water heaters does not have a residential use and can be clearly described in the final rule, and that the category of water heaters are effectively rated using the thermal efficiency and standby loss descriptors. (42 U.S.C. 6295(e)(5)(F)). Grid-enabled water heaters do have residential uses and are not rated using thermal efficiency or standby loss, and thus, do not meet the criteria for exclusion from the UEF metric. As a result, DOE has developed a conversion factor in this final rule to express the standard for these products in terms of UEF. Comments related to the conversion factor and converted UEF standards for grid-enabled water heaters are discussed in sections III.D.2.d and section III.D.3.

4. Residential-Duty Commercial Water Heaters

DOE notes that only commercial water heaters meeting the definition of ''residential-duty commercial water heater'' are subject to the uniform efficiency descriptor test method, while all other commercial water heaters are not. EPCA allows DOE to provide an exclusion from the uniform efficiency descriptor for specific categories of otherwise covered water heaters that do not have residential uses, that can be clearly described, and that are effectively rated using the current thermal efficiency and standby loss descriptors. (42 U.S.C. 6295(e)(5)(F)) In the July 2014 test procedure final rule, DOE determined that covered commercial water heating equipment that did not meet the definition of a ''residential-duty commercial water heater'' met the criteria in EPCA for exclusion from the uniform efficiency descriptor. 79 FR 40542, 40545–40547 (July 11, 2014). As a result, this final rule only addresses commercial water heaters that meet the definition of ''residential-duty commercial water heater.'' This definition was recently updated in the November 10, 2016 commercial water heater test procedure final rule to remove residential-duty classes where definitional criteria preclude the classification of any products as residential-duty commercial water heaters within that class.[7] 81 FR 79261, 79321–79322. The definition of ''residential-duty commercial water heater'' adopted in that final rule includes any gas-fired storage, oil-fired storage, or electric instantaneous commercial water heater that meets the following conditions:

(1) For models requiring electricity, uses single-phase external power supply;

(2) Is not designed to provide outlet hot water at temperatures greater than 180 °F; and

(3) Does not meet any of the criteria regarding rated input and storage volume presented in Table III.2.

TABLE III.2—CAPACITY LIMITATIONS FOR DEFINING COMMERCIAL WATER HEATERS WITHOUT RESIDENTIAL APPLICATIONS

[*i.e.,* Non-Residential-Duty]

Water heater type	Indicator of non-residential application
Gas-fired Storage	Rated input >105 kBtu/h; Rated storage volume >120 gal.
Oil-fired Storage	Rated input >140 kBtu/h; Rated storage volume >120 gal.
Electric Instantaneous	Rated input >58.6 kW; Rated storage volume >2 gal.

This final rule establishes mathematical conversion factors for gas-fired storage, oil-fired storage, and electric instantaneous residential-duty commercial water heaters. DOE also uses the conversion factors to express the energy conservation standards for these classes of equipment in the UEF metric.

C. Approaches for Developing Conversions

To develop the conversions between the prior metrics (first-hour rating, maximum GPM, energy factor, thermal efficiency, standby loss) and the new metrics (first-hour rating, maximum GPM, uniform energy factor), DOE considered three different approaches. The first, termed ''analytical methods,'' uses equations based on the fundamental physics of water heater operation to predict how changes in test parameters lead to changes in the performance metrics. The second, termed ''empirical regression,'' is a purely data-driven approach that uses experimental data and regressions to develop equations that relate the prior metrics to the new ones. The third approach, termed ''hybrid,'' uses a regression on the result of an analytical method to account for changes in the test procedure not captured by the analytical method.

1. Analytical Methods Approach

The analytical methods approach relies on basic equations of heat transfer and thermodynamics, as well as established understanding of the behavior of water heaters, to calculate the metric based on a set of known parameters for the water heater, environment, and test pattern. Such an approach typically yields an equation or set of equations that can be solved to ultimately yield the metric of interest, either an efficiency or delivery capacity. An attempt is then made to modify the equations for the metrics to yield an equation that expresses the new metrics in terms of the old metrics and other known quantities. Analytical methods have the advantage of capturing known effects on performance without conducting a series of experiments. Additionally, a properly formulated relationship would be expected to be applicable to all water heaters on the market. Analytical approaches do have some drawbacks, however. Most notably, these methods only account for

[7] For example, DOE has interpreted EPCA to include as consumer products electric storage water heaters as having an input of ≤ 12 kW. (42 U.S.C. 6291(27)) The previous definition of a residential-duty water heater excluded any electric storage water heater with an input of > 12 kW from being residential-duty. Thus, because all electric storage water heaters > 12 kW are not residential-duty, but all electric storage water heaters ≤ 12 kW are consumer water heaters, there could not have been a residential-duty commercial electric storage water heater. The changes adopted in the commercial water heater test procedure final rule amended the definition to remove mention of electric storage water heaters, along with several other types of water heaters, to prevent confusion.

factors that are known to impact performance and that can be readily modeled analytically. There may be other unknown phenomena that affect performance that may not be taken into account in the known models. Second, application of these models often require assumptions about conditions. For example, one may need to assume a particular temperature of the water in the water heater despite the fact that it is known that there is variation in that temperature. Lastly, while an analytical model reduces the amount of tests needed to generate a conversion equation, a thorough set of experiments is still necessary to validate the model. Because it is based on fundamental physics, though, an analytical model can typically be extended with more confidence to a water heater that has not been tested than would a model based purely on experimental data.

DOE developed conversion equations based on analytical methods for the maximum GPM test (from the maximum GPM under the prior method to the current method) and simulated-use tests (*i.e.,* from EF to UEF) for all water heaters covered in this rule. DOE created the UEF_{WHAM} parameter for consumer water heaters and the UEF_{rd} parameter for residential-duty commercial water heaters, which represent the converted UEF value for storage water heaters using the Water Heater Analysis Model (WHAM) as a basis for the conversions, along with several simplifying assumptions. Specifically, DOE assumed that the standby heat loss coefficient (UA) and recovery efficiency are the same for the EF and UEF test procedure, and that the nominal outlet water temperature is a representative approximation of the mean temperature of water within the tank. For consumer and residential-duty commercial instantaneous water heaters, DOE derived an analytical method for the conversion through testing experience and commenter feedback. DOE created the UEF_{model} and $UEF_{model,rd}$ parameters, which represent the converted UEF value for instantaneous water heaters using the analytical methods derived by DOE. DOE presented an in-depth derivation of the analytical methods in the August 2016 SNOPR. 81 FR 59736, 59744–59752 (August 30, 2016).

For the consumer storage uniform energy factor analytical conversion, Bradford White commented that the DOE finding that average delivered temperature versus mean tank temperature is higher for electric than gas-fired storage water heaters is inconsistent with their testing experience and does not fundamentally make sense due to water temperature stacking in gas-fired storage water heaters. (Bradford White, No. 26 at p. 2) Although DOE acknowledges that there is apparently a difference between the testing results observed by Bradford White and those observed by DOE, as the August 2016 SNOPR explained after discussing several potential assumptions about mean tank temperatures, the analytical model that best predicts UEF tested values uses the assumption that the mean tank temperature and delivered temperature were the same, regardless of fuel type. 81 FR 59736, 59747 (August 30, 2016). As a result, DOE did not change its assumptions related to the mean tank temperature and delivered water temperature based on either DOE's data or Bradford White's data, as such changes do not appear as though they would improve the accuracy of the conversion equation. Bradford White also commented that it does not agree that the UA and recovery efficiency will not change with the change in test procedure. (Bradford White, No. 26 at p. 2) DOE agrees that UA and recovery efficiency are different when testing to the EF test procedure than when testing to UEF test procedures, and so stated in the August 2016 SNOPR in addressing similar comments at that stage. 81 FR 59736, 59747 (August 30, 2016). DOE also stated that the analytical model that best predicts UEF test results uses the assumption that UA and recovery efficiency did not change with a change in test procedure. *Id.* Bradford White did not provide any data as would cause DOE to alter the tentative conclusion it reached in the August 2016 SNOPR. Accordingly, for this final rule, DOE has decided to continue to use the assumption that UA and recovery efficiency are the same in both the EF and UEF test procedures, as it provides the best prediction of the measured UEF. DOE recognizes that this assumption is a simplification of the realities of how water heaters operate under the old and new test procedures. The use of simplifying assumptions is appropriate in the development of an analytical model. The model is not intended to capture every aspect of the physical behavior of water and heat in these products down to the last detail. Rather, it is meant to provide a physically meaningful description that reflects the most significant features of water-heater physics and engineering so as to enable DOE to develop a mathematically-tractable conversion formula. To serve that purpose, DOE considers it appropriate to make simplifying assumptions like those regarding UA and recovery efficiency where, as discussed, doing so improves rather than decreases the predictive accuracy of the model.

Although, as previously noted, DOE developed a conversion based on analytical methods for converting the EF to UEF for all types of water heaters, as proposed in the August 2016 SNOPR. For the reasons explained in the SNOPR, DOE is choosing in this rule to use the analytical method approaches only for: (1) The conversion of maximum GPM under the prior test method to maximum GPM under the current test method for consumer instantaneous water heaters; and (2) the conversion of thermal efficiency and standby loss to UEF for electric instantaneous residential-duty commercial water heaters. 81 FR 59736, 59774 and 59778 (August 30, 2016). For the maximum GPM conversion for consumer instantaneous water heaters, DOE concludes that the analytical method predicts the resultant data very closely and will broadly apply to those units not tested, making it preferable to other approaches. For electric instantaneous residential-duty commercial water heaters, DOE did not have test data that would be appropriate for use in a regression analysis, thereby precluding the use of an empirical regression approach or the ''hybrid'' approach that combines an analytical method with a regression analysis. For the remaining conversion factors, DOE uses either the empirical regression approach (see section III.C.2) or the ''hybrid'' approach (see section III.C.3).

2. Empirical Regression Approach

The second category of conversion factors considered by DOE is empirical regression. In this approach, a collection of water heaters are tested according to both the former test procedure and the new test procedure. The resultant performance metrics, as well as other data on the units (*e.g.,* storage volume, input rate), are compiled, and statistical techniques are used to create correlations that relate the new performance metrics to the prior metrics and characteristics. No consideration of the underlying physics is used in this approach. Rather, it is purely a data-driven method. The advantage of this approach is that the results are not affected by existing assumptions on how a water heater should behave under given conditions, with the results representing exactly what is observed in actual comparison testing. This approach should capture all factors that affect the energy efficiency and delivery capacity, even though those factors may not be known *a priori.*

Empirical regression also has some drawbacks. One drawback is that the resulting equations are most confidently applied to water heaters with attributes similar to those that were tested. Consequently, to minimize uncertainties, a large sample for testing is often appropriate to capture more fully many of the nuances in water heater design. If extended to units not sufficiently similar to those that were tested, the equations may produce unacceptably large differences between predicted and measured values if a feature on the untested model has an effect that is not captured in the experimental data. Another major drawback is that empirical regression is susceptible to experimental uncertainties. While uncertainties can be reduced through careful quality checks of experimental data, uncertainty is present in any test. The empirical regressions, being based on many samples across multiple different units, will further reduce the uncertainty, but some amount of uncertainty in the regression may be unavoidable.

In the April 2015 NOPR and August 2016 SNOPR, DOE noted that it was not aware of an analytical method for determining the first-hour rating, and proposed to use an empirical regression methodology for developing the mathematical conversion factors for first-hour rating. DOE believed this approach would be more accurate than attempting to develop an analytical method. 80 FR 20116, 20125–20128 (April 14, 2015) and 81 FR 59736, 59752 (August 30, 2016). DOE did not receive any comments suggesting an alternate methodology for determining first-hour rating, and, thus, DOE is establishing conversion factors for those metrics and product types based on the use of the empirical regression methodology. In the August 2016 SNOPR, DOE found that the conversion equations for heat pump water heaters resulting from the analytical method (see section III.C.1) and hybrid regressed-analytical approach (see section III.C.3) had higher root-mean-square deviation (RMSD) values than those resulting from the empirical regression approach. 81 FR 59736, 59752, 59768 (August 30, 2016). Therefore, for the reasons explained in the August 2016 SNOPR and noted above, DOE is establishing a mathematical conversion for heat pump water heaters based on the empirical regression approach. Finally, for the reasons explained in the August 2016 SNOPR (81 FR 59736, 59778 (August 30, 2016)), for residential-duty commercial electric instantaneous water heaters, DOE has concluded that it is appropriate to assume that the delivery capacity would be heavily dependent on the input rating for electric instantaneous water heaters, and, thus, DOE developed an equation to predict maximum GPM as a function of input rate based on a regression analysis.

3. Hybrid Approach

DOE also analyzed a combination of the analytical methods approach and empirical regression approach, termed a hybrid approach. In this approach, a broad range of water heaters are tested, as would be done in using empirical regression. An additional factor is added to the list of attributes that is examined in the regression; this factor uses the analytical methods to first estimate the converted value. This estimate of the revised performance metric (maximum GPM, first-hour rating, or UEF) for each water heater tested is then used as an independent variable in a regression to determine the measured UEF. DOE believes that this approach takes advantage of the ability of the analytical methods approach to capture the major known factors that affect the efficiency, yet adds the additional step of regression to account for any influences that are not well described by the analytical methods. DOE uses this approach for the conversion factors adopted to convert from EF to UEF for all types of water heaters except for heat pump water heaters, for which the empirical regression approach is used (see section III.C.2), and residential-duty commercial electric instantaneous water heaters, for which the analytical methods approach is used (see section III.C.1).

D. Testing Results and Analysis of Test Data

DOE used actual test data as part of the basis for the conversion factors and to validate the results. DOE selected models for testing based on their characteristics being representative of the broader market. DOE also used test data supplied by AHRI in developing the mathematical conversion factors, and in total, the conversion factors prescribed by this final rule are based on test results for 264 basic models. The August 2016 SNOPR includes a detailed description of the characteristics of the models used in the development of the mathematical conversion factors. 81 FR 59736, 59760–59779 (August 30, 2016).

1. Impact of Certain Water Heater Attributes on Efficiency Ratings

After conducting testing on all of the selected water heaters according to both the prior test procedures and the uniform efficiency descriptor test procedure, DOE examined how particular attributes of water heaters might affect the conversion factors and investigated the approaches discussed in section III.C for obtaining conversion factors. The goal of this analysis was to determine whether or not particular attributes would warrant separate conversion equations. DOE investigated attributes such as: (1) NO_X emission level; (2) short or tall configuration; (3) vent type; (4) standing pilot versus electronic ignition; (5) whether condensing or heat pump technology is used; and (6) whether the unit is tabletop. The RMSD between the measured values and the values obtained through various conversion methods was compared. The conversion approach with the lowest cumulative RMSD value for a particular fuel type was considered to be the best candidate for the conversion equation.

No comments were received in response to the August 2016 SNOPR suggesting different combinations of water heater attributes to examine in regards to the derivation of conversion factors. Accordingly, in this final rule, DOE does not change the combination of water heater attributes used to derive the mathematical conversion factors. 81 FR 59736, 59760 (August 30, 2016).

2. Conversion Factor Derivation

DOE used the methods described in section III.C to derive the mathematical conversion factor for the different types of water heaters covered within the scope of this rulemaking (as discussed in section III.B). This section describes the methodology that was applied to develop a conversion factor for each type of water heater.

a. Consumer Storage Water Heaters

In total, DOE conducted testing of 55 consumer storage water heater models using both the EF and UEF test procedures, and likewise, AHRI supplied test data for 130 consumer storage water heater models using both the EF and UEF test procedures.[8] [9] In the August 2016 SNOPR, DOE presented the test data used to derive the consumer

[8] The AHRI submitted data points 2–5 and 2–6 were not used in this analysis as the reported recovery efficiencies were 98 percent and not calculated from test data.

[9] If multiple tests were conducted on either the same unit or same basic model of a water heater, the results were averaged to produce the values reported in this final rule. In one instance within the AHRI-submitted data for consumer storage water heaters, three tests were conducted, where two tests were conducted on the same unit and another test was conducted on a unit of the same basic model. The two tests of the same unit were averaged, and this value was then averaged with the results of the test of the unit of the same basic model.

storage water heater conversion factors and the water heater attributes by unit, respectively. 81 FR 59736, 59761–59767 (August 30, 2016).

In response to the August 2016 SNOPR, Bock Water Heaters, Inc. (Bock) provided test data for its 32E consumer oil-fired storage water heater. Bock stated that the DOE test model labeled in the August 2016 SNOPR as ''CS–27'' was the most similar to the 32E, but that it was unclear if the 32E was the actual unit tested in the SNOPR due to the measured first-hour rating under the EF test procedure being well below that of 32E. (Bock, No. 29 at p. 1) In response, DOE confirms that CS–27 was the Bock 32E. DOE reviewed its test data and did not identify any errors in the testing, nor does DOE have access to the raw test data from Bock to reconcile the difference in results. Therefore, DOE treated all three points as valid test points and in order to factor in the Bock data, averaged DOE's data point with the test results of the two units provided by Bock and derived the conversion factors with this updated test data. The test data replacing CS–27 is shown in Table III.3.

TABLE III.3—UPDATED CONSUMER STORAGE WATER HEATER TEST DATA POINT

CS No.	AHRI No.	Type	Storage volume (gal)	Input rate (Btu/h)	Prior FHR (gal)	Updated FHR (gal)	Prior recovery efficiency (%)	EF	UEF
27	N/A	Oil	30.2	103,800	153.3	128.5	91.6	0.621	0.641

For consumer storage water heaters, DOE used the regression method described in section III.C.2 to predict first-hour ratings (FHRs) under the UEF test procedure to be used in the conversion to UEF since DOE is not aware of an ''analytical approach'' that can be used to predict first-hour ratings. Of the factors considered, DOE found that the first-hour rating determined under the EF test procedure was the best overall predictor of the new first-hour rating. These findings were based on the RMSDs between predicted and measured values. The resulting equations for determining the new FHR of consumer storage water heaters are presented in Table III.4.

TABLE III.4—CONSUMER STORAGE WATER HEATER FIRST-HOUR RATING CONVERSION FACTOR EQUATIONS

Product class	Distinguishing criteria	Conversion factor
Consumer Gas-fired Water Heater	Non-Condensing, Standard or Low NO_X.	New FHR = 7.9592 + 0.8752 × FHR_P.
	Non-Condensing, Ultra-Low NO_X	New FHR = 25.0680 + 0.6535 × FHR_P.
	Condensing	New FHR = 1.0570 × FHR_P.
Consumer Oil-fired Water Heater	N/A	New FHR = 0.9102 × FHR_P.
Consumer Electric Water Heater	Electric Resistance	New FHR = 9.2827 + 0.8092 × FHR_P.
	Tabletop	New FHR = 41.5127 + 0.1989 × FHR_P.
	Heat Pump	New FHR = −4.2705 + 0.9947 × FHR_P.

In the equations, ''New FHR'' is the predicted first-hour rating that would result under the UEF test method and is used for conversion to UEF; ''FHR_P'' is the first-hour rating determined under the EF test procedure, and the slope and intercept are constants obtained from a linear regression. While most of the data allowed for such a regression fit, in two cases (condensing gas-fired and oil-fired) the available data were too limited to produce reliable regressions for the full set of parameters. To constrain the regression so as to generate more reliable predictions for those smaller sets of data, the intercepts of the regressions were assigned a value of zero, meaning that a water heater with an FHR_P of zero would also have a New FHR of zero. This assignment is reasonable because if a hypothetical water heater were not able to deliver any water under the EF test procedure, it also would not be able to deliver water under the UEF test procedure.

Bock commented that the first-hour rating conversion proposed in the SNOPR for consumer oil-fired water heaters was different in both direction and magnitude from its supplied test data and requested the conversion be reexamined. (Bock, No. 29 at p. 2) DOE notes, however, that the conversion factor must cover a range of water heaters, including models from manufacturers other than Bock. That the conversion is not the same as what one would get from Bock's tests alone does not invalidate it.

In response to the first-hour rating mathematical conversion developed in the SNOPR, Bradford White commented that the conversion is too inaccurate, but that it did not have an alternative suggestion. (Bradford White, No. 26 at p. 3) AHRI commented that the inaccuracy of the conversion causes models be converted to bins to which they were not tested. (AHRI, No. 27 at p. 6) In response, DOE notes that it explored several possible conversions for developing the first-hour rating conversion. The best trend was observed based on a regression as a function of first-hour rating. The average RMSD value resulting from this approach (7.73 gallons) is the lowest RMSD observed in the FHR analysis, and DOE is unaware of any approaches that would result in lower RMSDs. DOE received no comments suggesting methods that would result in a lower RMSD for the first-hour rating conversion. DOE acknowledges that some models can have a converted FHR that would classify it into one draw pattern and a tested FHR that would classify it into another as a result of the difference inherent with a mathematical representation of a physical system. DOE views such a result as unavoidable; as discussed above in section III.A, any conversion formula applied to a broad set of models will leave some residual differences for many models. Those differences can push a model at the edge of one category into another. However, DOE will not take enforcement action regarding such a model if there is adherence to the provisions discussed in section III.E. For models entering the market after July 13, 2015, representations will have to be based on tested UEF values, and the appropriate

energy conservation standards set forth in section III.D.3 will need to be met. Thus, for such units, the issue of a converted FHR value resulting in classification into the wrong draw pattern bin is not applicable.

After determining the converted first-hour rating, the next step in the conversion process is to determine which draw pattern is to be applied to convert from EF to UEF. After the first-hour rating under the uniform efficiency descriptor is determined using the conversion factor above, that value can be applied to determine the appropriate draw pattern bin (*i.e.,* very small, low, medium, or high) using Table 1 of the uniform efficiency descriptor test procedure. 10 CFR part 430, subpart B, appendix E, section 5.4.1. In the August 2016 SNOPR, DOE proposed to use the ''hybrid approach'' for all non-heat pump water heaters and the ''empirical regression approach'' for heat pump water heaters. 81 FR 59736, 59768 (August 30, 2016). DOE received no comments on the SNOPR regarding these conversion approaches and has, therefore, for the reasons provided in the August 2016 SNOPR, adopted the conversion factors found in Table III.6. DOE notes that the UEF conversion factor for consumer oil-fired storage water heaters has been updated based upon the addition of the Bock test data.

With the draw bin known, the UEF value based on the WHAM analytical model (*i.e.,* UEF_{WHAM}) can be calculated using the equation and the coefficient values presented in Table III.5 for all consumer non-heat pump storage water heater types, where EF is the energy factor; η_r is the recovery efficiency in decimal form; and P is the input rate in Btu/h. The UEF value can be calculated for heat pump storage water heater using the equation in Table III.6, which does not rely on the UEF_{WHAM} value from the analytical model.

$$UEF_{WHAM} = \left[\frac{1}{\eta_r} + \left(\frac{1}{EF} - \frac{1}{\eta_r}\right)\left(\frac{a\,P\,\eta_r - b}{c\,P\,\eta_r - d}\right)\right]^{-1}$$

TABLE III.5—COEFFICIENTS FOR THE ANALYTICAL UEF CONVERSION FACTOR FOR CONSUMER STORAGE WATER HEATERS, EXCEPT CONSUMER HEAT PUMP STORAGE WATER HEATERS

Draw pattern	a	b	c	d
Very Small	0.250266	57.5	0.039864	67.5
Low	0.065860	57.5	0.039864	67.5
Medium	0.045503	57.5	0.039864	67.5
High	0.029794	57.5	0.039864	67.5

In the equations in Table III.6, UEF_{WHAM} is a predicted value of UEF calculated based on the WHAM analytical model, EF is the measured energy factor, and DV is the drawn volume in gallons.

TABLE III.6—CONSUMER STORAGE UEF CONVERSION FACTOR EQUATIONS

Product class	Distinguishing criteria	Conversion factor
Consumer Gas-fired Water Heater	Non-Condensing, Standard or Low NO_X.	New UEF = $-0.0002 + 0.9858 \times UEF_{WHAM}$.
	Non-Condensing, Ultra-Low NO_X	New UEF = $0.0746 + 0.8653 \times UEF_{WHAM}$.
	Condensing	New UEF = $0.4242 + 0.4641 \times UEF_{WHAM}$.
Consumer Oil-fired Water Heater	N/A	New UEF = $-0.0033 + 0.9528 \times UEF_{WHAM}$.
Consumer Electric Water Heater	Conventional	New UEF = $0.4774 + 0.4740 \times UEF_{WHAM}$.
	Tabletop	New UEF = $-0.3305 + 1.3983 \times UEF_{WHAM}$.
	Heat Pump	New UEF = $0.1513 + 0.8407 \times EF + 0.0043 \times DV$.

b. Consumer Instantaneous Water Heaters

DOE tested 22 consumer instantaneous water heaters to both the EF and UEF test procedures, and AHRI supplied test data for 36 additional units of this water heater type.[10] [11] DOE presented the consumer instantaneous water heater test data and attributes in the August 2016 SNOPR. 81 FR 59736, 59773–59774 (August 30, 2016).

As proposed in the August 2016 SNOPR, DOE used an analytical method (see III.C.1) to convert the prior measured values of maximum GPM rating for consumer instantaneous water heaters to the measured values under the uniform efficiency descriptor test procedure, because it predicts the resultant data very closely and will broadly apply to those units not tested. 81 FR 59736, 59774 (August 30, 2016). As discussed in section III.C.1, DOE also developed an analytical method to estimate the change in prior measured values of energy factor under the energy factor test procedure to measured values of uniform energy factor under the uniform efficiency descriptor test procedure. DOE found that using the ''hybrid approach,'' which combined the DOE-developed analytical method with a regression analysis based on measured UEF test data (as described in III.C.3), resulted in the lowest RMSD value and proposed to use that conversion factor in the August 2016

[10] The AHRI submitted test data point identified as ''CIS–5'' was not used because the measured input rate was greater than the maximum allowable deviation from the rated input rate of 2 percent, resulting in an invalid test.

[11] To avoid weighting individual basic models more heavily than others in the development of the conversion factors, if multiple tests were conducted on either the same unit or same basic model of a water heater, the results were averaged to produce the values reported in the SNOPR. 81 FR 59736, 59773 (August 30, 2016). In one instance within the AHRI-submitted data for consumer instantaneous water heaters, three tests were conducted, where two tests were conducted on the same unit and another test was conducted on a unit of the same basic model. The two tests of the same unit were averaged, and this value was then averaged with the results of the test of the unit of the same basic model.

SNOPR. *Id.* DOE received no comments on the consumer instantaneous water heater conversion factors and, therefore, for the reasons given in the SNOPR, adopts the conversion factors proposed in the August 2016 SNOPR, as shown in Table III.8. In the equations in Table III.8, Max GPM_P is the maximum GPM based on the prior DOE test procedure, and UEF_{model} is the predicted UEF determined using the analytical model.

With the draw bin known, the UEF_{model} value can be calculated using the equation and the coefficient values presented in Table III.7 below for all consumer instantaneous water heater types, where η_r is the recovery efficiency expressed in decimal form, and A is dependent upon the applicable draw pattern and fuel type.

$$UEF_{model} = \frac{\eta_r}{1 + A\eta_r}$$

TABLE III.7—COEFFICIENTS FOR THE ANALYTICAL UEF CONVERSION FACTOR FOR CONSUMER INSTANTANEOUS WATER HEATERS

Draw pattern	A	
	Electric	Gas
Very Small	0.003819	0.026915
Low	0.001549	0.010917
Medium	0.001186	0.008362
High	0.000785	0.005534

TABLE III.8—CONSUMER INSTANTANEOUS UEF CONVERSION FACTOR EQUATIONS

Product class	Conversion factor
All Consumer Instantaneous	New Max GPM = 1.1461 × Max GPM_P.
Gas-fired Instantaneous	New UEF = 0.1006 + 0.8622 × UEF_{model}.
Electric Instantaneous	New UEF = 0.9847 × UEF_{model}.

c. Residential-Duty Commercial Water Heaters

i. Gas-fired Storage and Oil-fired Storage

DOE tested 8 residential-duty commercial storage water heaters to both the thermal efficiency and standby loss and UEF test procedures, and AHRI supplied test data for 12 additional units.[12] The August 2016 SNOPR presented the attributes and test results for residential-duty commercial storage water heaters used in the development of the conversion factors. 81 FR 59736, 59776–59777 (August 30, 2016).

DOE is not aware of an analytical method to use the measured values from the thermal efficiency and standby loss tests conducted under the prior commercial water heater test procedure to estimate the first-hour rating under the new test procedure. Therefore, DOE used the empirical regression approach (see section III.C.2) along with the best combination of water heater attributes to determine the first-hour rating conversion factor. The empirical regression for converting first-hour ratings presented in the August 2016 SNOPR was based on thermal efficiency and rated storage volume. 81 FR 59736, 59777 (August 30, 2016). DOE clarifies here that the storage volumes used in the empirical regression were measured storage volumes. The equations in Table III.10 and in the regulatory text have been updated to reflect this clarification. The next step in the conversion is to determine which draw pattern must be applied to convert to UEF. After the first-hour rating under the uniform efficiency descriptor is determined through the first-hour rating conversion factor, the converted value can be applied to determine the appropriate draw pattern bin (*i.e.,* very small, low, medium, or high) using Table 1 of the uniform efficiency descriptor test procedure. 10 CFR part 430, subpart B, appendix E, section 5.4.1. In the August 2016 SNOPR, DOE proposed to use the hybrid approach (see section III.C.3) to calculate the residential-duty commercial storage water heater conversion factor for the uniform energy factor. 81 FR 59736, 59777 (August 30, 2016). DOE received no comments on the uniform energy factor conversion for residential-duty commercial storage water heaters and for the reasons given in the SNOPR, continues use of the hybrid approach in this final rule. Therefore, the resulting conversion factors adopted in this final rule are the same as those proposed in the August 2016 SNOPR, and are shown in Table III.10.

With the draw bin known, the UEF_{rd} value (*i.e.,* the predicted UEF value from the analytical method alone) can be calculated using the equation and the coefficient values presented in Table III.9 below for all residential-duty commercial storage water heater types, where P is the input rate in Btu/h; Et is the thermal efficiency; SL is the standby loss in Btu/h; and F and G are coefficients as specified in the table below based on the applicable draw pattern.

$$UEF_{rd} = \left[\frac{1}{E_t} + F * SL\left(G - \frac{1}{P\,E_t}\right)\right]^{-1}$$

[12] If multiple tests were conducted on either the same unit or same basic model of a water heater, the results were averaged to produce the values reported in the August 2016 SNOPR. 81 FR 59736, 59776 (August 30, 2016).

TABLE III.9—COEFFICIENTS FOR THE ANALYTICAL UEF CONVERSION FACTOR FOR RESIDENTIAL-DUTY COMMERCIAL STORAGE WATER HEATERS

Draw Pattern	F	G
Very Small	0.821429	0.0043520
Low	0.821429	0.0011450
Medium	0.821429	0.0007914
High	0.821429	0.0005181

In Table III.10, V_m is the measured storage volume, in gallons.

TABLE III.10—RESIDENTIAL-DUTY COMMERCIAL STORAGE UEF CONVERSION FACTOR EQUATIONS

Product class	Conversion factor
All Residential-Duty Commercial Storage Water Heaters	New FHR = − 35.8233 + 0.4649 × V_m + 160.5089 × E_t. New UEF = − 0.0022 + 1.0002 × UEF_{rd}.

ii. Electric Instantaneous

As stated in the August 2016 SNOPR, the maximum GPM conversion for residential-duty commercial electric instantaneous water heaters was found using the empirical regression approach (see section III.C.2), and the uniform energy factor conversion was found using the analytical methods approach (see section III.C.1). 81 FR 59736, 59778 (August 30, 2016). DOE received no comments about the maximum GPM or UEF conversions for residential-duty commercial electric instantaneous water heaters, and, therefore, for the reasons given in the August 2016 SNOPR, adopts the equations below, where Q is the input rate in kBtu/h; E_t is the thermal efficiency; and A is found using the coefficients presented in Table III.11. The appropriate draw pattern bin (*i.e.,* very small, low, medium, or high) can be found by using the converted New Max GPM value and Table 1 of the uniform efficiency descriptor test procedure. 10 CFR part 430, subpart B, appendix E, section 5.4.1. There is no further UEF conversion equation needed, as the analytical method was used directly, rather than the ''hybrid'' regression-analytical approach used for other water heaters, and $UEF_{rd,model}$ is equal to the New UEF.

New Max GPM = 0.0146 + 0.0295 *Q

$$UEF_{rd,model} = \frac{E_t}{1 + AE_t}$$

TABLE III.11—COEFFICIENTS FOR THE ANALYTICAL UEF CONVERSION FACTOR FOR RESIDENTIAL-DUTY COMMERCIAL ELECTRIC INSTANTANEOUS WATER HEATERS

Draw pattern	A
Very Small	0.003819
Low	0.001549
Medium	0.001186
High	0.000785

d. Grid-Enabled Storage Water Heaters

EPCA defines a ''grid-enabled water heater'' as an electric resistance water heater that has a rated storage volume above 75 gallons, is equipped with an activation lock that prevents the water heater from delivering more than 50 percent of the rated first-hour rating unless unlocked, and bears a permanent label advising end-users of the intended and appropriate use of the product. (42 U.S.C. 6295(e)(6)(A)(ii))

At the time of the analysis for the SNOPR, DOE was unable to identify any grid-enabled water heaters available on the market which met the statutory definition, nor does it have test data specific to grid-enabled water heaters. However, due to the similarities in design between grid-enabled water heaters (which by definition are electric resistance water heaters) and consumer electric storage water heaters below 55 gallons that use electric resistance elements, DOE based its proposed conversion factor and energy conservation standard derivation for grid-enabled water heaters on the consumer electric storage water heater test data and the associated conversions for below-55-gallon consumer electric storage water heaters. 81 FR 59736, 59778–59779 (August 30, 2016).

In response, A.O. Smith commented that while the commenter would have preferred using test data from electric storage water heaters at or above 75 gallons, DOE's approach to the conversion was reasonable. (A.O. Smith, No. 28 at p. 5) In contrast, the NRECA Joint Stakeholders [13] stated that the conversion for grid-enabled water heaters should be based on real test data and that there was not enough time to review the conversion. (NRECA Joint Stakeholders, No. 30 at p. 2) Similarly, Rheem stated that the differences in design and functionality from regular electric resistance water heaters to grid-enabled water heaters resulting from the additional requirements on grid-enabled water heaters (*e.g.,* the activation lock), as well as the change in storage volume, may affect test results, and this cannot be represented through data extrapolation and regression analysis. Rheem further stated that it expects grid-enabled models to be introduced into the market in the near term, and suggested that DOE should postpone the development of a conversion factor for grid-enabled water heaters until such time that test data can be used to derive the conversion. (Rheem, No. 32 at pp. 4–6) In addition, AHRI and several manufacturers raised concerns regarding the test method for grid-enabled water heaters. AHRI stated that the UEF test procedure does not clearly specify how the activation lock first-hour rating requirement will be validated or how

[13] The National Rural Electric Cooperative Associations (NRECA) submitted a comment on behalf of itself, the Natural Resources Defense Council, Edison Electric Institute, Steffes Corporation, Rheem Manufacturing Company, Vaughn Thermal Corporation, and American Public Power Association under the title ''Joint Stakeholders.'' This comment is referred to as ''NRECA Joint Stakeholders'' throughout this final rule, as another joint comment was also submitted.

the thermostat should be set for a grid-enabled water heater. (AHRI, No. 27 at p. 3) A.O. Smith and Rheem supported AHRI's test procedure comments and urged DOE to adopt a specific method of test for grid-enabled water heaters. (A.O. Smith, No. 28 at p. 4; Rheem, No. 32 at p. 5)

Since the publication of the August 2016 SNOPR, four models of grid-enabled storage water heaters have been added to the AHRI database.[14] DOE was able to find product literature published on the manufacturer's Web site for only one the four models, which is manufactured by Vaughn. The Vaughn model is an 80-gallon electric resistance water heater with an input of 4.5 kW and an EF of 0.93. Product literature indicates the model has 3 inches of polyurethane foam insulation, two heating elements, and is equipped with a software activation lock to prevent the unit being used outside of a utility-sponsored load management or demand response program.[15] As one would expect, this model appears to be essentially the same as an electric resistance storage water heater, but with an activation lock control that limits the capacity unless the unit is used in a utility-sponsored load management or demand response program. DOE has no reason to expect that future designs for grid-enabled water heaters would differ significantly from Vaughn's design, and after considering the design of the grid-enabled water heater currently on the market from Vaughn, DOE disagrees that there are significant differences in design and functionality between regular electric resistance water heaters and grid-enabled water heaters that would affect the results under either the old or the current test procedure. DOE notes that a typical consumer electric water heater at or below 55 gallons would have a rated input of 4.5 kW, two resistance heating elements, and three to four inches of insulation, which is similar to the characteristics of the Vaughn model. One significant difference is the change in storage volume; however, DOE continues to conclude that the difference is a matter of scale, not technology, and, thus, would be well modeled by the WHAM analytical model. Further, DOE tested one 80 gallon electric storage water heater (which, as noted above, is expected to be similar in design to grid-enabled water heaters), and the measured UEF for the high draw pattern was 0.94, which is greater than the UEF standard level proposed in the August 2016 SNOPR of 0.92 for this size unit. 81 FR 59736, 59784 (August 30, 2016).

Regarding concerns related to the applicability of the test procedure, DOE notes that there is no separate test method for grid-enabled water heaters. Grid-enabled water heaters should be tested pursuant to the test procedure in Appendix E to Subpart B of part 430. As discussed above, DOE expects that designs for grid-enabled water heaters will, for the most part, consist of an electric resistance storage water heater that is equipped with a control mechanism to limit the capacity until activated by a utility company (*i.e.,* an activation lock). Thus, DOE sees no reason why the current Federal test method would not be applicable and representative of grid-connected water heaters. DOE believes manufacturers may have questions regarding set-up of grid-connected water heaters pursuant to the test method for which DOE is willing to work through. To the extent that the current test procedure is inapplicable, any interested person may submit a petition for waiver for a particular basic model from any requirements of the Federal test procedure, upon the grounds that the basic model contains one or more design characteristics which either prevent testing of the basic model according to the prescribed test procedures or cause the prescribed test procedures to evaluate the basic model in a manner so unrepresentative of its true energy and/or water consumption characteristics as to provide materially inaccurate comparative data. 10 CFR 430.27(a)(1).

After considering the comments, DOE has decided to use the conversion factors for consumer electric storage water heaters below 55 gallons of storage volume for grid-enabled water heaters as initially proposed in the August 2016 SNOPR and shown below. In the equation for the converted first-hour rating (''New FHR''), FHR_P is the first-hour rating based on the EF test procedure in gallons. The converted UEF (''New UEF'') equation is based on the UEF_{WHAM} (resulting from the analytical method), which is calculated as shown in the equation below where η_r is the recovery efficiency based on the EF test procedure, P is the input rate in Btu/h, and a, b, c, and d are coefficients to the WHAM analytical model and can be found using Table III.5.

$$\text{New FHR} = 9.2827 + 0.8092 \times FHR_P$$

$$UEF_{WHAM} = \left[\frac{1}{\eta_r} + \left(\frac{1}{EF} - \frac{1}{\eta_r}\right)\left(\frac{a\,P\,\eta_r - b}{c\,P\,\eta_r - d}\right)\right]^{-1}$$

$$\text{New UEF} = 0.4474 + 0.4740 \times UEF_{WHAM}$$

3. Energy Conservation Standard Derivation

After developing the mathematical conversion factors to convert from the prior tested values under the EF metric to the tested values under the UEF metric, DOE used the conversion factors to translate the energy conservation standards to be in terms of UEF. In the August 2016 SNOPR, DOE developed a methodology for translating the existing energy conservation standards to UEF, termed the ''representative model'' method. 81 FR 59736, 59779–59780. The ''representative model'' method, consists of the following steps for determining the minimum UEF standard:

1. Using the DOE compliance certification database and AHRI Directory, for minimally-compliant models, determine the unique rated storage volumes available on the market prior to July 13, 2015 (the date on which DOE's requirement that rated storage volume equal the mean of the measured storage volume was effective).[16]

2. For each rated storage volume identified in step 1, find average values of conversion factor inputs (*i.e.,* input rating and recovery efficiency for consumer water heaters (except consumer heat pump water heaters), and input rating for residential-duty commercial water heaters) for minimally-compliant basic models in each product class. (For product classes where no minimally-compliant models exist on the market, DOE used other

[14] See: *https://www.ahridirectory.org/ahridirectory/pages/home.aspx.*

[15] See: *http://www.vaughncorp.com/utilities/.*

[16] As discussed in section III.D.3.a, in the July 2014 final rule, DOE amended the certification requirements for consumer water heaters to specify that the rated storage volume of a water heater must be the mean of the storage volumes measured over the sample of tested units. 79 FR 40542, 40565–40566 (July 11, 2014)

methods to estimate the characteristics of minimally-compliant models, which were discussed in detail in the August 2016 SNOPR. 81 FR 59736, 59780–59782 (August 30, 2016))

3. Calculate the energy conservation standard (in terms of energy factor for consumer water heaters and thermal efficiency/standby loss for residential-duty commercial water heaters (with input rate for determining standards found from step 2)) for each product class based on the rated storage volume, as reported in the DOE compliance certification database and AHRI Directory at the time of this analysis (before DOE's requirement that rated storage volume equal the mean of the measured storage volume was effective).

4. Using applicable average values for conversion factor inputs determined in step 2 and the applicable minimum energy conservation standards calculated in step 3, calculate the equivalent UEF for minimally-compliant models at each discrete rated storage volume (determined in step 1) using the appropriate conversion factor for the product class.

5. Adjust the rated storage volumes to estimate the rated storage volume that would reflect DOE's requirement at 10 CFR 429.17(a)(1)(ii)(C) that rated storage volume equal the mean of the measured storage volume of all units within the sample. DOE estimated that for electric storage water heaters, the rated storage volume would decrease by 10 percent, and for gas-fired and oil-fired water heaters, the rated storage volume would decrease by 5 percent.

6. For each product class and draw pattern, using a simple regression, find the slope and intercept where the independent variable is the range of adjusted rated storage volumes (determined in step 5) and the dependent variable is the UEF values associated with the rated storage volumes and specific draw pattern calculated in step 4.

AHRI commented that for models at a discrete rated volume and with equivalent efficiency characteristics, the highest input rate should be used instead of the average input rate, as a higher input rate would result in a lower measured EF or UEF. AHRI commented further that DOE should release the actual derivations of the values used by DOE, as it believes the use of average input rates reflects an error in the DOE analysis. (AHRI, No. 27 at p. 3) DOE notes that the ''representative model'' method was not intended to analyze the worst-case EF or UEF at a particular volume, but rather to examine typical units that are representative of minimally compliant models at that volume. Thus, this method does not ensure all models on the market convert to at or above the standards. Rather, as the last step is the application of a linear regression, some of the representative models will be below the standards. This corresponds to the potential for some models on the market to have UEF ratings below the converted standards, which is to be expected as discussed in section III.A. Models that fall below the converted UEF standards may qualify for DOE's enforcement policy, as discussed in section III.E. Thus, DOE continued to use a representative value for the input rate in its calculations, rather than using the maximum input rate as suggested by AHRI. Based on the other comments received from AHRI and other stakeholders, in regards to the mathematical method DOE implemented and discussed subsequently in the next paragraph, DOE does not believe releasing the actual derivations would provide any benefit to the analysis. DOE has released the summary data in docket for each step in the rulemaking process such that its data is transparent and the results of the calculations are published as well. Any stakeholder can run a regression analysis in Excel on the dataset it wishes to mirror. Minor adjustments to specific standard levels were requested and addressed independently.

Several commenters submitted an analysis of converted UEF values based on published data, and compared those values to the proposed UEF standards. DOE notes that many of the comments received in response to the SNOPR appear to contain calculation errors. Thus, DOE seeks to clarify the process for applying the conversion factors, and has slightly re-organized the regulatory text at the end of this document in an attempt to clarify the process for applying the conversion factors. When converting the first-hour rating or maximum GPM values, apply the appropriate delivery capacity conversion equation, and round to the nearest gallon for the converted first-hour rating and nearest 0.1 gpm for the converted maximum GPM. Use this rounded delivery capacity value to determine the appropriate draw pattern bin (very small, low, medium, or high) as initially specified in either Table 1 or Table 2 of the uniform efficiency descriptor test procedure, and as also adopted in 10 CFR 429.17 in this final rule. 10 CFR part 430, subpart B, appendix E, section 5.4.1. With the draw pattern known, apply the appropriate UEF conversion for that draw pattern and water heater type, and round the result to the hundredths decimal place. To calculate the applicable minimum EF standard for a particular model, use the rated storage volume, as determined before July 13, 2015 (*i.e.,* before the requirement that the rated storage volume equal the mean of the measured storage volumes from testing was applicable) directly in the applicable equation. To calculate the minimum UEF for a particular model, either use the measured storage volume from testing or, if that information is not available, correct the rated storage volume to approximate the rated storage volume under the requirement that the rated storage volume be the mean of the measured volumes of the test sample. For electric storage water heaters and fossil fuel-fired storage water heaters, DOE applied a 10 percent and 5 percent decrease, respectively, to the rated storage volume to approximate the measured storage volume. Round the approximated measured storage volume to the nearest gallon, and use it to determine the minimum UEF requirement. Round the minimum EF and UEF values to the hundredths decimal place. DOE notes that in order to de-identify the models tested, the August 2016 SNOPR did not present rated values, so commenters, therefore, could not determine the minimum EF standard (as they did not have the rated storage volume) or compare the measured EF results to the rated EF. Minimum UEF values could be determined by using the stated measured storage volume rounded to the hundredths decimal place. In the discussion below, when comparing either a measured or converted EF or UEF value to the appropriate energy conservation standard, all values have been rounded to the hundredths decimal place.

California Investor Owned Utilities [17] (CA IOUs) stated that they support the proposed conversion equations. (CA IOUs, No. 25 at p. 2) ASAP Joint Stakeholders [18] provided a table with the number of models, by water heater type, in the AHRI Directory that did not meet the proposed UEF standards after having the appropriate conversion factors applied. The ASAP Joint

[17] Pacific Gas and Electric Company, Southern California Gas Company, San Diego Gas and Electric, and Southern California Edison collectively submitted a comment under the title California Investor Owned Utilities (CA IOUs).

[18] The Appliance Standards Awareness Project (ASAP) submitted a joint comment on behalf of itself, the American Council for an Energy Efficient Economy, the Northeast Energy Efficiency Partnerships, the Northwest Energy Efficiency Alliance, and the Alliance to Save Energy collectively. This comment is referred to as ''ASAP Joint Stakeholders'' throughout this final rule.

Stakeholders stated that the distribution of non-compliant models is not evenly distributed across the water heater product classes, and in particular, that DOE should reexamine its converted standard for tabletop water heaters. For all other product classes, the ASAP Joint Stakeholders commented in support of the proposed conversions. (ASAP Joint Stakeholders, No. 31 at pp. 1–3) Rheem also stated that none of the tabletop water heaters convert to pass the proposed standards and requested the levels be decreased by 0.04. (Rheem, No. 32 at p. 11) DOE examined the commenters' results for tabletop water heaters and believes that the commenters made an error in the calculation of non-complying models. After applying the proposed conversions for consumer electric storage and tabletop water heaters, DOE found that no models would have converted UEF values below the proposed UEF standards. However, for all other water heater types, DOE found similar results to those reported by ASAP Joint Stakeholders. Therefore, DOE has determined that no adjustments to the proposed energy conservation standards for tabletop storage water heaters are necessary.

For consumer gas-fired storage water heaters greater than or equal to 20 gallons but less than or equal to 55 gallons in the high draw pattern, Bradford White recommended the proposed level be decreased by 0.015. (Bradford White, No. 26 at p. 4) AHRI commented that 16 of the 62 consumer gas-fired storage water heater basic models tested for this rulemaking tested into the high draw pattern had measured UEF values below the proposed standard and requested the proposed level be decreased by 0.02. (AHRI, No. 27 at p. 2) Rheem commented that 37 of the 86 consumer gas-fired storage water heater basic models in the high draw pattern in the AHRI Directory convert to below the proposed standard and requested the proposed level be decreased by 0.01. (Rheem, No. 32 at p. 9) In reviewing its test data for the August 2016 SNOPR, DOE has found that 9 of the 61 [19] models tested had measured UEF values below the proposed standard, but that 6 of these 9 models also had measured EF values below the existing EF standard. Thus, most models with measured EF values at or above the current EF standard had measured UEF values at or above the proposed UEF standard. Further, as discussed in section III.A, DOE expects certain models that meet the current EF standard will not meet the UEF standard when tested. DOE accounts for this possibility through applying an enforcement policy to certain models, as discussed in section III.E. Further, when DOE analyzed converted values for models on the market based on their published ratings, as was done by Rheem,[20] DOE found that for consumer gas-fired storage water heaters that would be classified in the high draw pattern based on their converted first-hour rating, none have converted UEF values below the UEF standard level proposed in the August 2016 SNOPR. Thus, DOE concludes an adjustment to the proposed UEF standard for consumer gas-fired storage water heaters in the high-use draw pattern bin is not warranted.

For consumer gas-fired storage water heaters less than or equal to 55 gallons in the low-draw-pattern bin, Rheem stated that it found two EF-compliant models that would have a converted UEF 0.01 below the proposed standard, the data for which was supplied to DOE by AHRI during the development of the SNOPR. Further, Rheem stated that the SNOPR test data does not include any consumer gas-fired storage water heaters with a measured first-hour rating that would place the model in the low draw pattern and that it cannot identify these models within the tested data. Therefore, Rheem requested the proposed standards be decreased by 0.01. (Rheem, No. 32 at p. 9) In examining the August 2016 SNOPR test data, DOE notes that AHRI supplied test data for the consumer gas-fired storage water heaters identified as CS–66, CS–70, CS–89, CS–99, and CS–137, for which the application of the NOPR conversion factors for first-hour ratings would result in a converted first-hour rating that would classify the models in the low-draw-pattern bin. However, when applying the August 2016 SNOPR conversion factors, these models have converted first-hour ratings that would classify them in the medium-draw-pattern bin, and no models within the entire test data set have a converted first-hour rating that would result in testing to the low draw pattern. CS–89 and CS–90 (identified by AHRI as models CGS–17 and CGS–18, respectively) were tested to the low draw pattern, and AHRI provided those test results in response to the NOPR. DOE notes that CS–89 has a measured EF 0.05 above the minimum EF and a measured UEF 0.06 above the minimum UEF, while CS–90 has a measured EF 0.01 above the minimum EF and a measured UEF 0.01 above the minimum UEF. Therefore, DOE has determined that a decrease in the efficiency level for consumer gas-fired storage water heaters in the low draw pattern is not warranted.

For consumer electric storage water heaters less than or equal to 55 gallons in the low draw pattern, Bradford White recommended the proposed level be decreased by approximately 0.01 UEF to make the associated formula to 0.9160—($0.0003 \times V_r$). (Bradford White, No. 26 at p. 4) For those same water heaters, AHRI commented that all 11 basic models that were tested had measured UEF values below the proposed standard and requested the proposed standard be decreased by 0.01. (AHRI, No. 27 at p. 2) Rheem stated that 21 of the 31 electric storage water heaters that would have a converted first-hour rating that would classify them in the low draw pattern in the AHRI directory have converted UEF values below the proposed UEF standard, and that most of those models are around 30 gallons. Rheem requested that either the proposed standard be decreased by 0.01 or the slope be adjusted to allow the 30 gallon units to pass. (Rheem, No. 32 at pp. 9–10)

Rheem also commented that under the EF test procedure, electric storage water heaters only had to be tested once, and provisions were in place to allow multiple wattage configurations to be rated using the one test. Under the UEF test procedure, Rheem noted that electric storage water heaters now have to test each wattage to the first-hour rating test, and if a lower wattage puts the model in a different draw bin, the different UEF standard in that lower bin may not be met, whereas that configuration complied with the corresponding EF standard. Rheem commented that this essentially means the UEF standards for these draw patterns are more stringent than the EF standards. (Rheem, No. 32 at p. 10)

In examining the August 2016 SNOPR test data, DOE found that 12 of the 13 consumer electric storage water heaters with storage volumes below 55 gallons that were tested in the low draw pattern had measured UEF values below the proposed standard; however, 9 of those 12 models also had measured EF values

[19] CS–95 has a measured first-hour rating of 74.6 gallons and was tested to the medium draw pattern. If the first-hour rating is rounded to the nearest gallon, it would have been tested in the high draw pattern.

[20] To convert from represented values under the previous metrics (*i.e.,* EF, TE, and SL) to represented values under the UEF metric, manufacturers should utilize measured values obtained during testing under the previous test methods, where those values are required in the conversion factor equations. DOE provides an analysis of converted values based on published ratings for illustrative purposes only, in order to respond to commenters who performed analysis based on the rated values.

below the EF energy conservations standards. This indicates that for most models, the relationship between the measured EF and EF standard (*i.e.,* whether the measured EF is higher or lower than the standard) holds true for UEF as well. In response to Rheem's comment regarding testing of electric storage water heaters, DOE acknowledges that more testing is required under the UEF test procedure as compared to the EF test procedure. DOE notes that the UEF standards in the lower draw patterns are less stringent and are based on models with characteristics representative of that draw pattern. Thus, they should be applicable to electric storage water heaters being tested at lower element wattages and avoid the situation that Rheem describes where an electric storage water heater is compliant with one heating element wattage, but not with another. In addition, DOE reiterates that it expects certain models that meet the current EF standard will not meet the UEF standard when tested, and accounts for this possibility through an enforcement policy for certain models, as discussed in section III.E. Based on the foregoing, DOE has determined an adjustment to the proposed standard for electric storage water heaters is not warranted.

For consumer gas-fired instantaneous water heaters less than 2 gallons, Bradford White, AHRI, and Rheem recommended that the proposed level be decreased to those proposed in the April 2015 NOPR (*i.e.,* 0.80 for all draw patterns). AHRI argued that the actual difference between the NOPR and SNOPR levels of 0.003 (0.804 as compared to 0.807) resulted in a 0.01 change in the UEF standard level due to rounding. AHRI commented further that the converted UEF values for 20 of the 96 basic models in the AHRI Directory are less than the minimum UEF values proposed in the August 2016 SNOPR. Rheem stated that many models, specifically those in the low and medium draw pattern, are not meeting the proposed standard through the use of the conversion factor. (Bradford White, No. 26 at p. 4; AHRI, No. 27 at p. 2; Rheem, No. 32 at p. 11) In examining the August 2016 SNOPR test data, DOE found that 5 of the 53 consumer gas-fired instantaneous water heater models that were tested had measured UEF values below the proposed standards; however, 4 of the 5 models also had measured EF values below the existing EF standards. This indicates that for most models the relationship between the measured EF and EF standard (*i.e.,* whether the measured EF is higher or lower than the standard) holds true for UEF as well. Further, as was done by commenters, DOE also examined the number of models that would pass the proposed UEF standard based on their converted UEF determined using published values, and found that about 20 percent of the consumer gas-fired instantaneous water heaters on the market would have converted UEF values less than the SNOPR proposed standards, and all of the converted values were 0.01 below. All of these models were in the medium and high draw pattern bins. As stated above, the ''representative model'' method was not derived to ensure all models on the market convert to pass the converted standards. Rather, some models are expected to fall below the converted UEF standards, and these models are accounted for by the enforcement policy provisions discussed in section III.E. Therefore, DOE has decided to adopt the conversion factors proposed in the August 2016 SNOPR.

For consumer oil-fired storage water heaters in the high draw pattern, AHRI and Bock commented that two Bock 32E oil-fired storage water heaters were tested to the EF and UEF test procedures, and the average tested UEF value was below the proposed UEF standard. Further, the commenters noted that a similar model tested by DOE, identified in the August 2016 SNOPR as CS–27, tested below the proposed minimum. Therefore, AHRI and Bock requested that the proposed level be decreased by 0.02. (AHRI, No. 27 at p. 2; Bock, No. 29 at p. 2) As stated in section III.D.2.a, CS–27 is the Bock 32E, so DOE included the two Bock supplied test data points by averaging the results with those of CS–27, and derived new first-hour rating and UEF conversion factors. These conversion factors were carried through the analysis to derive updated energy conservation standards. The Bock 32E has a rated storage volume of 32 gallons (which DOE assumed would be adjusted to 30 gallons after the 5 percent decrease is applied to represent the value based on the mean of the measured volumes, and the value is rounded to the nearest gallon) and is in the high draw pattern which corresponds to a minimum UEF of 0.64. This updated minimum UEF value is equal to the mean of the measured UEF values for the Bock 32E that were submitted by Bock. Therefore, for the final rule, DOE is adopting the standards derived using the test data supplied by Bock.

For residential-duty commercial gas-fired storage water heaters in the high draw pattern, Rheem commented that the proposed standard is more stringent than the existing minimum thermal efficiency and maximum standby loss standards. Rheem stated that a unit with a storage volume of 100 gallons that meets the existing energy conservation standards would have a converted UEF that is 0.01 below the proposed UEF standard. Therefore, Rheem recommended lowering the proposed standard by 0.01. (Rheem, No. 32 at p. 10) In examining the August 2016 SNOPR test data, DOE found that 4 of the 5 minimally compliant residential-duty commercial gas-fired storage water heater models that were tested had measured UEF values below the proposed standards; however, 2 of the 4 models also had measured TE and SL values below and the above the existing standards, respectively. This indicates that for most models, the relationship between the measured EF and EF standard (*i.e.,* whether the measured EF is higher or lower than the standard) holds true for UEF as well. Further, as was done by Rheem, DOE examined the minimally compliant residential-duty commercial gas-fired water heaters on the market by applying the conversions based on rated values, and found that fewer than half of the models would have a converted UEF value below the proposed UEF standard based on their rated values. As stated above, the ''representative model'' method was not intended to ensure all models on the market convert to pass the converted standards, and existing models that have UEF values below the converted standard could be addressed through DOE's enforcement policy, as discussed in section III.E. Further, as discussed in III.A, because DOE's goal is to maintain the same stringency of the existing standards under EF, SL and TE, and because individual models are impacted differentially by the change in test method and metric, some models that were previously minimally compliant will perform better than the translated UEF minimum, and others will perform worse. The possibility of such outcomes does not mean that the conversion methodology is improper and, based on the results of testing, DOE believes the UEF standard that was proposed is equivalent in stringency to the minimum thermal efficiency and maximum standby loss standards. Therefore, DOE is adopting the conversion factors for residential-duty commercial gas-fired water heaters. DOE notes that the residential-duty commercial gas-fired conversion factors adopted in this final rule vary slightly [21]

[21] For example, for the high draw pattern for residential-duty commercial gas-fired water heaters,

from those presented in the August 2016 SNOPR. 81 FR 59736, 59798 (August 30, 2016). To improve the accuracy and maintain consistency with other product classes, DOE removed certain individual models, which were found to be duplicates (*i.e.,* models with identical designs that were listed under different model numbers by manufacturers), from the final rule dataset (so as not to give additional weight to models sold under various brand names). However, DOE notes that the resultant equations are essentially the same as those presented in the August 2016 SNOPR, and when rounded to the nearest 0.01, do not impact the UEF standard level for any models currently available on the market.

For consumer gas-fired storage water heaters below 55 gallons, DOE requested comment on whether its tentative decision to use the standard and low NO_X conversion to derive the proposed standard was appropriate, as well as its tentative decision that a separate standard for ultra-low NO_X water heaters was not necessary. CA IOUs, Bradford White, AHRI, A.O. Smith, and Rheem all stated that that there should not be separate standards for ultra-low NO_X. (CA IOUs, No. 25 at p. 3; BWC, No. 26 at p. 6; AHRI, No. 27 at p. 10; A.O. Smith, No. 28 at p. 5; Rheem, No. 32 at p. 12) CA IOUs also commented that in future rulemakings, ultra-low NO_X water heaters should continue to be examined separately from standard and low NO_X water heaters. (CA IOUs, No. 25 at p. 3) Therefore, DOE has decided not to create separate standards for ultra-low NO_X water heaters and will continue use the standard and low NO_X conversion to derive the converted energy conservation standards.

For consumer gas-fired storage water heaters above 55 gallons, DOE requested comment on whether the assumptions it used to create representative models were reasonable. Bradford White, AHRI, A.O. Smith, and Rheem all stated that the assumptions made in the August 2016 SNOPR were reasonable. (BWC, No. 26 at p. 6; AHRI, No. 27 at p. 10; A.O. Smith, No. 28 at p. 5; Rheem, No. 32 at p. 12) Therefore, DOE continued to use the assumptions presented in the August 2016 SNOPR for this final rule.

For consumer electric instantaneous water heaters, no minimally-compliant models are available on the market. DOE sought comment regarding whether the assumption of 0.93 recovery efficiency reasonably approximated a minimally-compliant model. Rheem stated that the 0.93 recovery efficiency was reasonable and correct. (Rheem, No. 32 at p. 12) Therefore, DOE continued to use 0.93 as the assumed recovery efficiency for a representative consumer electric instantaneous water heater in this final rule. In the August 2016 SNOPR, DOE proposed one set of standards for consumer electric instantaneous water heaters with storage volumes below 2 gallons and another at or above 2 gallons. 81 FR 59736, 59781 (August 30, 2016). As discussed in section III.B.1, DOE is not adopting UEF conversion factors or converting the energy conservation standards to UEF for the water heater listed in Table III.1, which include consumer electric instantaneous water heaters with storage volumes greater than or equal to 2 gallons. Therefore, DOE has updated the consumer electric instantaneous water heater energy conservation standards to be based solely on representative units with storage volumes less than 2 gallons, and will consider electric instantaneous water heaters with storage volumes greater than or equal to 2 gallons in a future proceeding.

For grid-enabled water heaters, AHRI and A.O. Smith commented that the proposed minimum energy conservation standard levels are acceptable. (AHRI, No. 27 at p. 9; A.O. Smith, No. 28 at p. 5) NRECA Joint Stakeholders stated that any establishment of a UEF for grid-enabled water heaters should await product development, and DOE should explicitly state that products meeting the EF energy conservation standard in the Energy Efficiency Improvement Act of 2015 (EEIA 2015) are compliant. (NRECA Joint Stakeholders, No. 30 at pp. 1–3) Rheem asserted that as grid-enabled water heaters have only recently been introduced into the market and no test data are available for them, they will not be able to use the conversion factor to rate the UEF. Further, Rheem argued that it is not reasonable for industry to be required to determine UEF values for grid-enabled water heaters by testing in accordance with the UEF test procedure, when no testing of this class was performed by DOE to establish adequate UEF standards. Rheem also argued that DOE should postpone establishing a conversion factor and converted UEF standard for grid-enabled water heaters until a future rulemaking once more models are available to be tested. (Rheem, No. 32 at pp. 4–6) In response, DOE notes that when EEIA 2015 was enacted, there were no grid-enabled storage water heaters on the market. As explained in section III.D.2.d, DOE has concluded that, with respect to characteristics that might affect the outcome of the old and current test procedures, grid-enabled water heaters are not designed and do not function differently than consumer electric storage water heaters below 55 gallons. For the one grid-enabled storage water heater that has subsequently become available on the market and for which published product literature is available, the rated EF value is equal to the minimum EF standard (when rounded to the nearest 0.01), and the converted UEF value (estimated based on its rated values in the AHRI Directory) is equal to the proposed standard. This suggests that the conversion factor and proposed standards appropriately reflect the operation of grid-enabled water heaters. For these reasons, DOE has determined that its conversion of existing EF standards for grid-enabled water heaters to UEF standards are adequate for use at this time.

As originally stated in the August 2016 SNOPR and noted several times previously in this final rule, DOE acknowledges that the test data that serves as the basis for the August 2016 SNOPR show that some units which previously passed the EF, thermal efficiency, and/or standby loss energy conservation standards might fail the proposed UEF standards, while other units which previously failed might now pass. As discussed in section III.A, DOE recognizes that the conversion factors presented cannot perfectly model the behavior of all water heaters, as each water heater model will react differently to the changes in the test procedure based on the characteristics of that particular model. The standards presented in Table III.12 and Table III.13 were derived using a method that was intended to reduce the number of units that would either be non-compliant under the EF test method and compliant under the UEF test method or vice versa, so as to maintain the stringency of the updated standard. Nevertheless, to ensure that water heaters which previously passed the energy conservation standards under the ''old'' metrics (*i.e.,* EF, thermal efficiency, and/or standby loss) will continue to comply, pre-existing models that were first distributed in commerce prior to July 13, 2015 and that are compliant with the energy conservation standards denominated in the old metric are eligible to have compliance determined based on the old metric, as described below in section III.E, if the design of the model is unchanged.

the constant in the equation has changed from 0.6592 in the August 2016 SNOPR to 0.6597 in this final rule, a difference of 0.0005. The coefficient multiplied by the volume remains 0.0009, which is the same as proposed in the August 2016 SNOPR.

DOE restates the standards denominated in terms of uniform energy factor, as shown in Table III.12 and Table III.13 by product class and draw pattern.

TABLE III.12—CONSUMER WATER HEATER ENERGY CONSERVATION STANDARDS

Product class	Rated storage volume and input rating (if applicable)	Draw pattern	Uniform energy factor
Gas-fired Storage Water Heater	≥ 20 gal and ≤ 55 gal	Very Small	$0.3456 - (0.0020 \times V_r)$
		Low	$0.5982 - (0.0019 \times V_r)$
		Medium	$0.6483 - (0.0017 \times V_r)$
		High	$0.6920 - (0.0013 \times V_r)$
	> 55 gal and ≤ 100 gal	Very Small	$0.6470 - (0.0006 \times V_r)$
		Low	$0.7689 - (0.0005 \times V_r)$
		Medium	$0.7897 - (0.0004 \times V_r)$
		High	$0.8072 - (0.0003 \times V_r)$
Oil-fired Storage Water Heater	≤ 50 gal	Very Small	$0.2509 - (0.0012 \times V_r)$
		Low	$0.5330 - (0.0016 \times V_r)$
		Medium	$0.6078 - (0.0016 \times V_r)$
		High	$0.6815 - (0.0014 \times V_r)$
Electric Storage Water Heaters	≥ 20 gal and ≤ 55 gal	Very Small	$0.8808 - (0.0008 \times V_r)$
		Low	$0.9254 - (0.0003 \times V_r)$
		Medium	$0.9307 - (0.0002 \times V_r)$
		High	$0.9349 - (0.0001 \times V_r)$
	> 55 gal and ≤ 120 gal	Very Small	$1.9236 - (0.0011 \times V_r)$
		Low	$2.0440 - (0.0011 \times V_r)$
		Medium	$2.1171 - (0.0011 \times V_r)$
		High	$2.2418 - (0.0011 \times V_r)$
Tabletop Water Heater	≥ 20 gal and ≤ 120	Very Small	$0.6323 - (0.0058 \times V_r)$
		Low	$0.9188 - (0.0031 \times V_r)$
		Medium	$0.9577 - (0.0023 \times V_r)$
		High	$0.9884 - (0.0016 \times V_r)$
Instantaneous Gas-fired Water Heater.	< 2 gal and > 50,000 Btu/h	Very Small	0.80
		Low	0.81
		Medium	0.81
		High	0.81
Instantaneous Electric Water Heater.	< 2 gal	Very Small	0.91
		Low	0.91
		Medium	0.91
		High	0.92
Grid-Enabled Water Heater	>75 gal	Very Small	$1.0136 - (0.0028 \times V_r)$
		Low	$0.9984 - (0.0014 \times V_r)$
		Medium	$0.9853 - (0.0010 \times V_r)$
		High	$0.9720 - (0.0007 \times V_r)$

* V_r is the Rated Storage Volume (in gallons), as determine pursuant to 10 CFR 429.17.

TABLE III.13—RESIDENTIAL-DUTY COMMERCIAL WATER HEATER ENERGY CONSERVATION STANDARDS

Product class	Draw pattern	Uniform energy factor
Gas-fired Storage	Very Small	$0.2674 - (0.0009 \times V_r)$
	Low	$0.5362 - (0.0012 \times V_r)$
	Medium	$0.6002 - (0.0011 \times V_r)$
	High	$0.6597 - (0.0009 \times V_r)$
Oil-fired Storage	Very Small	$0.2932 - (0.0015 \times V_r)$
	Low	$0.5596 - (0.0018 \times V_r)$
	Medium	$0.6194 - (0.0016 \times V_r)$
	High	$0.6740 - (0.0013 \times V_r)$
Electric Instantaneous	Very Small	0.80
	Low	0.80
	Medium	0.80
	High	0.80

* V_r is the Rated Storage Volume (in gallons), as determined pursuant to 10 CFR 429.44.

Storage Volume Requirements

In the July 2014 final rule, DOE amended the certification requirements for consumer water heaters to specify that the rated storage volume of a water heater must be the mean of the storage volumes measured over the sample of tested units. DOE also added enforcement provisions that state that if the rated storage volume is within 5 percent of the mean of the measured values of storage volume, then that rated value will be used as the basis for calculation of the required uniform energy factor for the basic model; otherwise, the mean of the measured storage volume values will be used as the basis for calculation of the required

uniform energy factor for the basic model. 79 FR 40542, 40565–40566 (July 11, 2014).

In the August 2016 SNOPR, DOE proposed to decrease the 5 percent tolerance to 2 percent of the mean of the measured value of storage volume. 81 FR 59736, 59786 (August 30, 2016). As discussed in the August 2016 SNOPR, based on testing performed on a sample of 24 units, DOE observed that a tolerance of 2 percent more accurately reflects the actual level of variability that manufacturers are currently able to achieve and allows for slightly more variability than what was observed in the sample set. *Id.*

Bradford White, AHRI, Rheem, and Giant Factories, Inc. (Giant) commented that they are opposed to the decrease in storage volume tolerance from ±5 percent to ±2 percent. Bradford White and AHRI also argued that the sample size used as the basis for the new requirements was too small and not statistically sound. (Bradford White, No. 26 at p. 3; AHRI, No. 27 at p. 4; Rheem, No. 32 at p. 8; Giant, No. 33 at p. 2) Bradford White and Rheem alleged that DOE did not consider the manufacturing costs associated with controlling tank volume variability. (Bradford White, No. 26 at p. 3; Rheem, No. 32 at p. 8) Rheem also stated that the costs of this change could amount to hundreds of thousands of dollars. (Rheem, No. 32 at p. 6) Giant and Rheem commented that because the rated volume is part of the water heater safety certification, any change in the rated storage volume would require a manufacturer to update its safety certification reports and perform validation testing at a cost that is not negligible. (Rheem, No. 32 at pp. 7–8; Giant, No. 33 at p. 2) Rheem requested clarification as to whether manufacturers will be permitted to advertise a different ANSI/UL 174 rated volume than the DOE UEF test procedure rated volume. (Rheem, No. 32 at pp. 7–8) Bradford White, AHRI, and Rheem argued that the requirement to round to the nearest gallon uses up some of the 2 percent tolerance and causes the tolerance to become more stringent than 2 percent. For smaller gallon sizes, the commenters asserted this results in almost no tolerance.[22] (Bradford White, No. 26 at p. 3; AHRI, No. 27 at p. 4; Rheem, No. 32 at pp. 7–10) AHRI requested clarification of the exact consequences of measuring a volume that is beyond 2 percent of the rated volume during a test with a passing measured UEF, particularly if the measured volume places the water heater into a different product category such as not a grid-enabled or above 55 gallons. (AHRI, No. 27 at p. 5) A.O. Smith also urged DOE to provide further clarification regarding any potential liability that a manufacturer may incur if the measured volume during an enforcement test is more than 2 percent outside the newly defined DOE rated volume, and if there is any further consequence beyond that the measured volume will be used for the enforcement test and to determine the minimum efficiency. (A.O. Smith, No. 28 at p. 2) Giant stated that for products such as grid-enabled water heaters, a model with a measured volume of 70 gallons and a rated volume of 76 gallon model would now have a maximum rated volume of 71.4 gallons and no longer meet the definition of a grid-enabled water heater. (Giant, No. 33 at p. 2) Bradford White and Giant commented that reducing the tolerance to 2 percent could result in an increase in energy use as manufacturers redesign their products to increase the tank size to a nominal value, adding that this change would lead to significant confusion in the market. (Bradford White, No. 26 at p. 3; Giant, No. 33 at pp. 2; Rheem, No. 32 at pp. 7–10)

After considering the comments, DOE performed a statistical analysis based on a t-distribution rather than a normal distribution as was done for the August 2016 SNOPR, which DOE concluded to be more appropriate for the number of samples available. For each model, DOE calculated the t-based 95-percent confidence interval, which corresponds to the maximum amount of deviation from the mean one would expect if a new sample were tested. DOE found a maximum percent deviation from the mean of three percent using this method; therefore, DOE is adopting a three-percent tolerance on measured storage volume instead of the proposed two percent. The three-percent tolerance more accurately reflects the level of variability that manufacturers are currently able to achieve. In addition, if manufacturers do not certify the rated storage volume in accordance with the requirements of 10 CFR 429.17 (*i.e.,* as the mean of the measured storage volume of the sample), the certified value may be considered invalid which could lead to DOE investigating the data underlying the certification in accordance with 10 CFR 429. With regard to the manufacturing costs associated with controlling tank volume variability, DOE notes that its test data show that manufacturers already control tank volume variability within the bounds being adopted, and thus, additional costs are not expected as manufacturers already appear to have this capability. Regarding potential increased energy usage, DOE acknowledges that a redesign of the tank size to a nominal value is possible. If the redesigned tank is larger than the previous tank, then it would likely use slightly more energy. DOE also acknowledges that there may be costs associated with safety certification of a re-designed model. However, DOE notes that the requirement that the rated volume be the mean the measured volumes in the test sample already exists at 10 CFR 429.17(a)(1)(ii)(C), and this change only modifies the existing tolerance in response to comments. Thus, the rated efficiency should already be equal to the mean the measured volumes in the test sample, and as discussed above, DOE's data show that manufacturers already control their volume within this tolerance. Finally, in response to Giant's comments that certain products that have a volume threshold, such as grid-enabled water heaters, may need to be reclassified based on the new storage volume requirements, that is correct. However, DOE contends that if the manufacturer was properly certifying to the July 2014 test procedure, there would be no reclassification needed.

E. Enforcement Policy

In the August 2016 SNOPR, DOE acknowledged that the nature of the conversion process could conceivably result in models very close to the standard falling below the converted standard. Recognizing that there is value in reducing the uncertainty for manufacturers and that there is no significant public harm in letting manufacturers continue sales of certain models, DOE explained its planned approach for basic models where units of individual models within the basic model were manufactured prior to July 13, 2015. 81 FR 59736, 59876–59787 (August 30, 2016). Specifically, DOE explained that in assessment and enforcement testing, DOE will evaluate the compliance of a basic model using the test procedure in effect prior to July 13, 2015, under the following circumstance: The basic model must have been in distribution in commerce prior to July 13, 2015; the basic model must have been tested and properly certified to DOE as compliant with the applicable standard prior to July 13, 2015; and the units manufactured prior to July 13, 2015, must be essentially

[22] AHRI cited an example of a water heater with 27.5 gallons of measured storage volume. The rated storage volume would be rounded to 28 gallons, and the 0.5 gallon difference would represent a 1.8 percent deviation from the rated volume.

identical to the units manufactured on or after July 13, 2015.[23]

In the August 2016 SNOPR, DOE also recognized that manufacturers seek certainty that models introduced (*i.e.,* first distributed in commerce) on or after July 13, 2015, will not be subject to civil penalties. In enforcing the standard(s) for models introduced on or after July 13, 2015, and before the effective date of this final rule, DOE stated that it would consider whether these models meet the standard(s) as denoted using the ''old'' metric(s), the deviation from the UEF standard when tested using the UEF test procedure, and efforts taken by the manufacturer to ensure compliance with the converted UEF standards. 81 FR 59736, 59787 (August 30, 2016).

In response to the number of comments and questions DOE received in response to its enforcement policy as presented in the August 2016 SNOPR, DOE is explaining its enforcement policy in greater detail in this final rule, as well as offering minor clarifications in response to comments.

In the event that DOE selects a model for assessment testing that was first distributed in commerce prior to July 13, 2015, DOE will first assess compliance with the UEF standard. If testing indicates that an individual model is noncompliant with the UEF standard, DOE will then evaluate compliance using the ''old'' metrics (*i.e.,* EF or thermal efficiency/standby loss, as applicable). DOE may request that the manufacturer provide information to show that the selected model met the minimum efficiency standard using the test procedure in effect prior to July 13, 2015, and that it has not been redesigned since that time. (DOE discusses the issue of whether a model has been redesigned later within this section.) The model will continue to be subject to the enforcement policy as long as all units of that model manufactured remain identical[24] to the units of that model that were being manufactured prior to July 13, 2015. These models will continue to remain subject to the enforcement policy until compliance with amended energy conservation standards is required.

To address any confusion regarding this enforcement policy, the policy will apply to individual models, rather than basic models. DOE generally permits manufacturers great latitude in assigning basic model numbers, and manufacturers normally are not required to certify a model as a new basic model if modifications make the model more efficient. However, in implementing this policy, DOE believes that if a manufacturer makes changes to the design of an individual model, then DOE would no longer consider the individual model ''identical'' to the units manufactured prior to July 13, 2015, and the model would not be subject to the enforcement policy. In such a case, the manufacturer should conduct the requisite testing using the UEF test procedure and ensure the compliance of the model with the converted standard. Further, if a manufacturer groups, within the same basic model, an individual model subject to DOE's enforcement policy with one or more individual models not subject to the policy, DOE would not treat the individual model as subject to the policy. Thus, if certain individual models within a basic model are redesigned, those individual models would have to be recertified as a separate basic model (or basic models) from the original basic model.

A.O. Smith requested clarification as to what is meant by the requirement that units for ''grandfathered'' models must be essentially identical to those manufactured prior to July 13, 2015, as DOE proposed in the August 2016 SNOPR. (A.O. Smith, No. 28 at p. 4) Rheem also sought clarification regarding what will be considered sufficient evidence to demonstrate a ''grandfathered'' model met the provisions laid out by DOE. (Rheem, No. 32 at p. 16)

Regarding the term ''essentially identical'' used in the August 2016 SNOPR, as well as the term ''identical'' used in this final rule and intended to have the same meaning, units of models that were manufactured after July 13, 2015, must have the same design as those manufactured before July 13, 2015, to be subject to the enforcement policy described above. If an individual model is redesigned in any way, it would no longer be subject to the policy. However, DOE recognizes that manufacturers may need to make small changes, such as a change in component supplier, that do not change the design and, thus, would not constitute a different ''design'' from the units of that model that were manufactured prior to July 13, 2015. One example of such a change would be a change in foam suppliers, where the properties of the foam were the same. Such changes would not be considered as a re-design of the model as long as the new component is identical to the component it replaces in the original model. In such instances, DOE would consider the design identical to that of the original model, and units of that model would be subject to the enforcement policy provided they, at a minimum, meet the energy conservation standards in place under the ''old'' metrics (*i.e.,* energy factor, thermal efficiency, and standby loss). DOE understands that manufacturers typically change suppliers of components or source raw materials (*e.g.,* foam or metals) as part of their day-to-day operations, and DOE does not consider sourcing decisions for the same components to constitute a non-identical model. In contrast, if a manufacturer were to redesign the product by introducing a new burner design for a gas water heater or by changing the formulation of the foam for a storage-type water heater, DOE would consider these changes as redesigns because such changes affect the performance and operation of the model. In these instances, a manufacturer should: (1) Arrive at represented values expressed in UEF in accordance with the test procedure and the amendments in this final rule; (2) ensure that the redesigned individual model complies with the applicable UEF standard; and (3) properly certify the individual model before distribution in commerce (either as its own basic model or as part of a basic model that does not have any other individual models which are subject to the enforcement policy). As part of considering whether units of an individual model were identical, DOE would consider a manufacturer's records of the bills of materials for models initially distributed in commerce before July 13, 2015, and for

[23] The last requirement for this policy—that units must be essentially identical—bears explanation. DOE generally permits manufacturers great latitude in assigning basic model numbers, and manufacturers normally are not required to certify a model as a new basic model if modifications make the model more efficient. In the August 2016 SNOPR, DOE stated that, if a manufacturer makes changes to a model (that make it either more efficient or less), then it should conduct the requisite testing using the UEF test procedure and ensure the compliance of the model with the converted standard. The proposed policy was intended to give certainty to manufacturers with respect to historical models; it was not intended to provide a mechanism to perpetuate an obsolete test method and obsolete metrics.

[24] DOE acknowledges that in the August 2016 SNOPR it used the term ''essentially identical'' to refer to the similarities between units manufactured prior to July 13, 2015, and units manufactured on or after that date, one factor relevant to application of the enforcement policy set forth here. DOE realizes that, due to that term's presence in the definition of ''basic model'' at 10 CFR 430.2, including this term in its statement of enforcement policy may cause confusion, particularly given DOE's application of the enforcement policy on an individual model basis. Thus, DOE is adopting the use of the term identical in this final enforcement policy and has included additional explanation to help manufacturers understand how it applies.

which they wish to demonstrate compliance based on the ''old'' metrics that show all components in the model prior to July 13, 2015. Such evidence would aid DOE in assessing whether units manufactured after July 13, 2015, remain identical to those manufactured prior to that date.

Bradford White requested clarification as to whether updating a product's rated volume would void ''grandfathering'' of a model that was introduced prior to July 13, 2015, assuming the other conditions DOE has laid out are met. (Bradford White, No. 26 at p. 2) As stated above, a model will not be eligible for DOE's enforcement policy if there was any design change. A change in the rated volume would not be a change in the design of the products themselves in that sense; it would be a change only in representations about the products. However, if rather than simply changing the rated value, the manufacturer chooses to redesign the model with a different volume such that the design would not be identical, such a model would not be subject to the policy.

The ASAP Joint Stakeholders noted that the water heater industry has called for explicit grandfathering of water heaters that comply with minimum efficiency standards when expressed in terms of EF, but not in terms of UEF, and argued that AEMTCA does not provide for such grandfathering. ASAP Joint Stakeholders' also expressed their understanding of the proposed grandfathering provisions as allowing EF-compliant water heaters to be sold for a year following the publication of the final rule, after which DOE would not enforce the UEF standards for an unlimited period of time for essentially identical, but UEF non-compliant, models. The ASAP Joint Stakeholders commented that adopting non-enforcement as a tool for energy efficiency standards implementation would set a terrible precedent, would create the need for DOE to continually monitor UEF non-compliant models, and would create uncertainty for industry and uncertainty about the ultimate impacts of the water heater efficiency standards. (ASAP Joint Stakeholders, No. 31 at p. 4)

To be clear, this enforcement policy is not ''grandfathering''—DOE is not allowing manufacture of products that do not meet a standard. As discussed above, the conversion factor can, for some models, change the compliance status as a result of changes in the test method; this enforcement policy ensures that a model that complied with the former metrics is not harmed by the transition to UEF. However, as soon as a manufacturer makes any change to a model, the manufacturer must test and ensure compliance with the new metric. This enforcement policy allows a smooth transition through a metric change but does not allow manufacture of non-compliant products. Moreover, this is not a policy of non-enforcement—DOE is adopting a policy of conducting additional testing, where needed, for a limited subset of models in order to assess compliance using a second metric. DOE emphasizes that only models manufactured and certified prior to July 13, 2015, are eligible for the full enforcement policy; therefore, DOE has a known, finite list of models eligible for this relief.

With respect to the ''transition'' models first distributed in commerce between July 13, 2015, and the publication date of this rule, DOE has committed to consider compliance using the former test method as a factor only and expects manufacturers to take appropriate, timely steps to ensure those models meet the standard as measured using the UEF test method—which was the applicable test method at the time of manufacture. Further, because DOE is not permitting manufacturers to ''overrate'' to the minimum UEF standard, manufacturers are required to disclose the actual performance in the same metric as all other products.

F. Certification

In this final rule, DOE adopts its position as stated in the August 2016 SNOPR, that upon the effective date of this final rule, certification of compliance with energy conservation standards will be exclusively in terms of UEF. 81 FR 59736, 59788 (August 30, 2016). In implementing the provisions of 42 U.S.C. 6295(e)(5), DOE has concluded that there will be three possible paths available to manufacturers for certifying compliance of basic models of consumer water heaters that were certified before July 13, 2015: (1) In the year following the publication of this final rule, convert the energy factor values obtained using the test procedure contained in appendix E to subpart B of 10 CFR part 430 of the January 1, 2015 edition of the CFR from energy factor to uniform energy factor using the applicable mathematical conversion factor, and then use the converted uniform energy factors along with the applicable sampling provisions in 10 CFR part 429 to determine the represented uniform energy factor; or (2) conduct testing using the test procedure contained at appendix E to subpart B of 10 CFR part 430, effective July 13, 2015, along with the applicable sampling provisions in 10 CFR part 429; or (3) where permitted, apply an alternative efficiency determination method (AEDM) pursuant to 10 CFR 429.70 to determine the represented efficiency of basic models for those categories of consumer water heaters where the ''tested basic model'' was tested using the test procedure contained at appendix E to subpart B of 10 CFR part 430, effective July 13, 2015.

Similarly, DOE has concluded that there will be three possible paths available to manufacturers for certifying compliance of basic models of commercial residential-duty water heaters that were certified before July 13, 2015: (1) In the year following the publication of this final rule, convert the thermal efficiency and standby loss values obtained using the test procedure contained in 10 CFR 431.106 of the January 1, 2015 edition of the CFR from thermal efficiency and standby loss to uniform energy factor using the applicable mathematical conversion factor, and then use the converted uniform energy factors along with the applicable sampling provision in 10 CFR part 429 to determine the represented uniform energy factor; or (2) conduct testing using the test procedure at 10 CFR 431.106, effective July 13, 2015, along with the applicable sampling provisions in part 429; or (3) where permitted, apply an alternative efficiency determination method (AEDM) pursuant to 10 CFR 429.70 to determine the represented efficiency of basic models for those categories of commercial water heaters where the ''tested basic model'' was tested using the test procedure at 10 CFR 431.106, effective July 13, 2015.

Bradford White, AHRI, Rheem, and Giant commented that it would take at least 6 months after the publication of this final rule to convert efficiency and performance ratings to those under the UEF test method. (Bradford White, No. 26 at p. 5; AHRI, No. 27 at p. 5; Rheem, No. 32 at pp. 14–15; Giant, No. 33 at p. 2) AHRI, Rheem, and Giant further stated that the FTC EnergyGuide compliance date is June 12, 2017, and if this final rule is delayed past December 12, 2016, DOE and FTC should coordinate actions to delay the effective date of the revised FTC label so as to maintain the 6-month period. AHRI, Rheem, and Giant added that because the next annual certification date is May 1, 2017, DOE should delay the annual certification requirement until the effective date of the FTC EnergyGuide label, due to the potential for confusion resulting from different values in certification data in the DOE compliance certification database and EnergyGuide labels on products. (AHRI,

No. 27 at p. 5; Rheem, No. 32 at pp. 14–15; Giant, No. 33 at p. 2) A.O. Smith stated the next annual certification date should be delayed to the expiration date of the conversion factor rulemaking. (A.O. Smith, No. 28 at p. 4)

DOE recognizes stakeholder concerns related to the timing of the FTC requirements and certification reports, and the Department agrees that harmonizing the dates for submitting certification reports and complying with the EnergyGuide labels is desirable to prevent consumer confusion and reduce burden on manufacturers. DOE has already issued an enforcement policy with respect to certification of water heaters subject to this rule. In that policy, DOE stated that the policy would be amended when this rule was finalized. DOE hereby revises that policy such that DOE will not seek civil penalties for failure to submit a UEF certification report, prior to June 12, 2017, for any basic model of water heater subject to this final rule. DOE may seek civil penalties for failure to submit a UEF certification report for each basic model of water heater subject to this final rule starting June 12, 2017.

Thus, while manufactures are required to submit certifications by the May 1, 2017 annual deadline for existing basic models of consumer water heaters, as set forth at 10 CFR 429.12(d), DOE will not seek civil penalties for failure to submit required certifications by this deadline. However, if a manufacturer does not submit its annual certification report for each basic model by June 12, 2017, it will be subject to civil penalties that will begin accruing on a per day per basic model basis as of that date.

This enforcement policy will not apply to basic models first distributed in commerce on or after the publication date of this rule. Manufacturers of any such basic model must certify the compliance of the basic model before distribution in commerce of the basic model, as required by 10 CFR 429.12(a), or be subject to civil penalties for failure to do so.

Rheem also made several comments specifically related to content of the FTC EnergyGuide label. (Rheem, No. 32 at pp. 12–14) As noted in section I, FTC published a final rule on September 15, 2016 updating the EnergyGuide label to reflect changes to the DOE test procedure. 81 FR 63634. DOE notes that it has no authority to make changes the FTC EnergyGuide label; however, DOE has passed Rheem's comments to FTC for consideration in future updates to the EnergyGuide label for water heaters.

Rheem stated it is unclear when DOE will transition the ability of its compliance certification database to collect the UEF metric rather than EF, thermal efficiency, and/or standby loss. AHRI and Rheem requested that data be identified as either converted or tested in the reporting template to ensure that enforcement testing is not conducted based on converted ratings. (AHRI, No. 27 at p. 6; Rheem, No. 32 at p. 15) AHRI also requested DOE to make a pronouncement that enforcement testing will be conducted using the test procedure which was used to establish the model's ratings. (AHRI, No. 27 at p. 5) Finally, AHRI commented that there should be no risk of a false-positive enforcement action based on converted ratings once the conversion factor expires. That is, if a model converted into one draw pattern and tested into another, enforcement action should be based on the tested ratings and energy conservation standards associated with the tested draw pattern. (AHRI, No. 27 at p. 6)

DOE will transition the ability of its compliance certification database to collect UEF metrics prior to the date by which manufacturers must submit certification reports (*i.e.,* June 12, 2017, as discussed previously in this section). The information required for certification for the various types of water heaters and methods for determining UEF (*i.e.,* based on testing or based on converted values) is detailed in the regulatory text at the end of this final rule and will appear in 10 CFR part 429 once this final rule is effective. Thus, manufacturers will be aware of the certification information that DOE will collect. DOE proposed specific data elements based on whether a certification was based on converted or tested values, and AHRI and Rheem requested that data be identified as either converted or tested in the reporting template. Although whether a value was converted or tested would be implicit based on the information provided, DOE will, as suggested by AHRI and Rheem, explicitly require manufacturers to report how the certified values were determined. DOE will also permit manufacturers to provide at their option a declaration of whether they are requesting that the enforcement policy apply to a basic model, in which case the manufacturer must also provide the certified value for that model using the old metric(s) and corresponding test data.

Bradford White requested that DOE provide guidance on how to translate back to the ''old'' metrics, so that utility rebate programs and codes may have time to transition to the ''new'' metrics. (Bradford White, No. 26 at p. 5) In response, DOE shares Bradford White's concern about utility rebate programs. However, DOE believes that facilitating calculation back to the old metrics for use in utility rebate programs would simply prolong the transition to the new metrics and could possibly result in consumer confusion regarding water heater efficiency ratings. Accordingly, DOE is not adopting the commenter's suggestion.

In the August 2016 SNOPR, DOE requested comment about its decision not to include standby heat loss coefficient (UA), Annual Energy Consumption (E_{annual}), Annual Electrical Energy Consumption ($E_{annual,e}$), and Annual Fossil Fuel Energy Consumption ($E_{annual,f}$) in the parameters manufacturers are required to certify to DOE. 81 FR 59736, 59787 (August 30, 2016). In response, Bradford White, AHRI, and A.O. Smith commented that they supported DOE's decision not to include these parameters in the annual certification report. (Bradford White, No. 26 at p. 3; AHRI, No. 27 at p. 10; A.O. Smith, No. 28 at p. 5) Bradford White stated that certifying the additional parameters could increase burden due to additional paperwork, while A.O. Smith argued that the additional parameters could result in consumer confusion. AHRI stated that the values are not necessary for establishing compliance with DOE efficiency regulations and the information is not necessary for consumers to be able to compare the efficiency of models. CA IOUs requested that recovery efficiency continue to be included in the CCMS directory. (CA IOUs, No. 25 at p. 2) Having considered these comments, DOE will not require the certification of standby heat loss coefficient (UA), Annual Energy Consumption (E_{annual}), Annual Electrical Energy Consumption ($E_{annual,e}$), and Annual Fossil Fuel Energy Consumption ($E_{annual,f}$), as these values are not necessary for establishing compliance with DOE efficiency regulations and requiring reporting of them could unnecessarily create additional burden for manufacturers. However, as requested by the CA IOUs, DOE will continue to require manufacturers to report recovery efficiency in their annual certification reports. Manufacturers are currently required to certify the recovery efficiency (see 10 CFR 429.17(b)(2)), so maintaining this requirement would not create additional burden, nor does is DOE aware of any consumer confusion resulting from the inclusion of this specific parameter.

AHRI, A.O. Smith, and Rheem provided their understanding of how ''grandfathered'' models will be handled

and requested that DOE confirm that it is correct. (AHRI, No. 27 at pp. 6–7; A.O. Smith, No. 28 at pp. 3–4; Rheem, No. 32 at p. 16)

In response, DOE reiterates that the statute did not grandfather any models. With respect to models that do not meet the UEF standard when converted or tested using the UEF test procedure, manufacturers of models certified prior to July 13, 2015, may continue to certify compliance on the basis of the then-applicable test procedure but must disclose the UEF rating as discussed above. Manufacturers should not represent the efficiency at the minimum UEF standard for models that, when rated in accordance with 10 CFR 429.17, would have a UEF rating below the minimum standard.

G. Effective Date

This rule will be effective upon its publication in the **Federal Register**. Ordinarily, pursuant to 5 U.S.C. 553, a rule can only be effective 30 days after publication. (This rule is not a major rule to which the effective-date delay in 5 U.S.C. 801 would apply.) However, DOE finds good cause to make the rule effective immediately. EPCA specifies that manufacturers may use the conversion factors established by this rule ''beginning on the date of publication of the conversion factor in the **Federal Register**.'' 42 U.S.C. 6295(e)(5)(E)(v)(I). Complying with that statutory mandate would require that DOE make the rule effective immediately; DOE accordingly finds good cause, under 5 U.S.C. 553(d)(3), to do so.

IV. 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.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996) requires preparation of an initial regulatory flexibility analysis (IRFA) for any rule that by law must be proposed for public comment and a final regulatory flexibility analysis (FRFA) for any such rule that an agency adopts as a final rule, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities.

A regulatory flexibility analysis examines the impact of the rule on small entities and considers alternative ways of reducing negative effects. Also, 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 at: *http://energy.gov/gc/office-general-counsel.*

This final rule prescribes a mathematical conversion that can be used on a limited basis to determine the represented values for consumer water heaters and certain commercial water heaters. For consumer water heaters and certain commercial water heaters, the mathematical conversion establishes a bridge between the rated values based on the results under the energy factor, thermal efficiency, and standby loss test procedures (as applicable) and the uniform energy factor test procedure. DOE reviewed this final rule under the provisions of the Regulatory Flexibility Act and the policies and procedures published on February 19, 2003. 68 FR 7990.

For the manufacturers of the covered water heater products, the Small Business Administration (SBA) has set a size threshold, which defines those entities classified as ''small businesses'' for the purposes of the statute. DOE used the SBA's small business size standards to determine whether any small entities would be subject to the requirements of the rule. 65 FR 30836, 30849 (May 15, 2000), as amended at 65 FR 53533, 53545 (Sept. 5, 2000), at 77 FR 49991, 50008–50011 (August 20, 2012), and at 81 FR 4469, 4490 (Jan. 26, 2016), and codified at 13 CFR part 121. The size standards are listed by North American Industry Classification System (NAICS) code and industry description and are available at *https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.* Consumer water heater manufacturing is classified under NAICS code 335228—''Other Major Household Appliance Manufacturing.'' The SBA sets a threshold of 1,000 employees or less for an entity to be considered as a small business under that code number. Commercial water heater manufacturing is classified under NAICS code 333318—''Other Commercial and Service Industry Machinery Manufacturing,'' for which SBA sets a size threshold of 1,000 employees or fewer as being considered a small business.

DOE has identified 11 manufacturers of consumer water heaters that can be considered small businesses. DOE identified five manufacturers of ''residential-duty'' commercial water heaters that can be considered small businesses. Four of the ''residential-duty'' commercial water heater manufacturers also manufacture consumer water heaters, so the total number of small water heater manufacturers impacted by this rule would be 12. DOE's research involved reviewing several industry trade association membership directories (*e.g.,* AHRI), product databases (*e.g.,* DOE Compliance Certification Database, AHRI, CEC, and ENERGY STAR databases), individual company Web sites, and marketing research tools (*e.g.,* Hoovers reports) to create a list of all domestic small business manufacturers of products covered by this rulemaking.

For the reasons explained below, DOE has concluded that the test procedure amendments contained in this final rule will not have a significant economic impact on any manufacturer, including small manufacturers.

For consumer water heaters that were covered under the energy factor test procedure and energy conservation standards, the conversion factor in this final rule converts the rated values based on the energy factor test procedure to values based on the uniform energy factor test procedure. Likewise, for certain commercial water heaters, defined under the term ''residential-duty commercial water heater,'' the conversion factor in this final rule converts the rated values based on the previous test procedure to the uniform descriptor which is based on the UEF test procedure. The energy conservation standards for commercial water heating equipment is denominated using the uniform descriptor.

The conversion factors established in this final rule accomplish two tasks: (1) Translating the EF-, TE-, and SL-denominated (as applicable) energy conservation standards for consumer water heaters and certain commercial water heaters to being expressed in terms of the metric and test procedure for uniform energy factor; and (2) providing a limited conversion factor that manufacturers can use to translate

represented values established for basic models certified prior to July 13, 2015. This limited conversion is a burden-reducing measure which helps to ease the transition of the market to the new test procedure and uniform metric over the one-year period instead of the typical 180-day timeframe allotted by statute. In addition, as discussed in section III.E, DOE will implement an enforcement policy that DOE will not seek civil penalties for the continued manufacture and distribution in commerce of units of certain basic models that meet certain conditions (as described in III.E), thereby further reducing any burden on small business manufacturers. Accordingly, DOE concludes and certifies that this rule will not have a significant economic impact on a substantial number of small entities, so DOE has not prepared a regulatory flexibility analysis for this rulemaking. DOE has provided its 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 water heaters 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 water heaters, 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 consumer and commercial water heaters. 76 FR 12422 (March 7, 2011); 79 FR 25486 (May 5, 2014). 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 was approved by OMB under OMB control number 1910–1400, and this conversion-factor rule does not constitute a significant change to the requirement. Public reporting burden for the certification is estimated to average 30 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 final rule, DOE establishes conversion factors to convert results from prior efficiency and delivery capacity metrics (and related energy conservation standard requirements) for consumer and certain commercial water heaters to the uniform efficiency descriptor. 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 final rule amends the existing rule without affecting the amount, quality, or distribution of energy usage, and, therefore, is not expected to 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 10, 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 final 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 this final 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. Regarding the review required by section 3(a), 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 final 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 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 them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. (This policy is also available at *http://energy.gov/gc/office-general-counsel.*) DOE examined this final 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 by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more in any year. Accordingly, no further assessment or analysis is required under UMRA.

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

Pursuant to Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' 53 FR 8859 (March 18, 1988), DOE has determined 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 information quality 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 this final 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 OIRA at OMB, a Statement of Energy Effects for any significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgates 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 significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use if the regulation is implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

This regulatory action, which develops conversion factors to amend the energy conservation standards for consumer and certain commercial water heaters in light of new test procedures is not a significant regulatory action under Executive Order 12866 or any successor order. Moreover, it will 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 for this rulemaking.

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 *et seq.*), DOE must comply with all laws applicable to the former Federal Energy Administration, including section 32 of the Federal Energy Administration Act of 1974 (Pub. L. 93–275), as amended by the Federal Energy Administration Authorization Act of 1977 (Pub. L. 95–70). (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.

This final rule to implement conversion factors between the existing water heaters test procedure and the amended test procedure does not incorporate testing methods contained in commercial standards.

M. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule before its effective date. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this final rule.

List of Subjects

10 CFR Part 429

Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Reporting and recordkeeping requirements.

10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Intergovernmental relations, Small businesses.

10 CFR Part 431

Administrative practice and procedure, Confidential business information, Test procedures, Incorporation by reference, Reporting and recordkeeping requirements.

Issued in Washington, DC, on December 6, 2016.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

For the reasons stated in the preamble, DOE amends parts 429, 430, and 431 of chapter II subchapter D of title 10, 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; 28 U.S.C. 2461 note.

■ 2. Section 429.17 is revised to read as follows:

§ 429.17 Water heaters.

(a) *Determination of represented value.* (1) As of July 13, 2015, manufacturers must determine the represented value for each new basic model of water heater by applying an alternative efficiency determination method (AEDM) in accordance with 10 CFR 429.70 or by testing for the uniform energy factor, in conjunction with the applicable sampling provisions as follows:

(i) If the represented value is determined through testing, the general requirements of 10 CFR 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 the 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

$$UCL = \bar{x} + t_{.95}\left(\frac{s}{\sqrt{n}}\right)$$

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-percent one-tailed confidence interval with n-1 degrees of freedom (from Appendix A).

(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 0.90, 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-percent one-tailed confidence interval with n-1 degrees of freedom (from Appendix A).

(C) Any represented value of the rated storage volume must be equal to the mean of the measured storage volumes of all the units within the sample.

(D) Any represented value of first-hour rating or maximum gallons per minute (GPM) must be equal to the mean of the measured first-hour ratings or measured maximum GPM ratings, respectively, of all the units within the sample.

(2) For basic models initially certified before July 13, 2015 (using either the energy factor test procedure contained in appendix E to subpart B of 10 CFR part 430 of the January 1, 2015 edition of the Code of Federal Regulations or the thermal efficiency and standby loss test procedures contained in 10 CFR 431.106 of the January 1, 2015 edition of the Code of Federal Regulations, in conjunction with applicable sampling provisions), manufacturers must:

(i) Determine the represented value for each basic model by applying an AEDM in accordance with 10 CFR 429.70 or by testing for the uniform energy factor, in conjunction with the applicable sampling provisions of paragraph (a)(1) of this section; or

(ii) Calculate the uniform energy factor for each test sample by applying the following mathematical conversion factors to test data previously obtained through testing according to appendix E to subpart B of 10 CFR part 430 of the January 1, 2015 edition of the Code of Federal Regulations or the thermal efficiency and standby loss test procedures contained in 10 CFR 431.106 of the January 1, 2015, edition of the Code of Federal Regulations. Represented values of uniform energy factor, first-hour rating, and maximum GPM rating based on a calculation using this mathematical conversion factor must be determined using the applicable sampling provisions in paragraphs (a)(1)(i) and (ii) of this section.

(A) Calculate the New First Hour Rating (New FHR) or New Max Gallons per Minute (New Max GPM), as applicable, using the equations presented in the table in this paragraph.

Product class	Distinguishing criteria	Conversion factor *
Consumer Gas-fired Water Heater	Non-Condensing, Standard and Low NO_X.	New FHR = 7.9592 + 0.8752 × FHR_P.
	Non-Condensing, Ultra-Low NO_X ..	New FHR = 25.0680 + 0.6535 × FHR_P.
	Condensing	New FHR = 1.0570 × FHR_P.
Consumer Oil-fired Water Heater ...	N/A	New FHR = 0.9102 × FHR_P.
Consumer Electric Water Heater	Electric Resistance	New FHR = 9.2827 + 0.8092 × FHR_P.
	Heat Pump	New FHR = −4.2705 + 0.9947 × FHR_P.
Tabletop Water Heater	N/A	New FHR = 41.5127 + 0.1989 × FHR_P.
Instantaneous Gas-fired Water Heater.	N/A	New Max GPM = 1.1461 × Max GPM_P.
Instantaneous Electric Water Heater.	N/A	New Max GPM = 1.1461 × Max GPM_P.
Grid-Enabled Water Heater	N/A	New FHR = 9.2827 + 0.8092 × FHR_P.
Residential-Duty Commercial Gas-fired Water Heater.	N/A	New FHR = −35.8233 + 0.4649 × V_m + 160.5089 × E_t.
Residential-Duty Commercial Oil-fired Water Heater.	N/A	New FHR = −35.8233 + 0.4649 × V_m + 160.5089 × E_t.

Product class	Distinguishing criteria	Conversion factor *
Residential-Duty Commercial Electric Instantaneous Water Heater.	N/A	New Max GPM = 0.0146 + 0.0295 × Q.

FHR_P = prior first-hour rating.
Max GPM_P = prior maximum GPM rating.
Q = nameplate input rate, in kBtu/h.
E_t = thermal efficiency rating.
V_m = measured storage volume in gallons.

(B) Determine the applicable draw pattern as follows:

(*1*) For consumer gas-fired water heaters, consumer oil-fired water heaters, consumer electric water heaters, tabletop water heaters, grid-enabled water heaters, residential-duty commercial gas water heaters, residential-duty commercial oil-fired water heaters: Use the New FHR (as defined in paragraph (a)(2)(ii)(A) of this section) to select the applicable draw pattern from the table in this paragraph:

New FHR greater than or equal to:	and new FHR less than:	Draw pattern
0 gallons	18 gallons	Very Small.
18 gallons	51 gallons	Low.
51 gallons	75 gallons	Medium.
75 gallons	No upper limit	High.

(*2*) For instantaneous gas-fired water heaters, instantaneous electric water heaters, and residential-duty commercial electric instantaneous water heaters: Use New Max GPM (as defined in paragraph (a)(2)(ii)(A) of this section) to select the applicable draw pattern from the table in this paragraph:

New max GPM greater than or equal to:	And new max GPM rating less than:	Draw pattern
0 gallons/minute	1.7 gallons/minute	Very Small.
1.7 gallons/minute	2.8 gallons/minute	Low.
2.8 gallons/minute	4 gallons/minute	Medium.
4 gallons/minute	No upper limit	High.

(C) For consumer electric heat pump water heaters, use the draw pattern to determine the applicable drawn volume (DV) from the table in this paragraph:

Draw pattern	DV
Very Small	10 gallons.
Low	38 gallons.
Medium	55 gallons.
High	84 gallons.

(D) For each class besides consumer electric heat pump water heaters, use the applicable equation to calculate: UEF_{WHAM} (for consumer storage water heaters-except heat pumps), UEF_{model} (for consumer instantaneous water heaters), UEF_{rd} (for residential-duty commercial storage water heaters), and $UEF_{rd,\ model}$ (for residential-duty commercial electric instantaneous water heaters) as follows:

(*1*) For consumer storage water heaters (except consumer electric heat pump water heaters):

$$UEF_{WHAM} = \left[\frac{1}{\eta_r} + \left(\frac{1}{EF} - \frac{1}{\eta_r}\right)\left(\frac{a\ P\ \eta_r - b}{c\ P\ \eta_r - d}\right)\right]^{-1}$$

Where a, b, c, and d are coefficients based on the applicable draw pattern as specified in the table below; EF is the energy factor; η_r is the recovery efficiency in decimal form; and P is the input rate in Btu/h.

Draw pattern	a	b	c	d
Very Small	0.250266	57.5	0.039864	67.5
Low	0.065860	57.5	0.039864	67.5
Medium	0.045503	57.5	0.039864	67.5
High	0.029794	57.5	0.039864	67.5

(*2*) For consumer instantaneous water heaters:

$$UEF_{model} = \frac{\eta_r}{1 + A\eta_r}$$

Where η_r is the recovery efficiency expressed in decimal form and A is dependent upon the applicable draw pattern and fuel type as specified in the table in this paragraph.

Draw pattern	A	
	Electric	Gas
Very Small	0.003819	0.026915
Low	0.001549	0.010917
Medium	0.001186	0.008362
High	0.000785	0.005534

(*3*) For residential-duty commercial storage water heaters:

$$UEF_{rd} = \left[\frac{1}{E_t} + F * SL\left(G - \frac{1}{P\,E_t}\right)\right]^{-1}$$

Where P is the input rate in Btu/h; E_t is the thermal efficiency; SL is the standby loss in Btu/h; and F and G are coefficients as specified in the table in this paragraph based on the applicable draw pattern.

Draw pattern	F	G
Very Small	0.821429	0.0043520
Low	0.821429	0.0011450
Medium	0.821429	0.0007914
High	0.821429	0.0005181

(*4*) For residential-duty commercial electric instantaneous water heaters:

$$UEF_{rd,model} = \frac{E_t}{1 + AE_t}$$

Where E_t is the thermal efficiency expressed in decimal form and A is dependent upon the applicable draw pattern, as specified in the table in this paragraph.

Draw pattern	A
Very Small	0.003819
Low	0.001549
Medium	0.001186
High	0.000785

(E) Calculate the ''New UEF'' (*i.e.,* the converted UEF) using the applicable equation in the table in this paragraph.

Product class	Distinguishing criteria	Conversion factor
Consumer Gas-fired Water Heater	Non-Condensing, Standard and Low NO_X	New UEF = $-0.0002 + 0.9858 \times UEF_{WHAM}$.
	Non-Condensing, Ultra-Low NO_X	New UEF = $0.0746 + 0.8653 \times UEF_{WHAM}$.
	Condensing	New UEF = $0.4242 + 0.4641 \times UEF_{WHAM}$.
Consumer Oil-fired Water Heater	N/A	New UEF = $-0.0033 + 0.9528 \times UEF_{WHAM}$.
Consumer Electric Water Heater	Electric Resistance	New UEF = $0.4774 + 0.4740 \times UEF_{WHAM}$.
	Heat Pump	New UEF = $0.1513 + 0.8407 \times EF + 0.0043 \times DV$.
Tabletop Water Heater	N/A	New UEF = $-0.3305 + 1.3983 \times UEF_{WHAM}$.
Instantaneous Gas-fired Water Heater	N/A	New UEF = $0.1006 + 0.8622 \times UEF_{model}$.
Instantaneous Electric Water Heater	N/A	New UEF = $0.9847 \times UEF_{model}$.
Grid-Enabled Water Heater	N/A	New UEF = $0.4774 + 0.4740 \times UEF_{WHAM}$.
Residential-Duty Commercial Gas-fired Water Heater.	N/A	New UEF = $-0.0022 + 1.0002 \times UEF_{rd}$.
Residential-Duty Commercial Oil-fired Water Heater.	N/A	New UEF = $-0.0022 + 1.0002 \times UEF_{rd}$.

Product class	Distinguishing criteria	Conversion factor
Residential-Duty Commercial Electric Instantaneous Water Heater.	N/A	New UEF = $UEF_{rd,\ model}$.

New UEF = converted UEF.
EF = Energy Factor.

(b) *Certification reports.* (1) The requirements of 10 CFR 429.12 apply; and

(2) Pursuant to 10 CFR 429.12(b)(13), a certification report must include the following public, product-specific information:

(i) For storage-type water heater basic models previously certified for energy factor pursuant to § 429.17(a) of the January 1, 2015 edition of the Code of Federal Regulations, and for which uniform energy factor is calculated pursuant to 10 CFR 429.17(a)(2)(ii): The energy factor (EF, rounded to the nearest 0.01), the uniform energy factor (UEF, rounded to the nearest 0.01), the rated storage volume in gallons (gal, rounded to the nearest 1 gal), the uniform energy factor test procedure first-hour rating in gallons (gal, rounded to the nearest 1 gal) as determined under paragraph (a)(2)(ii)(A) of this section, the previously certified first-hour rating under the energy factor test procedure in gallons (gal, rounded to the nearest 1 gal), and the recovery efficiency in percent (%, rounded to the nearest 1%);

(ii) For storage-type water heater basic models rated pursuant to 10 CFR 429.17(a)(1) or 10 CFR 429.17(a)(2)(i): The uniform energy factor (UEF, rounded to the nearest 0.01), the rated storage volume in gallons (gal, rounded to the nearest 1 gal), the first-hour rating in gallons (gal, rounded to the nearest 1 gal), and the recovery efficiency in percent (%, rounded to the nearest 1%);

(iii) For instantaneous-type water heater basic models previously certified for energy factor pursuant to § 429.17(a) of the January 1, 2015 edition of the Code of Federal Regulations, and for which uniform energy factor is calculated pursuant to 10 CFR 429.17(a)(2)(ii): The energy factor (EF, rounded to the nearest 0.01), the uniform energy factor (UEF. rounded to the nearest 0.01), the rated storage volume in gallons (gal, rounded to the nearest 1 gal), the uniform energy factor test procedure maximum gallons per minute (gpm, rounded to the nearest 0.1 gpm) as determined under paragraph (a)(2)(ii)(A) of this section, the previously certified maximum gallons per minute (gpm, rounded to the nearest 0.1 gpm) under the energy factor test procedure, and the recovery efficiency in percent (%, rounded to the nearest 1%);

(iv) For instantaneous-type water heater basic models rated pursuant to 10 CFR 429.17(a)(1) or 10 CFR 429.17(a)(2)(i): The uniform energy factor (UEF, rounded to the nearest 0.01), the rated storage volume in gallons (gal, rounded to the nearest 1 gal), the maximum gallons per minute (gpm, rounded to the nearest 0.1 gpm), and the recovery efficiency in percent (%, rounded to the nearest 1%);

(v) For grid-enabled water heater basic models previously certified for energy factor pursuant to 10 CFR 429.17(a) of the January 1, 2015 edition of the Code of Federal Regulations, and for which uniform energy factor is calculated pursuant to 10 CFR 429.17(a)(2)(ii): The energy factor (EF, rounded to the nearest 0.01), the uniform energy factor (UEF, rounded to the nearest 0.01), the rated storage volume in gallons (gal, rounded to the nearest 1 gal), the uniform energy factor test procedure first-hour rating in gallons (gal, rounded to the nearest 1 gal) as determined under paragraph (a)(2)(ii)(A) of this section, the previously certified first-hour rating under the energy factor test procedure in gallons (gal, rounded to the nearest 1 gal), the recovery efficiency in percent (%, rounded to the nearest 1%), a declaration that the model is a grid-enabled water heater, whether it is equipped at the point of manufacture with an activation lock, and whether it bears a permanent label applied by the manufacturer that advises purchasers and end-users of the intended and appropriate use of the product; and

(vi) For grid-enabled water heater basic models rated pursuant to 10 CFR 429.17(a)(1) or 10 CFR 429.17(a)(2)(i): The uniform energy factor (UEF, rounded to the nearest 0.01), the rated storage volume in gallons (gal, rounded to the nearest 1 gal), the first-hour rating in gallons (gal, rounded to the nearest 1 gal), and the recovery efficiency in percent (%, rounded to the nearest 1%), a declaration that the model is a grid-enabled water heater, whether it is equipped at the point of manufacture with an activation lock, and whether it bears a permanent label applied by the manufacturer that advises purchasers and end-users of the intended and appropriate use of the product.

■ 3. Section 429.17 is further revised, effective December 29, 2017, to read as follows:

§ 429.17 Water heaters.

(a) *Determination of represented value.* (1) Manufacturers must determine the represented value for each water heater by applying an AEDM in accordance with 10 CFR 429.70 or by testing for the uniform energy factor, in conjunction with the applicable sampling provisions as follows:

(i) If the represented value is determined through testing, the general requirements of 10 CFR 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 the estimated annual operating cost or other measure of energy consumption 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:

$$UCL = \bar{x} + t_{.95}\left(\frac{s}{\sqrt{n}}\right)$$

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-percent one-tailed confidence interval with n-1 degrees of freedom (from Appendix A).

(B) Any represented value of the uniform energy factor, 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, 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:

$$LCL = \bar{x} - t_{.95}\left(\frac{s}{\sqrt{n}}\right)$$

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-percent one-tailed confidence interval with n-1 degrees of freedom (from Appendix A).

(C) Any represented value of the rated storage volume must be equal to the mean of the measured storage volumes of all the units within the sample.

(D) Any represented value of first-hour rating or maximum gallons per minute (GPM) must be equal to the mean of the measured first-hour ratings or measured maximum GPM ratings, respectively, of all the units within the sample.

(b) *Certification reports.* (1) The requirements of 10 CFR 429.12 are applicable to water heaters; and

(2) Pursuant to 10 CFR 429.12(b)(13), a certification report shall include the following public, product-specific information:

(i) For storage-type water heater basic models: The uniform energy factor (UEF, rounded to the nearest 0.01), the rated storage volume in gallons (rounded to the nearest 1 gal), the first-hour rating in gallons (gal, rounded to the nearest 1 gal), and the recovery efficiency in percent (%, rounded to the nearest 1%);

(ii) For instantaneous-type water heater basic models: The uniform energy factor (UEF, rounded to the nearest 0.01), the rated storage volume in gallons (gal, rounded to the nearest 1 gal), the maximum gallons per minute (gpm, rounded to the nearest 0.1 gpm), and the recovery efficiency in percent (%, rounded to the nearest 1%); and

(iii) For grid-enabled water heater basic models: The uniform energy factor (UEF, rounded to the nearest 0.01), the rated storage volume in gallons (gal, rounded to the nearest 1 gal), the first-hour rating in gallons (gal, rounded to the nearest 1 gal), the recovery efficiency in percent (%, rounded to the nearest 1%), a declaration that the model is a grid-enabled water heater, whether it is equipped at the point of manufacture with an activation lock, and whether it bears a permanent label applied by the manufacturer that advises purchasers and end-users of the intended and appropriate use of the product.

■ 4. Section 429.44 is amended by adding paragraph (d) to read as follows:

§ 429.44 Commercial water heating equipment.

* * * * *

(d) Certification reports for residential-duty commercial water heaters. (1) The requirements of § 429.12 apply; and

(2) Pursuant to § 429.12(b)(13), a certification report must include the following public, equipment-specific information:

(i) Residential-duty commercial gas-fired and oil-fired storage water heaters previously certified for thermal efficiency and standby loss pursuant to 10 CFR 429.44(b) of the January 1, 2015 edition of the Code of Federal Regulations, and for which uniform energy factor is calculated pursuant to 10 CFR 429.17(a)(2)(ii): The thermal efficiency in percent (%), the standby loss in British thermal units per hour (Btu/h), the uniform energy factor (UEF, rounded to the nearest 0.01), the rated storage volume in gallons (gal), and the nameplate input rate in Btu/h.

(ii) Residential-duty commercial gas-fired and oil-fired storage water heaters rated for uniform energy factor pursuant to 10 CFR 429.17(a)(2)(i): The uniform energy factor (UEF, rounded to the nearest 0.01), the rated storage volume in gallons (rounded to the nearest 1 gal), the first-hour rating in gallons (gal, rounded to the nearest 1 gal), and the recovery efficiency in percent (%, rounded to the nearest 1%).

(iii) Residential-duty commercial electric instantaneous water heaters previously certified for thermal efficiency and standby loss pursuant to 10 CFR 429.44(b) of the January 1, 2015 edition of the Code of Federal Regulations, and for which uniform energy factor is calculated pursuant to 10 CFR 429.17(a)(2)(ii): The thermal efficiency in percent (%), the standby loss in British thermal units per hour (Btu/h), the uniform energy factor (UEF, rounded to the nearest 0.01), the rated storage volume in gallons (gal), and the nameplate input rate in kilowatts (kW).

(iv) Residential-duty commercial electric instantaneous water heaters rated for uniform energy factor pursuant to 10 CFR 429.17(a)(2)(i): The uniform energy factor (UEF, rounded to the nearest 0.01), the rated storage volume in gallons (gal, rounded to the nearest 1 gal), the maximum gallons per minute (gpm, rounded to the nearest 0.1 gpm), and the recovery efficiency in percent (%, rounded to the nearest 1%)).

* * * * *

■ 5. Section 429.44 is further revised, effective December 29, 2017, by revising paragraph (d)(2) to read as follows:

§ 429.44 Commercial water heating equipment.

* * * * *

(d) * * *

(2) Pursuant to § 429.12(b)(13), a certification report for equipment must include the following public, equipment-specific information:

(i) Residential-duty commercial gas-fired and oil-fired storage water heaters: The uniform energy factor (UEF, rounded to the nearest 0.01), the rated storage volume in gallons (gal, rounded to the nearest 1 gal), the first-hour rating in gallons (gal, rounded to the nearest 1 gal), and the recovery efficiency in percent (%, rounded to the nearest 1%).

(ii) Residential-duty commercial electric instantaneous water heaters: The uniform energy factor (UEF, rounded to the nearest 0.01), the rated storage volume in gallons (gal, rounded to the nearest 1 gal), the maximum gallons per minute (gpm, rounded to the nearest 0.1 gpm), and the recovery efficiency in percent (%, rounded to the nearest 1%).

* * * * *

■ 6. Section 429.134 is amended by revising paragraph (d)(2) to read as follows:

§ 429.134 Product-specific enforcement provisions.

* * * * *

(d) * * *

(2) *Verification of rated storage volume.* The storage volume of the basic model will be measured pursuant to the test requirements of appendix E to subpart B of 10 CFR part 430 for each unit tested. The mean of the measured values will be compared to the rated storage volume as certified by the manufacturer. The rated value will be considered valid only if the measurement is within 3 percent of the certified rating.

(i) If the rated storage volume is found to be within 3 percent of the mean of the measured value of storage volume, then the rated value will be used as the basis for calculation of the required uniform energy factor for the basic model.

(ii) If the rated storage volume is found to vary more than 3 percent from the mean of the measured values, then the mean of the measured values will be used as the basis for calculation of the required uniform energy factor for the basic model.

* * * * *

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

■ 7. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 8. Section 430.23 is amended by revising paragraph (e) to read as follows:

§ 430.23 Test procedures for the measurement of energy and water consumption.

* * * * *

(e) *Water heaters.* (1) For water heaters tested using energy factor and for which uniform energy factor is determined using the conversion factors in accordance with 10 CFR 429.17(a)(2):

(i) The estimated annual operating cost is calculated as—

(A) For a gas-fired or oil-fired water heater, the product of the annual energy consumption, determined according to section 6.3.7 or 6.4.4 of appendix E of this subpart, times the representative average unit cost of gas or oil, as appropriate, in dollars per Btu as provided by the Secretary. Round the resulting product to the nearest dollar per year.

(B) For an electric water heater, the product of the annual energy consumption, determined according to section 6.3.7 or 6.4.4 of appendix E of this subpart, times the representative average unit cost of electricity in dollars per kilowatt-hour as provided by the Secretary, divided by 3412 Btu per kilowatt-hour. Round the resulting product to the nearest dollar per year.

(ii) For an individual unit, determine the tested energy factor in accordance with section 6.1.7 or 6.2.4 of appendix E to subpart B of 10 CFR part 430 of the January 1, 2015 edition of the Code of Federal Regulations, and round the value to the nearest 0.01. Determine the converted uniform energy factor in accordance with 10 CFR 429.17(a)(2), and round the value to the nearest 0.01.

(2) For water heaters tested using uniform energy factor:

(i) The estimated annual operating cost is calculated as:

(A) For a gas-fired or oil-fired water heater, the sum of: The product of the annual gas or oil energy consumption, determined according to section 6.3.9 or 6.4.6 of appendix E of this subpart, times the representative average unit cost of gas or oil, as appropriate, in dollars per Btu as provided by the Secretary; plus the product of the annual electric energy consumption, determined according to section 6.3.8 or 6.4.5 of appendix E of this subpart, times the representative average unit cost of electricity in dollars per kilowatt-hour as provided by the Secretary. Round the resulting sum to the nearest dollar per year.

(B) For an electric water heater, the product of the annual energy consumption, determined according to section 6.3.7 or 6.4.4 of appendix E of this subpart, times the representative average unit cost of electricity in dollars per kilowatt-hour as provided by the Secretary. Round the resulting product to the nearest dollar per year.

(ii) For an individual unit, determine the tested uniform energy factor in accordance with section 6.3.6 or 6.4.3 of appendix E of this subpart, and round the value to the nearest 0.01.

* * * * *

■ 9. Section 430.23 paragraph (e) is further revised, effective December 29, 2017, to read as follows:

§ 430.23 Test procedures for the measurement of energy and water consumption.

* * * * *

(e) *Water heaters.* (1) The estimated annual operating cost is calculated as:

(i) For a gas-fired or oil-fired water heater, the sum of: The product of the annual gas or oil energy consumption, determined according to section 6.3.9 or 6.4.6 of appendix E of this subpart, times the representative average unit cost of gas or oil, as appropriate, in dollars per Btu as provided by the Secretary; plus the product of the annual electric energy consumption, determined according to section 6.3.8 or 6.4.5 of appendix E of this subpart, times the representative average unit cost of electricity in dollars per kilowatt-hour as provided by the Secretary. Round the resulting sum to the nearest dollar per year.

(ii) For an electric water heater, the product of the annual energy consumption, determined according to section 6.3.7 or 6.4.4 of appendix E of this subpart, times the representative average unit cost of electricity in dollars per kilowatt-hour as provided by the Secretary. Round the resulting product to the nearest dollar per year.

(2) For an individual unit, determine the tested uniform energy factor in accordance with section 6.3.6 or 6.4.3 of appendix E of this subpart, and round the value to the nearest 0.01.

* * * * *

■ 10. Section 430.32 is amended by revising paragraph (d) to read as follows:

§ 430.32 Energy and water conservation standards and their compliance dates.

* * * * *

(d) *Water heaters.* The uniform energy factor of water heaters shall not be less than the following:

Product class	Rated storage volume and input rating (if applicable)	Draw pattern	Uniform energy factor
Gas-fired Storage Water Heater	≥20 gal and ≤55 gal	Very Small	$0.3456 - (0.0020 \times V_r)$
		Low	$0.5982 - (0.0019 \times V_r)$
		Medium	$0.6483 - (0.0017 \times V_r)$
		High	$0.6920 - (0.0013 \times V_r)$
	>55 gal and ≤100 gal	Very Small	$0.6470 - (0.0006 \times V_r)$
		Low	$0.7689 - (0.0005 \times V_r)$
		Medium	$0.7897 - (0.0004 \times V_r)$
		High	$0.8072 - (0.0003 \times V_r)$
Oil-fired Storage Water Heater	≤50 gal	Very Small	$0.2509 - (0.0012 \times V_r)$
		Low	$0.5330 - (0.0016 \times V_r)$
		Medium	$0.6078 - (0.0016 \times V_r)$
		High	$0.6815 - (0.0014 \times V_r)$
Electric Storage Water Heaters	≥20 gal and ≤55 gal	Very Small	$0.8808 - (0.0008 \times V_r)$
		Low	$0.9254 - (0.0003 \times V_r)$
		Medium	$0.9307 - (0.0002 \times V_r)$
		High	$0.9349 - (0.0001 \times V_r)$
	>55 gal and ≤120 gal	Very Small	$1.9236 - (0.0011 \times V_r)$
		Low	$2.0440 - (0.0011 \times V_r)$

Product class	Rated storage volume and input rating (if applicable)	Draw pattern	Uniform energy factor
		Medium	$2.1171 - (0.0011 \times V_r)$
		High	$2.2418 - (0.0011 \times V_r)$
Tabletop Water Heater	≥20 gal and ≤120 gal	Very Small	$0.6323 - (0.0058 \times V_r)$
		Low	$0.9188 - (0.0031 \times V_r)$
		Medium	$0.9577 - (0.0023 \times V_r)$
		High	$0.9884 - (0.0016 \times V_r)$
Instantaneous Gas-fired Water Heater.	<2 gal and >50,000 Btu/h	Very Small	0.80
		Low	0.81
		Medium	0.81
		High	0.81
Instantaneous Electric Water Heater	<2 gal	Very Small	0.91
		Low	0.91
		Medium	0.91
		High	0.92
Grid-Enabled Water Heater	>75 gal	Very Small	$1.0136 - (0.0028 \times V_r)$
		Low	$0.9984 - (0.0014 \times V_r)$
		Medium	$0.9853 - (0.0010 \times V_r)$
		High	$0.9720 - (0.0007 \times V_r)$

* V_r is the Rated Storage Volume (in gallons), as determined pursuant to 10 CFR 429.17.

* * * * *

PART 431—ENERGY EFFICIENCY PROGRAM FOR CERTAIN COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 11. The authority citation for part 431 continues to read as follows:

Authority: 42 U.S.C. 6291–6317; 28 U.S.C. 2461 note.

■ 12. Section 431.110 is revised to read as follows:

§ 431.110 Energy conservation standards and their effective dates.

(a) Each commercial storage water heater, instantaneous water heater, unfired hot water storage tank and hot water supply boiler (excluding residential-duty commercial water heaters) must meet the applicable energy conservation standard level(s) as specified in the table in this paragraph. Any packaged boiler that provides service water that meets the definition of ''commercial packaged boiler'' in subpart E of this part, but does not meet the definition of ''hot water supply boiler'' in subpart G, must meet the requirements that apply to it under subpart E.

Equipment category	Size	Energy conservation standard [a]		
		Maximum standby loss [c] (equipment manufactured on and after October 29, 2003) [b]	Minimum thermal efficiency (equipment manufactured on and after October 29, 2003 and before October 9, 2015) [b] (%)	Minimum thermal efficiency (equipment manufactured on and after October 9, 2015) [b] (%)
Electric storage water heaters	All	$0.30 + 27/V_m$ (%/hr)	N/A	N/A
Gas-fired storage water heaters	≤155,000 Btu/hr	$Q/800 + 110(V_r)^{1/2}$ (Btu/hr)	80	80
	>155,000 Btu/hr	$Q/800 + 110(V_r)^{1/2}$ (Btu/hr)	80	80
Oil-fired storage water heaters	≤155,000 Btu/hr	$Q/800 + 110(V_r)^{1/2}$ (Btu/hr)	78	80
	>155,000 Btu/hr	$Q/800 + 110(V_r)^{1/2}$ (Btu/hr)	78	80
Gas-fired instantaneous water heaters and hot water supply boilers.	<10 gal	N/A	80	80
	≥10 gal	$Q/800 + 110(V_r)^{1/2}$ (Btu/hr)	80	80
Oil-fired instantaneous water heaters and hot water supply boilers.	<10 gal	N/A	80	80
	≥10 gal	$Q/800 + 110(V_r)^{1/2}$ (Btu/hr)	78	78

Equipment category	Size	Minimum thermal insulation
Unfired hot water storage tank	All	R–12.5

[a] V_m is the measured storage volume (in gallons), and V_r is the rated volume (in gallons). Q is the nameplate input rate in Btu/hr.

[b] For hot water supply boilers with a capacity of less than 10 gallons: (1) The standards are mandatory for products manufactured on and after October 21, 2005, and (2) products manufactured prior to that date, and on or after October 23, 2003, must meet either the standards listed in this table or the applicable standards in subpart E of this part for a ''commercial packaged boiler.''

[c] Water heaters and hot water supply boilers having more than 140 gallons of storage capacity need not meet the standby loss requirement if: (1) The tank surface area is thermally insulated to R–12.5 or more; (2) a standing pilot light is not used; and (3) for gas or oil-fired storage water heaters, they have a fire damper or fan-assisted combustion.

(b) Each residential-duty commercial water heater must meet the applicable energy conservation standard level(s) as follows:

Product class	Specifications [a]	Draw pattern	Uniform energy factor [b]
Gas-fired Storage	>75 kBtu/hr and ≤105 kBtu/hr and ≤120 gal.	Very Small	$0.2674 - (0.0009 \times V_r)$
		Low	$0.5362 - (0.0012 \times V_r)$
		Medium	$0.6002 - (0.0011 \times V_r)$
		High	$0.6597 - (0.0009 \times V_r)$
Oil-fired Storage	>105 kBtu/hr and ≤140 kBtu/hr and ≤120 gal.	Very Small	$0.2932 - (0.0015 \times V_r)$
		Low	$0.5596 - (0.0018 \times V_r)$
		Medium	$0.6194 - (0.0016 \times V_r)$
		High	$0.6740 - (0.0013 \times V_r)$
Electric Instantaneous	>12 kW and ≤58.6 kW and ≤2 gal	Very Small	0.80
		Low	0.80
		Medium	0.80
		High	0.80

[a] Additionally, to be classified as a residential-duty commercial water heater, a commercial water heater must meet the following conditions: (1) if the water heater requires electricity, it must use a single-phase external power supply; and (2) the water heater must not be designed to heat water to temperatures greater than 180 °F.

[b] V_r is the rated storage volume (in gallons), as determined pursuant to 10 CFR 429.44.

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Part III

Federal Housing Finance Agency

12 CFR Part 1282

Enterprise Duty To Serve Underserved Markets; Final Rule

FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1282

RIN 2590–AA27

Enterprise Duty To Serve Underserved Markets

AGENCY: Federal Housing Finance Agency.

ACTION: Final rule.

SUMMARY: The Housing and Economic Recovery Act of 2008 (HERA) amended the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (Safety and Soundness Act) to establish a duty for the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the Enterprises) to serve three specified underserved markets—manufactured housing, affordable housing preservation, and rural markets—in order to increase the liquidity of mortgage investments and improve the distribution of investment capital available for mortgage financing for very low-, low-, and moderate-income families in those markets. The Federal Housing Finance Agency (FHFA) is issuing this final rule which specifies the scope of Enterprise activities that are eligible to receive Duty to Serve credit. These activities generally are those that facilitate a secondary market for mortgages related to: Manufactured homes titled as real property or personal property; blanket loans for certain categories of manufactured housing communities; preserving the affordability of housing for renters and homebuyers; and housing in rural markets. The final rule provides a framework for FHFA's method for evaluating and rating the Enterprises' compliance with the Duty to Serve each underserved market.

DATES: The final rule is effective January 30, 2017.

FOR FURTHER INFORMATION CONTACT: Jim Gray, Manager, Office of Housing and Community Investment, (202) 649–3124; Matt Douglas, Senior Policy Analyst, Office of Housing and Community Investment, (202) 649–3328; Miriam Smolen, Associate General Counsel, Office of General Counsel, (202) 649–3182; or Sharon Like, Managing Associate General Counsel, Office of General Counsel, (202) 649–3057. These are not toll-free numbers. The mailing address for each contact is: Federal Housing Finance Agency, 400 7th Street SW., Washington, DC 20219. The telephone number for the Telecommunications Device for the Hearing Impaired is (800) 877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory Background

The Safety and Soundness Act provides generally that the Enterprises ''have an affirmative obligation to facilitate the financing of affordable housing for low- and moderate-income families.'' [1] Section 1129 of HERA amended section 1335 of the Safety and Soundness Act to establish a duty for the Enterprises to serve three specified underserved markets, to increase the liquidity of mortgage investments and improve the distribution of investment capital available for mortgage financing for certain categories of borrowers in those markets.[2] Specifically, the Enterprises are required to provide leadership in developing loan products and flexible underwriting guidelines to facilitate a secondary market for mortgages on housing for very low-, low-, and moderate-income families for manufactured housing, affordable housing preservation, and rural markets.[3] In addition, section 1335(d)(1) requires FHFA to establish, by regulation, a method for evaluating and rating the Enterprises' compliance with the Duty to Serve underserved markets.[4] FHFA is required to separately evaluate each Enterprise's compliance with respect to each underserved market, taking into consideration the following:

(i) The Enterprise's development of loan products, more flexible underwriting guidelines, and other innovative approaches to providing financing to each of the underserved markets (hereafter, the ''loan product evaluation area'');

(ii) The extent of the Enterprise's outreach to qualified loan sellers and other market participants in each of the underserved markets (hereafter, the ''outreach evaluation area'');

(iii) The volume of loans purchased by the Enterprise in each underserved market relative to the market opportunities available to the Enterprise, except that the Director shall not establish specific quantitative targets or evaluate the Enterprise based solely on the volume of loans purchased (hereafter, the ''loan purchase evaluation area''); and

(iv) The amount of investments and grants by the Enterprise in projects which assist in meeting the needs of the underserved markets (hereafter, the ''investments and grants evaluation area'').[5]

The Duty to Serve provisions and issues considered are discussed further below.

B. Conservatorship

On September 6, 2008 the Director of FHFA appointed FHFA as conservator of the Enterprises in accordance with the Safety and Soundness Act to maintain the Enterprises in a safe and sound financial condition and to help assure performance of their public mission. Since the establishment of FHFA as conservator, the Enterprises have returned to profitability. The U.S. Department of the Treasury (Treasury Department) has provided essential financial commitments of taxpayer funding under Senior Preferred Stock Purchase Agreements (PSPAs). Fannie Mae and Freddie Mac have drawn a combined total of $187.5 billion in taxpayer support under the PSPAs to date. Through September 30, 2016, the Enterprises have paid the Treasury Department a total of $250.5 billion in dividends on senior preferred stock. Under the provisions of the PSPAs, the Enterprises' dividend payments do not offset the amounts drawn from the Treasury Department.

While the Enterprises are in conservatorships, all of their activities are subject to FHFA review and approval. FHFA has delegated day-to-day management of the Enterprises to their senior management and boards of directors. In managing the conservatorships, FHFA sets the strategic direction of the Enterprises, approves Enterprise actions as deemed appropriate by FHFA, and oversees and monitors Enterprise activities.

The law also requires and FHFA expects the Enterprises to continue to fulfill their core statutory purposes while they are in conservatorship, which include their support for affordable housing and underserved markets. Consistent with the conservatorships, Enterprise support for affordable housing and underserved markets must be accomplished within the confines of safety and soundness and the goals of conservatorship.

C. Regulatory History

Prior to issuing this final rule, FHFA engaged in a number of rulemaking activities to establish its regulatory expectations for the Enterprises' Duty to

[1] 12 U.S.C. 4501(7).

[2] 12 U.S.C. 4565.

[3] 12 U.S.C. 4565(a). The terms ''very low-income,'' ''low-income,'' and ''moderate-income'' are defined in 12 U.S.C. 4502.

[4] 12 U.S.C. 4565(d)(1).

[5] 12 U.S.C. 4565(d)(2).

Serve obligations and FHFA's evaluation process for those activities. These prior regulatory actions are described below.

1. Advance Notice of Proposed Rulemaking

Rulemaking for the Duty to Serve commenced in August 2009 with FHFA's publication in the **Federal Register** of an Advance Notice of Proposed Rulemaking (ANPR) on the Enterprise Duty to Serve underserved markets.[6] FHFA received 100 comment letters in response to the ANPR.

2. 2010 Duty To Serve Proposed Rule

After reviewing the comment letters on the ANPR, FHFA published in the **Federal Register** on June 7, 2010 a proposed rule on the Duty to Serve.[7] The 45-day public comment period for the proposed rule closed on July 22, 2010. FHFA received 4,019 comments on the proposed rule. Commenters included individuals, trade associations, policy and housing advocacy groups, nonprofit organizations, corporations, government entities, management companies, homeowners' associations, developers, lenders, a legal services group, Members of Congress, and both Enterprises. No final Duty to Serve rule was issued after the close of the comment period in 2010.

3. 2015 Duty To Serve Proposed Rule

FHFA began work to develop a new Duty to Serve proposed rule in 2014, taking into consideration the comments received on the 2010 Duty to Serve proposed rule and subsequent input from diverse stakeholder groups. The comments and input received and FHFA's intervening years of experience with the Enterprises and their operations in the underserved markets suggested a different approach, sufficiently so that further notice and comment was necessary through issuance of a new proposed rule. Accordingly, FHFA published in the **Federal Register** on December 18, 2015 a second proposed rule on the Enterprises' Duty to Serve requirements.[8] The 90-day public comment period for the proposed rule closed on March 17, 2016.

FHFA received 1,567 comments on the 2015 proposed rule, including from the following stakeholder groups:

- Individuals, including owners of manufactured homes;
- Trade associations, including manufactured housing trade organizations, and lender, builder and energy efficiency trade organizations;
- Nonprofit lenders and developers, including loan funds, land trusts, community development financial institutions, intermediaries, and organizations focused on preservation and energy conservation;
- Policy and housing advocacy organizations, including civil rights organizations, fair housing organizations, and national and state consumer law organizations;
- Commercial enterprises including Low-Income Housing Tax Credit investors, manufactured housing construction companies and developers, and energy efficiency companies;
- Government entities, including federal, state, and local government entities and state and local housing finance agencies;
- Members of Congress;
- Academicians, including university professors; and
- Fannie Mae and Freddie Mac.

A number of commenters addressed one or more of the 79 specific requests for comment posed in the **SUPPLEMENTARY INFORMATION** to the proposed rule. Responses to the questions came from a diversity of stakeholders reflecting a wide range of opinions. FHFA appreciates the efforts made by commenters to respond to the questions, and FHFA considered these comments in developing the final rule. Some questions were answered by a large number of commenters, while other questions were not addressed by commenters at all. Some commenters offered a single answer to multiple questions. As a result, FHFA has incorporated applicable responses to the questions into the discussion below of comments on particular issues.

FHFA also held five roundtable discussions with commenters representing a diversity of interests on issues pertaining to the rulemaking.[9] The purpose of the roundtable discussions was to provide the commenters with an opportunity to elaborate on their comment letters, express their views on the comment letters submitted by others, and provide responses to FHFA questions seeking clarifications on their comment letters. Each roundtable discussion focused on specific groups of stakeholders:

- On April 19, 2016, FHFA met with rural housing stakeholders to discuss how the term ''rural area'' should be defined, high-needs rural areas, and other related issues.
- On April 20, 2016, FHFA met with advocates for consumers, civil rights, energy efficiency, and affordable housing to discuss manufactured housing, energy efficiency, Low-Income Housing Tax Credits, and other strategies to preserve affordable housing.
- On April 25, 2016, FHFA met with organizations representing the mortgage finance and insurance industries to discuss gaps in underserved market segments that are within acceptable credit risk tolerances for lenders, insurance companies, and investors, and other related issues.
- On April 26, 2016, FHFA met with organizations representing manufactured housing industry participants to discuss tenant protections in manufactured housing communities, manufactured housing units titled as real estate or personal property, and other related issues.
- On May 2, 2016, FHFA held a conference call with rural housing stakeholders who were unable to participate in the April 19 meeting described above.

II. Duty To Serve Underserved Markets

A. Implementing the Duty To Serve

The final rule implements the Enterprises' statutory Duty to Serve very low-, low-, and moderate-income families in the underserved markets of manufactured housing, affordable housing preservation, and rural housing. In doing so, the final rule creates two complementary processes for the Enterprises to plan for their Duty to Serve activities and for FHFA to annually evaluate each Enterprise's compliance with its Duty to Serve obligations. Under the final rule, each Enterprise must prepare an Underserved Markets Plan (Plan) describing the specific activities and objectives it will undertake to fulfill its Duty to Serve obligations in each underserved market over a three-year period. The Plan process as outlined in the final rule does not make any specific activity mandatory. Instead, the final rule establishes a set of procedures for the Enterprises to consider a range of activities for inclusion in their Plans and incentives for the Enterprises to include impactful activities in their Plans. In addition to the provisions described in the final rule, and in order to address implementation and operational questions that may arise, FHFA intends to release guidance from time to time as the Enterprises develop and execute their Plans.

The final rule also establishes an evaluation and ratings process for FHFA

[6] *See* 74 FR 38572 (Aug. 4, 2009).

[7] *See* 75 FR 32099 (June 7, 2010).

[8] *See* 80 FR 79181 (Dec. 18, 2015).

[9] Summaries of each of these meetings are available on FHFA's Web site at: *https://www.fhfa.gov/SupervisionRegulation/Rules/Pages/Comment-List.aspx?RuleID=543.*

to assess the Enterprises' performance in fulfilling their Plans in each underserved market. As part of this process, FHFA will prepare Evaluation Guidance which, together with the Enterprises' Plans, will be the basis for FHFA's evaluations and ratings. The public will have an opportunity to provide input on each Enterprise's draft Plan as well as FHFA's draft Evaluation Guidance. FHFA will annually assign each Enterprise a rating for each of the three underserved markets in its Plan, and FHFA will publicly report on its basis for assigning each rating. As part of these annual evaluations, FHFA will also monitor the Enterprises' Duty to Serve activities on an ongoing basis.

All activities that an Enterprise undertakes in furtherance of its Duty to Serve must be consistent with its charter act,[10] as well as with all other applicable federal and state laws. Nothing in the final rule authorizes or requires an Enterprise to engage in any activity that would be otherwise inconsistent with its charter or the Safety and Soundness Act, or prohibits an Enterprise from engaging in any activity. Rather, the final rule specifies the scope of Enterprise activities that are eligible to receive Duty to Serve credit, and provides a framework for evaluating the Enterprises' performance.

Consistent with safety and soundness and consistent with the conservatorships, FHFA expects the Enterprises to show tangible results in each underserved market and to effectively facilitate mortgage lending to very low-, low-, and moderate-income families in each underserved market. Consistent with their charters, the Enterprises should expect mortgage purchases and activities pursuant to the Duty to Serve to earn a reasonable economic return, which may be less than the return earned on activities that do not serve these underserved markets.[11]

B. Underserved Markets Plans

The below section sets out the final rule's requirements for each Enterprise to submit a Plan that will describe the activities and objectives the Enterprise will undertake for Duty to Serve credit. Each Enterprise must not only describe in its Plan the activities it intends to engage in, but also why it decided not to include certain other activities in its Plan.

In the final rule, FHFA has established parameters for Enterprise Plans and the following aspects are described below: (1) Requirement that the Plans have a three-year term; (2) definitions of those activities eligible to include in Enterprise Plans; (3) requirement that the Enterprises designate Plan activities for each underserved market; (4) requirement that the Enterprises designate Plan objectives for each activity and also specify the evaluation area for each Plan objective; (5) submission and review of Enterprise Plans; (6) modification of Enterprise Plans; and (7) the process for approving new products.

1. Requirement for Underserved Markets Plans With Three-Year Terms—§ 1282.32(a), (b)

Consistent with the proposed rule, § 1282.32(a) and (b) of the final rule provides that each Enterprise must prepare a Plan describing the specific activities and objectives it will undertake to fulfill its Duty to Serve obligations in each underserved market over a three-year period. As discussed further below, objectives are the specific action items that the Enterprises will identify for each activity. The Plan, along with Evaluation Guidance to be provided by FHFA, will be the basis for FHFA's evaluation of each Enterprise's Duty to Serve performance. The Evaluation Guidance is discussed further below under § 1282.36.

Numerous commenters, including both Enterprises, supported the use of Plans, which commenters stated is a reasonable way for the Enterprises to describe their planned activities and objectives and for FHFA to evaluate Enterprise performance. Fannie Mae recommended that the Plans be simplified to align more closely with the requirements of other federal regulators for Community Reinvestment Act (CRA) Strategic Plans. Fannie Mae stated that such simplified Plans would require fewer Enterprise resources to develop, thereby enabling the Enterprises to devote more of their resources to engaging in activities in the underserved markets. Freddie Mac also commented on the level of detail required in the Plans and recommended that FHFA permit the Enterprises to update their Plans annually in order to address changes.

FHFA has considered the feedback from commenters and has determined that such Plans should be required in the final rule. Accordingly, § 1282.32(a) of the final rule requires the Enterprises to develop Plans describing the specific activities and objectives they will undertake to meet their Duty to Serve each underserved market.

Many commenters discussed the appropriateness of the proposed three-year term for the Plans, with the large majority supporting three years. A trade association commented that compliance with a requirement to submit Plans every three years would be burdensome for the Enterprises. Freddie Mac stated that reliably projecting activities and benchmarks beyond the first year of the Plan would be challenging due to changes in market conditions, lessons learned, and market opportunities, and recommended that FHFA permit annual updates to the Plans. FHFA has determined that three-year cycles are an appropriate period of time for the Enterprises to be able to accomplish multiyear objectives and that it is feasible for the Enterprises to forecast activities and market conditions for Plan purposes. In addition, as discussed below, the Enterprises will be permitted to annually modify their Plans during the three-year cycle,, subject to FHFA Non-Objection.

2. Eligible Activities for Underserved Markets—§§ 1282.33(b), 1282.34(b), 1282.35(b), 1282.36(c)(3)

The final rule defines the scope of eligible activities that an Enterprise may include in a Plan as those that facilitate a secondary mortgage market on residential properties for very low-, low-, and moderate-income families, consisting of: (1) Manufactured homes titled as real property or personal property and manufactured housing communities; (2) affordable rental housing preservation and affordable homeownership preservation; and (3) rental housing and homeownership housing in rural areas. *See* §§ 1282.33(b), 1282.34(b), 1282.35(b), and 1282.36(c)(3). In a change from the proposed rule, the scope of eligible activities in the final rule includes manufactured homes titled as personal property, which is discussed in greater detail below in Section C(1): Manufactured Housing.

Section 1282.36(c)(3) of the final rule also provides for extra credit-eligible activities, including those that promote residential economic diversity.

3. Underserved Markets Plan Activities—§§ 1282.32(d); 1282.33(c), (d); 1282.34(c), (d); 1282.35(c), (d); 1282.36(c)(3)

a. Statutory, Regulatory, and Additional Activities

Consistent with the proposed rule, § 1282.32 of the final rule retains the requirement that each Enterprise's Plan

[10] *See* Federal National Mortgage Association Charter Act sec. 301, 12 U.S.C. 1716, *et seq.,* and Federal Home Loan Mortgage Corporation Act sec. 301, 12 U.S.C. 1451 note, *et seq.* The Enterprises' public purposes include a broad obligation to serve lower- and moderate-income borrowers.

[11] *See* 12 U.S.C. 4513(a)(1)(B)(ii).

describe all activities that the Enterprise will undertake for Duty to Serve credit, with the activities grouped under the following categories, as applicable:

- Statutory Activities—Activities that assist affordable housing projects under the eight affordable housing programs specifically enumerated in the Safety and Soundness Act and any comparable state and local affordable housing programs (a category that is also specified in the Safety and Soundness Act);
- Regulatory Activities—Activities in the underserved markets that are designated as Regulatory Activities in the final rule; and
- Additional Activities—Other activities identified by an Enterprise in its Plan that are determined by FHFA to be eligible for that underserved market.

FHFA invites the Enterprises to include Additional Activities in their Plans for FHFA's review and consideration. Additional Activities may include, for example, activities that support other federal, state, and local programs not specifically enumerated in the final rule that would benefit from Enterprise support. Any Additional Activities must be eligible under one of the three specified underserved markets as defined in this final rule. If an Enterprise chooses to include an Additional Activity in its Plan, the Enterprise must provide sufficient explanation in its Plan of how the Additional Activity will target an underserved segment of the market. In addition, an Enterprise must describe how the Additional Activity ensures that there are adequate levels of consumer protections or benefits to the tenants or homeowners that are consistent with the requirements of other Statutory and Regulatory Activities in the rule. As an example, for an Additional Activity that pertains to energy efficiency to be eligible to include in a Plan, an Enterprise would have to provide evidence that the activity would provide a benefit comparable to how affordable housing is preserved in the Regulatory Activities relating to energy efficiency.

FHFA will also take into consideration how different the proposed Additional Activity is from the other Duty to Serve Statutory and Regulatory Activities. Additional Activities that are very similar to a Statutory and Regulatory Activity will be subject to higher levels of scrutiny, recognizing that the protections embedded in those activities have been either statutorily enumerated by Congress, or have been subject to the public comment process in the proposed Duty to Serve rule, respectively and considered by FHFA.

The table below shows the Statutory and Regulatory Activities for each of the three underserved markets.

Activities	*Underserved markets*		
	Manufactured housing	Affordable housing preservation	Rural areas
Statutorily-Enumerated Activities.	None	1. Section 8 programs 2. Section 236 (rental and cooperative housing program). 3. Section 221(d)(4) (moderate-income and displaced families). 4. Section 202 (elderly) 5. Section 811 (persons with disabilities). 6. Permanent supportive housing projects (homeless assistance). 7. Section 515 (rural rental) 8. Low-Income Housing Tax Credits (LIHTCs). 9. Comparable state and local affordable housing programs.	None.
Regulatory Activities	1. Support manufactured homes titled as real property. 2. Support manufactured homes titled as personal property. 3. Support manufactured housing communities owned by government instrumentalities, nonprofits, or residents. 4. Manufactured housing communities with specified minimum tenant pad lease protections.	1. Support small multifamily rental property financing activity. 2. Support financing of multifamily energy efficiency improvements. 3. Support financing of single-family energy efficiency improvements. 4. Support affordable homeownership preservation (shared equity) financing. 5. Support HUD's Choice Neighborhoods Initiative (CNI). 6. Support HUD's Rental Assistance Demonstration (RAD) Program. 7. Support financing of purchase or rehabilitation of distressed properties.	1. Support housing in high-needs rural regions: • Middle Appalachia. • The Lower Mississippi Delta. • Colonias. • Rural tracts in persistent poverty counties. 2. Support housing for high-needs rural populations: • Native Americans in Indian areas. • Agricultural workers. 3. Support financing by small financial institutions of rural housing. 4. Support rural small multifamily rental property activity.

Because the goal of the Duty to Serve statute is to increase the amount of investment capital available for mortgage financing for very low-, low-, and moderate-income households, §§ 1282.32(a), 1282.33(a), 1282.34(a), 1282.35(a) of the final rule require the Plans to include activities in each underserved market that serve all three income categories in each year in which the Enterprise is evaluated and rated. Any one activity may, but need not, serve more than one of the three income categories.

b. Extra Credit-Eligible Activities

Section 1282.36(c)(3) of the final rule provides that certain activities designated in the Evaluation Guidance, including those activities that reduce the economic isolation of very low-, low-, and moderate-income households by promoting residential economic diversity, will be eligible for Duty to Serve extra credit.

FHFA received comments from a wide range of commenters who

recommended providing extra credit for a diverse set of activities. Extra credit-eligible activities, including residential economic diversity activities, are not mandatory. However, in order to be eligible to for extra credit, the Enterprises must include and describe the designated activities and objectives in their Plans. Extra credit-eligible activities, including residential economic diversity activities, are discussed further below under § 1282.36(c)(3).

c. Consideration of Minimum Number of Activities

This final rule does not require the Enterprises to engage in any particular activity for Duty to Serve credit. However, the final rule does require that the Enterprises consider a certain number of activities and explain why they are either included in their Plans or why they have chosen not to include them in their Plans. Section 1282.32(d)(1) of the final rule provides that FHFA will designate in the Evaluation Guidance a minimum number of Statutory Activities or Regulatory Activities that the Enterprises must consider for each underserved market. For example, if FHFA decides that the Enterprises must consider at least three Statutory or Regulatory Activities for a given market, each Enterprise would be required to select any three Statutory or Regulatory Activities and explain in its proposed Plan whether it will engage in these activities, and if not, why not. This is a change from the proposed rule, which would have required the Enterprises to consider, and include explanations in their Plans for, every Statutory and Regulatory Activity specified in the rule.[12]

Several policy advocacy organizations supported the proposed approach that the Enterprises be required to consider and address every Statutory and Regulatory Activity in their Plans. Some commenters reasoned that the proposed approach would maintain accountability for the programs enumerated in the statute, while at the same time provide the Enterprises the flexibility to decide which activities to undertake. A few commenters who advocated for the consideration of every Statutory or Regulatory Activity in a Plan also supported providing the Enterprises with broad discretion in deciding how to serve the underserved markets.

Freddie Mac commented that by FHFA designating certain activities as Statutory or Regulatory Activities, the proposed rule appeared to be intended to guide the Enterprises towards certain Activities. Freddie Mac also raised the concern that it might not be possible to create or sustain a secondary mortgage market in certain submarkets. Fannie Mae stated that the proposed approach could be simplified and made more cost effective. Both Enterprises commented on the importance of having discretion and flexibility to propose suitable activities for the underserved markets.

After considering the comments, FHFA has determined in § 1282.32(d)(1) of the final rule that it will state in the Evaluation Guidance a minimum number of Statutory or Regulatory Activities that the Enterprises must consider and address in their Plans, leaving to the Enterprises the decision on which specific Statutory or Regulatory Activities to consider and address under this requirement. This approach balances the comments recommending that FHFA guide the scope of activities and maintain accountability for the statutorily-enumerated programs with the feasibility concerns of the Enterprises. In addition, because the Enterprises' capacity to address the Statutory and Regulatory Activities may change over time, providing flexibility for FHFA to specify in the Evaluation Guidance the minimum number of such activities to be considered and addressed in the Plans will enable FHFA to change the minimum number each Plan cycle as appropriate. The statutory programs in § 1282.34(c)(5) and (c)(6) are excluded for this purpose because they do not, at this time, lend themselves to Enterprise support, so FHFA does not expect the Enterprises to address these two programs in their Plans.

d. Activities and Objectives To Be Undertaken

Section 1282.32(d)(1) and (2) of the final rule provides that for all Statutory, Regulatory, and Additional Activities that an Enterprise chooses to undertake in its Plan, the Enterprise must address in its Plan how it will undertake the activities and related objectives, which are discussed further below. Section 1282.32(d)(3) provides that if an Enterprise chooses to undertake an activity, such as a residential economic diversity activity, for extra credit under § 1282.36(c)(3), the Enterprise must describe the activity and related objectives in its Plan.

The Enterprises may include as many Statutory, Regulatory, and Additional Activities and related objectives in their Plans as they consider feasible. FHFA will review the number of activities and objectives included in an Enterprise's Plan, as well as the nature of those activities, to determine whether the number is reasonable and achievable, and the degree of potential impact on the underserved markets.

4. Underserved Markets Plan Objectives for Each Activity—§ 1282.32(e), 1282.32(f)

Consistent with the proposed rule, § 1282.32(e) of the final rule provides that for each activity set forth in a Plan, the Plan must include one or more objectives, which are the specific action items that the Enterprises will identify for each activity. Objectives are central to FHFA's Duty to Serve evaluation process and ratings determinations. Objectives may cover a single year or multiple years. Each objective must meet all of the following requirements:

- *Strategic.* Directly or indirectly maintain or increase liquidity to an underserved market;
- *Measurable.* Provide measurable benchmarks, which may include numerical targets, that enable FHFA to determine whether the Enterprise has achieved the objective;
- *Realistic.* Calibrated so that the Enterprise has a reasonable chance of meeting the objective with appropriate effort;
- *Time-bound.* Subject to a specific timeframe for completion by being tied to Plan calendar year evaluation periods; and
- *Tied to analysis of market opportunities.* Based on assessments and analyses of market opportunities in each underserved market, taking into account safety and soundness considerations.

A number of policy advocacy organizations and nonprofit lenders supported FHFA's proposed approach for the objectives. A policy advocacy organization and a nonprofit organization suggested regulatory language changes that it stated would enhance the specificity of the Enterprise's objectives, strengthen the ability of the public and FHFA to assess compliance with the Enterprise's stated objectives, and measure their impact. FHFA believes that such changes are not necessary as the Evaluation Guidance will contain sufficient information regarding the process for developing the Plans.

Statutory Evaluation Areas

As proposed, § 1282.32(f) of the final rule provides that each Plan objective must incorporate one or more of the following four statutory evaluation areas (referred to as ''assessment factors'' in

[12] The proposed rule referred to the Statutory and Regulatory Activities as ''Core'' Activities.

the proposed rule), which are set forth in § 1282.36(b) of the final rule:

• *Outreach.* The outreach evaluation area requires evaluation of ''the extent of outreach [by the Enterprises] to qualified loan sellers and other market participants'' in each of the three underserved markets.[13] A Plan objective could describe how an Enterprise would engage market participants, such as through conducting meetings and conferences with current and prospective seller/servicers and providing technical support to seller/servicers, in order to accomplish a Plan activity. Market participants could include traditional participants in Enterprise programs, as well as non-traditional participants such as consortia sponsored by banks, nonprofit organizations, real estate developers, and state and local governments.

• *Loan Product.* The loan product evaluation area requires evaluation of an Enterprise's ''development of loan products, more flexible underwriting guidelines, and other innovative approaches to providing financing to each'' underserved market.[14] A Plan objective could describe, for example, how the Enterprise will reevaluate its underwriting guidelines, which could include empirical testing of different parameters and modification of loan products in an effort to increase the availability of loans to families targeted by the Duty to Serve, consistent with safe and sound lending practices. FHFA expects the Enterprise to identify and assess current underwriting guidelines that may impede service to very low-, low-, and moderate-income families in the underserved markets.

• *Loan Purchase.* The loan purchase evaluation area requires FHFA to consider ''the volume of loans purchased in each of such underserved markets relative to the market opportunities available to the [E]nterprise.'' [15] The Safety and Soundness Act further states that FHFA ''shall not establish specific quantitative targets nor evaluate the [E]nterprises based solely on the volume of loans purchased.'' [16] A Plan objective could include the Enterprise's plans for purchasing loans in particular underserved markets, including its assessments and analyses of the market opportunities available for each underserved market and its expected volume of loan purchases for a given year.

Although the final rule does not establish quantitative targets, FHFA will consider the Enterprise's past performance on the volume of loans purchased in a particular underserved market relative to the volume of loans the Enterprise actually purchases in that underserved market in a given year pursuant to its Plan. In reviewing the Plan and the loan purchase evaluation area, FHFA will take into account difficulties in forecasting future performance and the need for flexibility in dealing with unexpected market changes.

• *Investments and Grants.* The investments and grants evaluation area requires evaluation of ''the amount of investments and grants in projects which assist in meeting the needs of such underserved markets.'' [17] A Plan objective could include investments. As with all activities, the investments must comply with the Enterprises' Charter Acts.[18] FHFA has directed the Enterprises to refrain from making grants because they are in conservatorship. Accordingly, during the period of conservatorship, FHFA does not intend to provide Duty to Serve credit to the Enterprises for making grants.

FHFA received a number of comments on the four evaluation areas. The two evaluation areas that received the most comments were loan products, and grants and investments. For the loan products evaluation area, commenters offered suggestions for specific pilots and for enhancing the criteria to use when assessing loan product activities. Commenters generally expressed support for the development of new loan products. The commenters were nearly unanimous in expressing their support for the Enterprises to be allowed to receive Duty to Serve credit for investments and grants, with many suggesting specific uses for those funds.

The proposed rule specifically requested comment on whether Duty to Serve credit should be given under the loan product evaluation area for research and development activities that may not show initial results. Several trade associations, nonprofit lenders, and policy advocacy organizations, as well as the Enterprises supported providing Duty to Serve credit for this activity even without initial results. A few commenters offered qualified support for research and development only for targeted markets and focused activities provided the research and development activities are robust, the data collected and findings are shared with industry stakeholders, and the research and development activities mesh with already well-developed concepts that have the potential to reach the market within a short period of time.

After considering the comments, FHFA has determined that it is reasonable to make Enterprise research and development activities eligible for Duty to Serve credit under the loan product or outreach evaluation areas because of their importance in encouraging innovation and creative solutions to the challenges that exist in the underserved markets.

Requirement of a Single Evaluation Area for Each Objective

Section 1282.32(f) of the final rule provides that an Enterprise must designate in its Plan the evaluation area under which each Plan Objective will be evaluated.

Under the proposed rule, an objective would have been eligible to receive Duty to Serve credit under only one evaluation area in each underserved market for each year. Both Enterprises objected to this proposed requirement, stating that Duty to Serve credit should be available under multiple evaluation areas within an underserved market. Fannie Mae argued that Plan activities, regardless of which evaluation area they are in, are intertwined with achieving the end result of better serving an underserved market. Freddie Mac argued that the proposed requirement would undercount Enterprise support for activities that meet multiple evaluation areas within a particular market and could result in imprecise or arbitrary classification of the Enterprises' activities or objectives.

After considering the comments, FHFA has determined in the final rule that each objective should only be eligible to receive Duty to Serve credit under one evaluation area per year in an underserved market. This requirement is not intended to preclude or discourage the Enterprises from undertaking multi-faceted activities and objectives that take place over several years. Rather, the Enterprises will simply be required to identify one evaluation area for each objective during each year of a Plan cycle that reflects the Enterprise's primary focus for the objective. In many instances, this may involve an Enterprise specifying separate objectives to cover actions relating to different evaluation areas. For example, a multi-faceted objective, such as one involving research and development, could foreseeably be assessed under outreach in year one of

[13] 12 U.S.C. 4565(d)(2)(B).

[14] 12 U.S.C. 4565(d)(2)(A).

[15] 12 U.S.C. 4565(d)(2)(C).

[16] *Id.*

[17] 12 U.S.C. 4565(d)(2)(D).

[18] 12 U.S.C. 1451 *et seq.* and 12 U.S.C. 1716 *et seq.*

a Plan, and under loan products in year two of the Plan. Identifying the primary evaluation area for each objective, for each year, will focus Enterprise efforts and make it easier for FHFA and other stakeholders to evaluate their performance.

5. Plan Procedures—§ 1282.32(g)

a. Submission of Proposed Plans—§ 1282.32(g)(1)

Section 1282.32(g)(1) of the final rule establishes a process and timeline for the Enterprises to submit their proposed Plans to FHFA for review, with some changes to the process and timeline in the proposed rule. The final rule also establishes distinct timelines for the first Plan development cycle and subsequent Plan cycles.

For the first Plan development cycle following the publication of the final rule, the Enterprises will be required to submit their proposed Plans to FHFA within 90 days after the posting of the proposed Evaluation Guidance on FHFA's Web site. This is a change from the proposed rule, which would have required submitting the first proposed Plan to FHFA pursuant to a timeframe and procedures to be established by FHFA, and would have required FHFA to provide to each Enterprise an individualized Evaluation Guide containing a scoring matrix for its Plan after Non-Objection to the Plan.

For subsequent proposed Plans after the first Plans, FHFA will provide timelines 300 days before the termination date of the Plan in effect, or a later date if additional time is necessary for proposed Plan submission, public input periods, and Non-Objection to an undeserved market in a Plan. FHFA envisions that these timelines will be part of the Evaluation Guidance. Unless otherwise directed by FHFA, each Enterprise must submit a proposed Plan to FHFA at least 210 days before the termination date of the Enterprise's Plan in effect.

Several policy advocacy organizations, a trade organization, and both Enterprises expressed the need for greater certainty earlier in the Plan development process as to how the Enterprises will be evaluated by FHFA. FHFA agrees that providing more details on the Plan submission and review process will assist the Enterprises in developing their proposed Plans and assist the public in understanding how the Enterprises will be evaluated. Accordingly, under the final rule, FHFA will provide the proposed Evaluation Guidance to the Enterprises prior to the date the Enterprises must submit their proposed Plans to FHFA, as opposed to providing an Evaluation Guide to each Enterprise after submission of its Plan, as proposed. Specifically, FHFA will provide the proposed Evaluation Guidance to the Enterprises at least 90 days before their proposed Plans are due to FHFA and will post the proposed Evaluation Guidance on FHFA's Web site for public input. For the first Plan development cycle, FHFA expects to provide the proposed Evaluation Guidance to the Enterprises within 30 days of the date of the posting of this final rule on FHFA's Web site.

b. Posting of Proposed Plans and Public Input—§ 1282.32(g)(2), (3)

Section 1282.32(g)(2) of the final rule establishes a process and timeline for public input on the Enterprises' proposed Plans, with some changes to the process and timeline set forth in the proposed rule. Consistent with the proposed approach, the final rule provides that as soon as practical after an Enterprise submits its proposed Plan, FHFA will post a public version of the proposed Plan, with any proprietary and confidential data and information omitted, on FHFA's Web site for public input. Section 1282.32(g)(3) of the final rule provides that the public input period for the first cycle of proposed Plans will be 60 days, a change from the proposed rule's 45 days.

There was broad support from a wide range of commenters, including policy advocacy organizations, nonprofit intermediaries, trade associations and state housing finance agencies for posting the Enterprises' proposed Plans for public input. Commenters stated that public input would improve the quality of the Plans, add accountability to the Plan review process, and improve FHFA's evaluation of the adequacy of the proposed Plans.

Both Enterprises expressed concerns about posting the proposed Plans for public input, stating that the Plans would contain proprietary and confidential information and that the process of preparing a public version of the proposed Plan could be time intensive. The Enterprises and some commenters also expressed significant concerns about the proposed rule's timeline for specific actions related to proposing and reviewing the Plans. The primary criticisms from various commenters were that the proposed deadlines would not provide sufficient time for the Enterprises to develop their proposed Plans, for stakeholders to provide input on the proposed Plans, for FHFA to adequately consider the public input, and for the Enterprises to incorporate changes in response to the public input. For example, a policy advocacy organization stated that because of the complexity of the Plans, along with the number of activities they are likely to cover, the public would likely need 60–90 days to provide sufficient input on the proposed Plans.

After considering the comments, FHFA has determined that a public input process for the Enterprises' proposed Plans can be implemented that provides transparency and an opportunity for productive public input, while preserving the proprietary and confidential nature of Enterprise data and information. Public input can provide significant value in assisting the Enterprises to identify the needs of the underserved markets, as well as the specific activities that could help meet those needs. FHFA has also determined that the proposed 45-day public input period should be increased to 60 days. Accordingly, under § 1282.32(g)(3) of the final rule, for the Enterprises' first proposed Plans, the public will have 60 days from the date the proposed Plans are posted on FHFA's Web site to provide input. The Enterprises' subsequent proposed Plans will be available for public input pursuant to the timeframe and procedures established by FHFA. FHFA envisions that the timeframe and procedures for public input on subsequent proposed Plans will be specified in future Evaluation Guidance.

c. Enterprise Review—§ 1282.32(g)(4)

Consistent with the proposed rule, § 1282.32(g)(4) of the final rule provides that each Enterprise may, in its discretion, make revisions to its proposed Plan based on public input.

d. FHFA Review—§ 1282.32(g)(5)

Section 1282.32(g)(5) of the final rule provides that for the first Plan development cycle following publication of the final rule, FHFA will review each Enterprise's proposed Plan, and within 60 days or such additional time as may be necessary from the end of the public input period, provide each Enterprise with FHFA's comments on its proposed Plan. FHFA has determined that a 60-day review period generally should provide sufficient time for review of the Enterprises' proposed Plans.

For subsequent Plan development cycles, as opposed to the 45-day review period in the proposed rule, the final rule provides that FHFA will establish a timeframe and procedures for FHFA review, comments, and any required Enterprise revisions for the subsequent proposed Plans. FHFA envisions that the timeframe and procedures for FHFA's review of the subsequent

proposed Plans will be specified in future Evaluation Guidance. This will allow the review process for subsequent proposed Plans to remain flexible and aligned with the future timelines for submitting the Enterprises' proposed subsequent Plans and publishing the Evaluation Guidance.

The Enterprises will be required to address FHFA's comments on their proposed Plans, as appropriate, through revisions to their proposed Plans pursuant to the timeframe and procedures established by FHFA.

e. Designation of Statutory or Regulatory Activity for FHFA Consideration in Issuing a Non-Objection—§ 1282.32(g)(5)(iii)

Section 1282.32(g)(5)(iii) of the final rule provides that FHFA may, in its discretion, designate in the Evaluation Guidance one Statutory Activity or Regulatory Activity in each underserved market that FHFA will significantly consider in determining whether to provide a Non-Objection to that underserved market in an Enterprise's proposed Plan. This provision was not included in the proposed rule.

This provision evolved from comments that FHFA received suggesting that some Statutory and Regulatory Activities are so important that FHFA should *require* the Enterprises to engage in them. Several commenters recommended a number of specific Statutory or Regulatory Activities that should be mandatory, with residential economic diversity and a chattel manufactured housing pilot being the most frequently cited, on the basis that these activities are the most likely to have an impact on the underserved markets.

After considering the comments, FHFA has determined to maintain the approach in the proposed rule and not make any Statutory or Regulatory Activities mandatory in the final rule. FHFA has concerns that mandating a specific activity, without first considering how the Enterprise would propose conducting an activity to ensure that it would be undertaken in a safe and sound manner, would be inadvisable.

Instead, § 1282.32(g)(5)(iii) of the final rule provides that FHFA may, in its discretion, designate in the Evaluation Guidance one Statutory or Regulatory Activity in each underserved market that FHFA will significantly consider in determining whether to provide a Non-Objection to that underserved market in a proposed Plan. This provision of the final rule provides FHFA with the authority to transparently communicate a priority activity to the Enterprises and puts the Enterprises on notice that FHFA will evaluate their decisions to either include or not include this activity in their Plans. For example, FHFA might encourage the Enterprises to consider serving challenging regions or populations such as Middle Appalachia, or challenging activities such as shared equity homeownership or agricultural workers' housing, which could require more time and effort to make an impact on the underserved market than other activities. In determining whether to issue a Non-Objection where an Enterprise has chosen not to include the designated Statutory or Regulatory Activity in its Plan, FHFA will consider whether the Enterprise has made a convincing case in its Plan for not including it.

f. FHFA Non-Objections to Underserved Markets in a Plan—§ 1282.32(g)(5)(iv)

This final rule provides that FHFA will issue three Non-Objections for a Plan—one for each underserved market—and not for the Plan as a whole. Section 1282.32(g)(5)(iv) of the final rule provides that after FHFA is satisfied that all of its comments on an individual underserved market section in an Enterprise's proposed Plan have been addressed, FHFA will issue a Non-Objection for that underserved market in the Plan. This is a change from the proposed rule, which would have required FHFA to issue a single Non-Objection for the entire proposed Plan.

Several policy advocacy organizations commented that the proposed rule did not make clear the procedures and consequences FHFA would invoke in the event its issuance of a Non-Objection delayed the start of a Plan. This could occur under the proposed approach where FHFA is not satisfied that its comments on an Enterprise's plans for a particular underserved market have been addressed and FHFA is unable to issue a Non-Objection to the entire Plan, thereby preventing the Enterprise from commencing implementation of its Plan in all of the three underserved markets. Under the final rule, FHFA will issue a separate Non-Objection for each of the three underserved markets, which will enable the Enterprises to proceed with implementing their plans for a particular underserved market that has received a Non-Objection without having to wait for FHFA's Non-Objection to the other underserved markets. The next section describes the final rule's approach in the event that there is a delay in FHFA's ability to provide a Non-Objection for one or more underserved markets in a Plan.

g. Effective Dates of Underserved Markets in Plans—§ 1282.32(g)(6)

Section 1282.32(g)(6) of the final rule provides that the effective date of an underserved market in a Plan that has received a Non-Objection from FHFA by December 1 of the prior year will be January 1 of the first evaluation year for which the Plan is applicable. Where an underserved market in a Plan does not receive a Non-Objection by December 1 of the prior year, the effective date for that underserved market will be determined by FHFA. This provision is changed from the proposed rule to take into account that the timing of receiving Non-Objections for each of the underserved markets in a proposed Plan may impact the effective dates for those sections of the Plan. Based on the extent of the delay, FHFA will also describe the impact of any delay in a Plan's effective date on the evaluation and rating processes for the affected underserved market.

h. Posting of Underserved Market Sections of Plans—§ 1282.32(g)(7)

Section 1282.32(g)(7) of the final rule provides that as soon as practical after FHFA issues a Non-Objection to an underserved market in an Enterprise's Plan, that section of the Plan will be posted on the Enterprise's and FHFA's respective Web sites, with any confidential and proprietary data and information omitted. This provision is revised from the proposed rule to take into account that particular underserved markets in a proposed Plan may receive Non-Objections at different times.

6. Modifying Underserved Markets Plans—§ 1282.32(h)

As proposed, § 1282.32(h) of the final rule provides that at any time after implementation of a Plan, an Enterprise may request to modify its Plan during the three-year term, subject to FHFA Non-Objection of the proposed modifications, and FHFA may require an Enterprise to modify its Plan during the three-year term. FHFA and the Enterprises may seek public input on proposed modifications to a Plan if FHFA determines that public input would assist its consideration of the proposed modifications. If a Plan is modified, the modified Plan, with any confidential and proprietary information and data omitted, will be posted on the Enterprise's and FHFA's respective Web sites.

Several commenters, including both Enterprises, supported allowing the final Plans to be modified during the three-year term. A number of commenters also recommended that

FHFA require the Enterprises to solicit public input on their proposed Plan modifications, with some suggesting between 30 and 90 days for such input. Policy advocacy organizations also recommended that FHFA provide public notice when significant modifications to a final Plan receive a Non-Objection, with the modifications and rationale for FHFA's Non-Objection detailed. Freddie Mac strongly supported allowing Plan modifications, and recommended that FHFA establish a simple notice and review process without public input when modifications merely reflect changes in the market.

After considering the comments, FHFA has determined that Plan modifications generally should be permitted, as set forth in the proposed rule. Because of the detailed level of information that the Enterprises need to include in their Plans, FHFA envisions allowing the Enterprises to annually adjust their Plans to reflect their progress, to incorporate lessons learned from executing their Plans, and to make other appropriate adjustments. Additionally, FHFA envisions utilizing the same annual adjustment to ensure that Plan objectives continue to represent meaningful progress over time. However, to maintain the integrity of the final Plans, ad hoc modifications, occurring outside of the annual adjustment, should occur only in special circumstances and should not be a routine part of the process. Instances in which FHFA might require an Enterprise to modify its Plan include significant changes in market conditions, including obstacles and opportunities, or significant safety and soundness concerns arising during the three-year term of the Plan.

FHFA is more likely to seek public input on a proposed Plan modification where an Enterprise requests to eliminate an activity or objective from its Plan, or make numerous changes to the Plan, as opposed to, for example, a request to modify the measurable quantity of an objective by a modest amount.

7. Enterprise New Products and New Activities

Enterprise new products and new activities are subject to the prior approval and prior notice requirements pursuant to the Safety and Soundness Act.[19] If an Enterprise determines that a new product or new activity would facilitate its Duty to Serve obligations and would be consistent with safety and soundness, it may propose that new product or new activity for FHFA consideration.

C. Underserved Markets

1. Manufactured Housing Market—§ 1282.33

The below section describes the final rule provisions for the manufactured housing market and explains FHFA's rationale for adopting four Regulatory Activities for this market. The Regulatory Activities are for: (1) Manufactured homes titled as real property, (2) manufactured homes titled as personal property, (3) manufactured housing communities owned by government units or instrumentalities, nonprofits, or residents; and (4) manufactured housing communities with specified minimum tenant pad lease protections.

FHFA's final rule does not adopt the small manufactured housing community Regulatory Activity that was included in the proposed rule. The below section also discusses the affordability methodology adopted in the final rule.

a. Eligible Activities—§ 1282.33(b)

Section 1282.33(b) of the final rule provides that Enterprise activities eligible to be included in a Plan for the manufactured housing market are activities that facilitate a secondary market for mortgages on residential properties for very low-, low-, or moderate-income families in the manufactured housing market. The manufactured housing market consists of manufactured homes and manufactured housing communities. As defined in the final rule, manufactured homes include: (i) Manufactured homes titled as personal property (also referred to as ''chattel''), and (ii) manufactured homes titled as real property. The proposed rule would have included manufactured housing communities and manufactured homes titled as real property, but not manufactured homes titled as chattel. As further discussed below, after extensive research and consideration of the comments received on chattel lending, FHFA has also included Enterprise support for chattel loans as a Regulatory Activity in the final rule.

Definition of ''Manufactured Home''

Consistent with the proposed rule, § 1282.1 of the final rule defines ''manufactured home'' to mean a home as defined in section 603(6) of the National Manufactured Housing Construction and Safety Standards Act of 1974, as amended (42 U.S.C. 5401 *et seq.*) (referred to here as the ''HUD Code''). As in the proposed rule and because of concerns about the structural integrity of pre-HUD Code homes, activities related to manufactured homes that are not compliant with the HUD Code are excluded from the definition and activities supporting them are not eligible for Duty to Serve credit in the final rule.

Some commenters favored Duty to Serve credit for Enterprise support for financing of pre-HUD Code manufactured homes (*i.e.,* those built prior to June 15, 1976). A nonprofit organization focused on rural housing estimated that one-fifth of rural manufactured homes are pre-HUD Code mobile homes.[20] In joint comment letters, two manufactured housing trade associations noted that in ''55 and over'' manufactured housing communities, some residents are low-, fixed-income seniors with no source of financing for their pre-HUD Code mobile homes. They further noted that in ''all age communities,'' pre-HUD Code home occupants are often low-income and work ''blue collar'' jobs or depend on government assistance.

Pre-HUD Code homes, even those with modifications, do not meet HUD standards and cannot be accepted as compliant with the HUD Code.[21] FHFA acknowledges the financing needs for owners of pre-HUD Code homes and may reconsider the matter in a future rulemaking if appropriate methodologies can be found for assuring the structural integrity of the homes.

b. Regulatory Activities—§ 1282.33(c)

Section 1282.33(c) of the final rule establishes four specific Regulatory Activities under the manufactured housing market. Two of these Regulatory Activities pertain to Enterprise support for financing of single-family manufactured homes titled as real property or chattel, and two pertain to Enterprise support for financing of blanket loans for manufactured housing communities.

(i) Chattel: Loans on Manufactured Homes Titled as Personal Property—§ 1282.33(c)(2)

Section 1282.33(c)(2) of the final rule establishes a Regulatory Activity for Enterprise activities related to facilitating a secondary market for loans on manufactured homes titled as

[19] *See* 12 U.S.C. 4541.

[20] *See* Housing Assistance Council, ''Moving Home—Manufactured Housing in Rural America'' (Dec. 2005), *available at http://www.ruralhome.org/storage/documents/movinghome.pdf.*

[21] *See generally* U.S. Department of Housing and Urban Development, ''Frequently Asked Questions'' (HUD homepage), *available at http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/rmra/mhs/faqs.*

personal property, also referred to as chattel. The proposed rule did not include chattel lending as an eligible activity under the manufactured housing market. The proposed rule discussed issues related to chattel loans and specifically requested comment on whether the Enterprises should receive Duty to Serve credit for purchasing chattel loans, either on a pilot or an ongoing basis.

FHFA received almost 1,400 comment letters on whether Enterprise purchases of chattel loans should be an eligible activity that receives Duty to Serve credit. The vast majority of the letters were form letters signed by individuals and small businesses in the manufactured housing industry recommending Duty to Serve credit for Enterprise support of chattel loans. FHFA also received many individual comment letters from trade associations, consumer advocacy organizations, and manufactured housing community owners and operators supporting Duty to Serve credit for chattel loans. Three Members of Congress also supported Duty to Serve credit for chattel loans.

Several trade associations for the manufactured housing industry favored Duty to Serve credit for chattel loans but acknowledged that modifications such as credit enhancements and greater borrower protections could facilitate secondary market support for these loans. One trade association for the manufactured housing industry had a different view, strongly supporting Duty to Serve credit for chattel loans but opposing any additional credit enhancements or borrower protections for chattel loans. All of these manufactured housing industry commenters advised that manufactured housing is a significant source of unsubsidized affordable housing and manufactured home borrowers have significant needs for financing that are not being met. The commenters further stated that the absence of a secondary market and the lack of available financing for chattel loans have severely impacted the manufactured housing industry, resulting in closures of many factories nationwide. Several trade associations for the manufactured housing industry and a financial marketing corporation commented that much of the pricing disparity between chattel loans and real estate loans results from the absence of a significant secondary market for chattel loans.

In a change from their comments on the 2010 proposed rule, a number of consumer advocacy organizations and nonprofit organizations favored Duty to Serve credit for chattel loans as long as there are adequate consumer protections. A state housing finance agency similarly supported Duty to Serve credit for a chattel pilot provided there are strong underwriting and tenant protections.

A federal financial regulatory agency did not take a position on Duty to Serve credit for chattel loans but urged FHFA to protect chattel loan borrowers, whom the agency stated are particularly vulnerable to unfair lending practices.

A trade association for community bankers was among the few commenters opposing Duty to Serve credit for chattel loans. The trade association expressed general concern about the Enterprises' safety and soundness, as well as the risks that attend chattel lending, stating that more could be done to support real estate lending for manufactured housing, which the trade association stated is a safer loan product. A joint comment letter signed by several policy advocacy organizations and nonprofit organizations opposed any Duty to Serve credit for chattel loans, noting the abuses and high default rates detailed in the **SUPPLEMENTARY INFORMATION** to the proposed rule.

Freddie Mac opposed Duty to Serve credit for chattel loans, as it did in its comment letter on the 2010 proposed rule, without providing a rationale. Fannie Mae did not address chattel loans, a change from its comment letter on the 2010 proposed rule in which it opposed Duty to Serve credit for chattel loans.

After considering the comments, FHFA has decided to establish a new Regulatory Activity in § 1282.33(c)(2) of the final rule for Enterprise support for chattel loans. While FHFA expects the Enterprises to also serve manufactured homes titled as real estate, which include borrower protections and is discussed in greater detail in the next section, FHFA has also determined that the pursuing pilot initiatives, in safe and sound manner, that serve very low-, low-, and moderate-income households who live in manufactured homes titled as chattel, should be eligible for Duty to Serve credit.

FHFA makes this change in the final rule having considered the feedback from many commenters in support of providing the Enterprises with Duty to Serve credit for chattel-titled lending. FHFA also makes this change having considered the potential for the Enterprises' to improve liquidity and access to credit in the manufactured housing market generally and for very low-, low-, and moderate-income households.[22] For example the percentage of new manufactured homes titled as chattel has increased from 67 percent in 2009 to 80 percent in 2015.[23] Additionally, efforts to expand the real estate titled share of the market have faced some difficulties.[24] FHFA also makes this change having considered the potential for the Enterprises to improve the chattel lending market through standardization that includes borrower protections.

In making this change in the final rule, FHFA is also aware of the challenges and risks, which FHFA discussed in detail in the proposed rule, that the Enterprises would face in exploring the chattel lending market. As is discussed in the following sections, FHFA would require the Enterprises to methodically assess ways to mitigate these challenges and risks before beginning any chattel loan purchases. Additionally, FHFA would also conduct a thorough review and assessment of any chattel loan pilot initiative, both when proposed by the Enterprise and, if approved, throughout its execution by the Enterprise. This review is a core part of FHFA's regulatory responsibilities in overseeing all of the Enterprises' Duty to Serve activities, but FHFA believes it is appropriate to emphasize this point for chattel lending since it would be a new purchase activity for the Enterprises.

Review of Enterprise Chattel Loan Pilot Initiatives. Initially, only approved chattel loan pilot initiatives included in an Enterprise's Plan would be eligible for Duty to Serve credit. Under an

[22] One indicator of how little liquidity exists is that over 70 percent of manufactured home loans reported under HMDA are held in portfolio by the lenders, compared with 16 percent for site-built homes. *See* Consumer Financial Protection Bureau, ''Manufactured-housing consumer finance in the United States,'' p. 37 (Sept. 2014), *available at http://files.consumerfinance.gov/f/201409_cfpb_report_manufactured-housing.pdf.*

[23] *See* U.S. Commerce Department, Census Bureau, ''Cost & Size Comparisons For New Manufactured Homes and New Single-Family Site-Built Homes'' (2007–2015), *available at https://www.census.gov/data/tables/2015/econ/mhs/2015-annual-data.html.*

[24] One factor inhibiting the potential for market change is that manufactured home dealers and lenders are not legally obligated to explain the titling of homes to buyers or its implications. *See generally* Ann M. Burkhart, Bringing Manufactured Housing into the Real Estate Finance System, 37 Pepp. L. Rev. 427, 443 (Mar. 2010), *available at http://cfed.org/assets/pdfs/manufactured_housing/advocacy_center/mht/Burkhart_MH_Finance.pdf.* Another factor is that state laws for converting the titles of manufactured homes from chattel to real property present challenges. For example, some states prohibit converting titles for manufactured homes on leased land. *See* National Consumer Law Center, ''Titling Homes as Real Property'' (Oct. 2015), *available at https://www.nclc.org/images/pdf/manufactured_housing/titling-homes2.pdf. See also* Ann M. Burkhart, Bringing Manufactured Housing into the Real Estate Finance System, 37 Pepp. L. Rev. 427, 443–444 (Mar. 2010), *available at http://cfed.org/assets/pdfs/manufactured_housing/advocacy_center/mht/Burkhart_MH_Finance.pdf.*

Enterprise Plan to pursue such a chattel loan pilot initiative, FHFA review of the pilot initiative would also be required under the new product and activities statute prior to any purchases by the Enterprise of chattel loans.[25] To facilitate a timely new product review, an Enterprise's Plan should indicate when the Enterprise expects to commence purchasing chattel loans as part of a pilot initiative prior to any purchases by the Enterprise of chattel loans.

As described in greater detail below, FHFA will carefully assess a number of factors in reviewing any chattel loan pilot or ongoing initiative included in an Enterprise Plan. While the final rule does not contain pre-determined limitations on pilot chattel loan initiatives, FHFA could include such parameters in the Evaluation Guidance. For example, the final rule does not restrict the location of the manufactured homes (within or outside of a manufactured housing community), the volume of Enterprise chattel loan purchases, the duration of any initiative, or the Enterprises' counterparties. Nor does the final rule restrict the specific terms and features of an acceptable chattel loan product beyond those restrictions applicable to all single-family loan purchases. However, FHFA could address some of these parameters in the Evaluation Guidance, and FHFA will also consider them in determining whether to provide a Non-Objection to an Enterprises Plan for the manufactured housing market and for purposes of the new product review.

FHFA will review the results of a chattel loan pilot initiative conducted by an Enterprise, including an assessment of safety and soundness. If at any time FHFA believes that such a pilot poses a risk to the safety and soundness of the Enterprises, as with any activity under a Duty to Serve Plan, FHFA would require the Enterprise to modify or stop its activities accordingly. If, however, FHFA determines that a pilot initiative has been successful, and the Enterprise wishes to pursue an ongoing initiative for chattel loans, that ongoing initiative would require FHFA approval.

The below sections discuss a number of factors that FHFA will consider in reviewing any Enterprise Plan to pursue pilot chattel loan initiatives, including the financial performance of chattel loans, possible risk mitigants, and borrower and tenant protections.

Financial Performance of Chattel Loans. An important factor in determining the potential success of any chattel pilot would be access to reliable data about chattel loan performance. According to manufactured housing industry representatives, since the manufactured housing subprime crisis in 1999 to 2000, manufactured home loan underwriting standards and practices have sharply improved.[26] However, little default and foreclosure data for conventional chattel loans are publicly available to determine how well chattel loans have performed.[27]

This limited data about chattel lending has not only been a challenge for FHFA in developing this rule, but FHFA also understands that it will be an ongoing challenge for the Enterprises in developing any chattel loan pilot initiative. Therefore, as part of any Plan that includes chattel loan activities, FHFA expects that the Enterprises would work to develop better financial performance data both in preparation for a chattel loan pilot purchase initiative and through the implementation of the pilot itself.

One source of chattel loan data that, while limited, would be relevant in considering a chattel loan pilot initiative is the Federal Housing Administration's (FHA) Title I manufactured home chattel loans insurance program. Data for the 2010 originations of Title I chattel loans show that as of year-end 2015, claims had been filed with FHA on 218 out of 1,789 loans endorsed (12 percent).[28] Data for Title I chattel loans showing the percentage of delinquencies, however, are not available. Also, credit score data on Title I loans are incomplete due to the lack of credit scores for some borrowers who do not have traditional credit accounts on which scores are generated by the national credit agencies. The Office of Management and Budget projects that Title I chattel loans for fiscal year 2017 will have a 19 percent recovery rate.[29] FHA data further show that interest rates on Title I chattel loans ranged around 7 to 8 percent in recent years. These rates may appear high in comparison to interest rates for site-built homes with fixed rate, 30-year mortgages. However, the Title I rates are relatively low compared to those for conventional chattel loans, which were reported to be in the 7 to 13 percent range in early 2015.[30]

FHFA expects that the Enterprises, in pursuing a chattel loan pilot initiative, would significantly build on the data available through FHA's Title I program by partnering with manufactured housing lenders to access performance data on chattel loans, including, where possible, for chattel loans currently held in portfolio by lenders that serve this market.

As the Enterprises develop information about chattel loan performance, FHFA expects that this would impact Enterprise decisions on how to appropriately price these loans. On this point, a trade association for the manufactured housing industry suggested charging appropriate loan level price adjustments and guarantee fees as possible conditions for chattel initiatives by the Enterprises. The pricing on the FHA Title I program has resulted in a projected 4 percent surplus over its expected costs.[31] Also, loan modifications for some borrowers have been one way to allow them to stay in their homes and, at the same time, mitigate losses to lenders. Part of the assessment of the performance of chattel loans would include analysis of available loan modification efforts.

Risk Mitigants. In designing a chattel loan pilot initiative, FHFA would also expect the Enterprises to incorporate appropriate risk mitigants into the pilot design. In addition to limiting the volume or duration of the chattel loan pilot initiative, one type of risk mitigant could be to tighten underwriting requirements for credit scores, down

[25] *See* 12 U.S.C 4541.

[26] *See* Cavco Industries, Inc., ''Annual Report on Form 10–K for the Fiscal Year Ended March 28, 2015,'' pp. 8–9 (Mar. 28, 2015), *available at http://investor.cavco.com/public/phhweb/gallery/userupload/ir-doc-386/cvco_2015.3.28_10k.pdf;* George Allen, ''Manufactured Housing Primer,'' pp. 2–3 (Franklin Printing, Apr. 2010). *See generally* Ronald Wirtz, ''Home, sweet (manufactured?) home,'' Fedgazette (Federal Reserve Bank of Minneapolis, July 1, 2005), *available at https://www.minneapolisfed.org/publications/fedgazette/home-sweet-manufactured-home.*

[27] Regarding the paucity of data on manufactured housing overall, *see generally* Matthew Furman, ''Eradicating Substandard Manufactured Homes: Replacement Programs as a Strategy,'' p. 4 (Nov. 2014) (A paper submitted to Harvard's Joint Center for Housing Studies and NeighborWorks America), *available at http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/w15-3_furman.pdf.*

[28] This was one of the higher claim rates in recent years.

[29] *See* Office of Management and Budget, Federal Credit Supplement—Budget of the U.S. Government, Fiscal Year 2017, p. 14 (Table 4) (2016) [hereinafter cited ''OMB Forecast''], *available at https://www.whitehouse.gov/sites/default/files/omb/budget/fy2017/assets/cr_supp.pdf.*

[30] *See* Paola Iuspa, ''Refinancing mobile home loan at lower rate,'' *Bankrate.com* (Jan. 23, 2015), *available at http://www.bankrate.com/finance/refinance/refinancing-mobile-home-loan.aspx.* One researcher found that at the middle of 2012, chattel financing rates were typically at 15 percent. *See* Darla Hailey, ''Mobile Home Decommissioning and Replacement Research in the Pacific Northwest,'' p. 7 (Sept. 2016), *available at https://rtf.nwcouncil.org/subcommittee/small-and-rural-utility-rtf-technical-support-subcommittee.*

[31] *See* OMB Forecast, p. 6 (Table 2) (2016), *available at https://www.whitehouse.gov/sites/default/files/omb/budget/fy2017/assets/cr_supp.pdf.*

payments, loan-to-value ratios (LTV), debt-to-income ratios, and borrower reserves. Another risk mitigant could be having chattel loans purchased by the Enterprises secured not only by a lien on the title to the home, but also by a lien on the underlying land, as one manufactured housing trade association suggested. Additionally, loan modifications for some borrowers have been one way to allow them to stay in their homes and, at the same time, mitigate losses to lenders.

Credit enhancements that share credit risk with private investors are an additional risk mitigant, although the Enterprises would need to develop counterparty relationships and approaches tailored for these loans. None of the Enterprises' approved mortgage insurer counterparties currently offers mortgage insurance for chattel loans, and bond insurance is also unavailable.

The Enterprises could require loan sellers to repurchase the loan or retain a participation of at least ten percent in the loan to meet the requirements of the Enterprises' charter acts.[32]

In pursuing such an approach, the Enterprises would need to consider the financial strength of the counterparty, which would be an important factor in assessing the total credit risk of a transaction. Additionally, as the Enterprises work to develop loan performance data, the Enterprises could explore developing credit risk transfer approaches specific to chattel loans, separate from the credit enhancement requirements of the charter acts.

FHFA would assess these and any other risk mitigants included by an Enterprise in a proposed chattel loan pilot before the Enterprise could begin any loan purchases.

Borrower and Tenant Protections. Before approving any chattel loan purchases by the Enterprises, FHFA would also expect the Enterprises to require meaningful borrower and tenant protections beyond those required under current law. As one regulatory agency commented, chattel loan borrowers are subject to increased risks due to the lack of borrower and tenant protections for chattel loans. The relative lack of consumer protections, compared to those households with a manufactured home titled as real estate, was also discussed at length in the proposed rule. The main protections for real estate mortgage borrowers, which chattel loan borrowers lack, are those afforded by the Real Estate Settlement Procedures Act (RESPA), which prohibits inappropriate kickbacks, requires disclosures of settlement costs, and requires proper loan servicing.[33] The proposed rule described potential difficulties in replicating RESPA-like protections for chattel loan borrowers.[34] A number of manufactured housing trade associations commented in favor of adding these protections for chattel loan borrowers. Several nonprofit organizations suggested that housing counseling be required for chattel loan borrowers, although another nonprofit organization pointed out that there is a shortage of counselors with training in manufactured housing. FHFA is also concerned about a lack of tenant protections in the pad leases for chattel borrowers whose homes are located on leased land.

FHFA expects that the Enterprises would seek feedback from stakeholder groups about how best to design the borrower and tenant protections for any chattel loan pilot initiative. This approach will provide important input on how the Enterprises should balance providing appropriate borrower and tenant protections with designing the pilot in a way that is operationally feasible for the Enterprises and their counterparties.

Preparations for Loan Purchases. FHFA understands that the Enterprises would need to expend substantial effort and would incur non-trivial costs prior to implementing a chattel loan pilot initiative.[35] As discussed above concerning access to better financial performance data, Enterprise research and development efforts would need to precede any purchases of chattel loans, including developing expertise, designing pilot parameters, reviewing potential counterparties, researching investors and securities structures, and developing appropriate borrower and tenant protections to be integrated as counterparty requirements. Enterprise counterparties would also need to be prepared to accurately report their chattel loan data and to adopt strong compliance and internal auditing standards.

The final rule, therefore, allows for a wide range of Enterprise activities supporting chattel loans to be eligible for Duty to Serve credit. For example, Enterprise outreach to potential counterparties could count under the outreach evaluation area, and Enterprise research and development could count under the outreach evaluation area or the loan product evaluation area even where it does not result in actual purchases of chattel loans by the Enterprise. The Enterprises' publication of their research and findings could benefit the entire manufactured housing market, which could also work to further liquidity in this market.

Request for Information (RFI). In light of the many considerations that the Enterprises would need to make in designing and proposing a chattel pilot initiative, FHFA has determined to issue an RFI to the public on what an Enterprise should include in a chattel pilot initiative, if an Enterprise decides to pursue a pilot initiative. FHFA has determined that the RFI will conclude in time for the Enterprises to consider the input from the RFI in any chattel pilot initiative that may be included in an Enterprise's draft Plan.

(ii) Manufactured Homes Titled as Real Property—§ 1282.33(c)(1)

Consistent with the proposed rule, § 1282.33(c)(1) of the final rule establishes a Regulatory Activity for Enterprise support of financing for manufactured homes titled as real property.

A wide range of commenters asserted that there is a need for Enterprise support for this market. Manufactured housing industry commenters stated that while real estate-titled homes are a smaller part of the manufactured housing market than chattel-titled homes, there are changes the Enterprises could make to assist this market. A manufactured housing trade association suggested that Enterprise guarantee fees for loans on real estate-titled homes be comparable to those for loans on site-built homes. The commenter also recommended that a number of terms and conditions of the Enterprises' mortgage products for real estate-titled homes be modified, such as financing of property damage insurance, liberalizing the LTV requirements, and financing pre-HUD Code homes in some instances.

Except for the general requirements applicable to all single-family loan purchases, the final rule does not incorporate commenters' specific suggestions regarding the terms and conditions for mortgages on real estate-titled homes purchased by the

[32] *See generally* 12 U.S.C. 1717(b)(1) (Fannie Mae Charter Act); 12 U.S.C. 1454(a)(1) (Freddie Mac Charter Act).

[33] *See generally* 12 U.S.C. Ch. 27; Consumer Financial Protection Bureau, ''CFPB Consumer Laws and Regulations—RESPA'' (Apr. 2015), *available at http://files.consumerfinance.gov/f/201503_cfpb_regulation-x-real-estate-settlement-procedures-act.pdf.*

[34] *See* 80 FR at 79190 (Dec. 18, 2015).

[35] Regarding the difficulties involved in establishing an Enterprise pilot for chattel loans, *see generally* Titus Dare, ''A Deeper Look at why the GSEs say no to Securitizing Chattel Loans,'' MHProNews (May 24, 2016), *available at http://www.mhmarketingsalesmanagement.com/blogs/industryvoices/tag/titus-dare/.*

Enterprises. These suggestions are more appropriate to be raised by the commenters directly with the Enterprises during the development and implementation of the Enterprises' Plans.[36]

The proposed rule specifically requested comment on whether Duty to Serve credit for real estate-titled manufactured homes should be limited to certain situations, such as when refinancing borrowers with excessive interest rates.[37] A wide variety of commenters opposed any limitations on Duty to Serve credit for real estate-titled homes because of the shortage of funding for manufactured housing overall and the acute housing needs of lower-income borrowers. FHFA is persuaded by these comments and has not included any such limitations in the final rule.

FHFA notes that mortgages on real estate-titled manufactured homes generally perform well. The borrowers for these homes are subject to the same consumer protections as borrowers for site-built homes, and the housing is affordable relative to site-built housing. In addition, the Enterprises already have an infrastructure in place for purchasing and servicing mortgages on real estate-titled manufactured homes.

(iii) Manufactured Housing Communities—§ 1282.33(c)(3)

Section 1282.33(c)(3) of the final rule establishes the following Regulatory Activities for Enterprise support for manufactured housing communities, with some modifications from the proposed rule: (1) Support for blanket loans on government-, nonprofit-, or resident-owned manufactured housing communities, and (2) support for blanket mortgages on manufactured housing communities with minimum tenant protections in the pad leases. The definition of ''manufactured housing community'' in § 1282.1 of the final rule remains unchanged from the proposed rule—a tract of land under unified ownership and developed for the purpose of providing individual rental spaces for the placement of manufactured homes for residential purposes within its boundaries.

The final rule does not allow additional Duty to Serve credit where a manufactured housing community qualifies under both Regulatory Activities because government-, nonprofit-, or resident-owned owned communities are likely to already have meaningful tenant pad lease protections.

Freddie Mac supported Duty to Serve credit for activities that generally support affordable manufactured housing communities, without limiting eligibility to the specific Regulatory Activities in the proposed rule, stating that this would be consistent with Congressional intent.

A manufactured housing trade association opposed any Duty to Serve credit for Enterprise support for manufactured housing communities, maintaining that manufactured home communities are not an underserved market and do not address the critical challenge for homeowners, which is affordable financing for chattel-titled manufactured homes facilitated by a strong Enterprise secondary market. Two state trade associations for the manufactured housing industry similarly opposed Duty to Serve credit for manufactured housing community loans and preferred that the Enterprises focus on manufactured home loans.

As further discussed below, the final rule retains two of the proposed Regulatory Activities, with some modifications, but does not include the third proposed Regulatory Activity for Enterprise support for financing small manufactured housing communities.

(a) Small Manufactured Housing Communities

In a change from the proposed rule, the final rule does not include Enterprise support for the financing of blanket loans on small manufactured housing communities (communities with 150 or fewer pads) as a Regulatory Activity. As discussed in the **SUPPLEMENTARY INFORMATION** to the proposed rule, this Regulatory Activity was proposed because the Enterprises' purchases to date had tended to be for loans on larger manufactured housing communities, and existing funding for smaller communities was likely to have variable interest rates and balloon payments at the end of the mortgage term.

Few commenters specifically addressed this proposed Regulatory Activity. A trade association supported the proposed Regulatory Activity because the need for financing in this market is for the older or rural communities that tend to be smaller in size. The commenter further suggested that the Enterprises develop prudent underwriting standards that would expand Enterprise loan purchases beyond higher-end communities. In addition, the commenter suggested that the Enterprises collect, analyze, and publish data on manufactured housing communities, in order to develop investor interest. The commenter advised that this would improve liquidity and lower the costs to borrowers. A state housing finance agency supported the proposed Regulatory Activity, stating that small communities need the most financing assistance. A manufactured housing community investor and consultant also supported the proposed Regulatory Activity without providing a rationale.

A larger number of commenters opposed the proposed Regulatory Activity. For example, a policy advocacy organization opposed basing a Regulatory Activity on the size of a community, stating that while it is reasonable to assume that smaller manufactured housing communities face greater challenges in attracting capital than larger communities, the Enterprises already support financing of smaller communities. The commenter instead favored Enterprise support for manufactured communities located in geographies with greater needs, such as high-cost areas where manufactured housing community preservation would secure affordable housing for many years. The commenter asserted that of the three proposed Regulatory Activities for manufactured housing communities, the Enterprises would favor serving smaller communities because it would be the easiest Regulatory Activity to pursue.

Most other commenters who addressed the proposed Regulatory Activities for manufactured housing communities also saw no particular need for targeted Enterprise support for the small manufactured community submarket. The commenters said that there is no correlation between the size of a community and the affordability it provides to residents with limited financial means. A trade association for owners of manufactured homes opposed the proposed Regulatory Activity, commenting that the number of pads in a community is less relevant than the need to provide tenant protections. In addition, a trade association for the manufactured housing industry and a state housing finance agency expressed doubts about conditioning access to Duty to Serve credit on the size of the manufactured housing community. Neither Enterprise supported the proposed Regulatory Activity, although Freddie Mac favored service to this market as an ''Additional Activity.'' Freddie Mac stated that very small manufactured housing communities have a higher chance of being below

[36] Commenters in a number of circumstances addressed individual underwriting recommendations. As noted throughout, FHFA encourages the Enterprises to consider this feedback, although FHFA also notes that this should not be construed as an endorsement by FHFA of those comments and FHFA will review any underwriting guidelines as part of its review of Enterprise Plans for Non-Objection.

[37] *See* 80 FR at 79190 (Dec. 18, 2015).

investment grade and that there are economy of scale difficulties with small communities. Freddie Mac also stated that 25 percent of its blanket loan portfolio is loans on communities with fewer than 150 pads. An academician stated that the proposed Regulatory Activity would encourage service to the least efficient sector of the market. In the **SUPPLEMENTARY INFORMATION** to the proposed rule, FHFA noted that blanket loans for smaller manufactured housing communities are frequently originated by local banks or credit unions and held in portfolio. FHFA did not receive comment letters from community banks or credit unions indicating support for or opposition to this proposed Regulatory Activity.

After considering the comments, it appears that this proposed Regulatory Activity would provide relatively less assistance to the very low-, low-, and moderate-income families targeted for assistance by the Duty to Serve, as compared with the two Regulatory Activities for manufactured housing communities retained in the final rule. Nevertheless, if an Enterprise proposed support for smaller manufactured housing communities as a qualifying Additional Activity and provided detailed information on a targeted market need, FHFA would consider it in reviewing the Enterprise's Plan.

(b) Manufactured Housing Communities Owned by Government Units or Instrumentalities, Nonprofits, or Residents—§ 1282.33(c)(3)

Consistent with the proposed rule, § 1282.33(c)(3) of the final rule establishes a Regulatory Activity for Enterprise support for mortgages on manufactured housing communities owned by government units or instrumentalities, nonprofits, or residents. The final rule defines ''resident-owned manufactured housing community'' as a manufactured housing community for which the terms and conditions of residency, policies, operations, and management are controlled by at least 51 percent of the residents, either directly or through an entity formed under the laws of the state. FHFA has changed the percentage of residents in this definition from 50 percent in the proposed rule to 51 percent in the final rule so that control by a majority of the residents would be required for the community to be eligible for credit, as Fannie Mae suggested in its comment letter.

A number of policy advocacy organizations and nonprofit organizations supported this proposed Regulatory Activity because these types of communities play a key role in preserving sustainable manufactured housing communities and also tend to be safer investments. A nonprofit organization stated that lot rents in resident-owned communities remain affordable following the residents' purchase of the communities.

Several manufactured housing trade associations opposed the proposed Regulatory Activity, as well as any other Regulatory Activity for manufactured housing communities, based on the view that support for manufactured housing communities would not carry out the Duty to Serve mandate. For instance, one commenter objected to the type of ownership of a manufactured housing community affecting access to capital, and stated that government-owned manufactured housing communities should not have easier access to Enterprise support than other types of manufactured housing communities.

FHFA has determined that making Enterprise support for manufactured housing communities owned by government units or instrumentalities, nonprofits, or residents eligible for Duty to Serve credit is consistent with the Enterprises' Duty to Serve responsibilities because these types of communities typically serve lower-income residents, remain residential communities, promote fair treatment of tenants, and help preserve permanent affordability for their residents.[38] One study found that residents of resident-owned communities ''have consistent economic advantages over their counterparts in investor-owned communities, as evidenced by lower lot fees, higher average home sales prices, faster home sales, and access to fixed rate home financing.'' [39] Although government-, nonprofit-, and resident-owned communities currently make up a very small portion of the overall manufactured housing community market, more active support by the Enterprises for communities with these types of ownership structures could encourage more communities to convert to these forms of ownership. Accordingly, consistent with the proposed rule, the final rule establishes a Regulatory Activity for Enterprise support for financing manufactured housing communities owned by government units or instrumentalities, nonprofits, or residents.

(c) Manufactured Housing Communities With Specified Minimum Tenant Pad Lease Protections—§ 1282.33(c)(4)

Section 1282.33(c)(4) of the final rule establishes a Regulatory Activity for Enterprise support for blanket loans on manufactured housing communities that have certain specified minimum pad lease protections for tenants. These protections address renewable lease terms, rent increases and payments, unit sale and sublease rights, and advance notice of a planned sale or closure of the community. The final rule incorporates several modifications to the tenant protections in the proposed rule. By establishing this Regulatory Activity, FHFA seeks to encourage manufactured housing communities to adopt pad lease protections for tenants, or enhance existing pad lease protections. The minimum pad lease protections in the final rule are:

- One-year renewable lease term unless there is good cause for nonrenewal;
- 30-day written notice of rent increases;
- 5-day grace period for rent payments, and the right to cure defaults on rent payments; and
- Right of tenants to:

(A) Sell the manufactured home without having to first relocate it out of the community;

(B) Sublease the home or assign the pad lease for the unexpired term to the new buyer of the tenant's manufactured home without any unreasonable restraint;

(C) Post ''For Sale'' signs;

(D) Sell the manufactured home in place within a reasonable time period after eviction by the manufactured housing community owner; and

(E) Receive at least 60 days advance notice of a planned sale or closure of the manufactured housing community.

The final rule changes the proposed rule by: (1) Clarifying that Enterprise support of financing of manufactured housing communities located in jurisdictions with laws providing tenants with equal or greater protections than those specified in the rule is eligible for Duty to Serve credit; (2) making the pad lease protections available to tenants at all times and not only in cases of default on rent payments; (3) reducing the advance notice period for planned sale or closure of the community from 120 days to 60 days; and (4) not including the proposed provisions on bona fide offers of sale of the community. The changes are discussed further in the sections below.

[38] *See generally* Millennium Housing—Mission Statement, *available at http://www.millenniumhousing.net/#Mission_Statement.*

[39] Sally K. Ward, Charlie French & Kelly Giraud, ''Resident Ownership in New Hampshire's 'Mobile Home Parks:' A Report on Economic Outcomes'' (rev. 2010), *available at http://scholars.unh.edu/cgi/viewcontent.cgi?article=1009&context=carsey.*

As discussed in the **SUPPLEMENTARY INFORMATION** to the proposed rule, the final rule does not impose requirements on sellers and servicers to oversee manufactured housing community owners' compliance with the pad lease protections. Also, consistent with the approach in the proposed rule, the final rule does not require that covenants in the blanket loan documents for the manufactured housing community provide that noncompliance by community owners with the pad lease protections constitutes an event of default. Instead, tenants would need to file private lawsuits to remediate any landlord noncompliance with the lease provisions.

Both Enterprises commented that manufactured housing communities that do not have the proposed pad lease protections are able to obtain financing without Enterprise support. This is due to the current strong market for manufactured housing community financing.[40] A policy advocacy organization that supported having strong tenant protections as a concept also expressed concern that requiring tenant protections could deter community owners from selling their loans to the Enterprises. FHFA notes that this Regulatory Activity would not require the owner of a manufactured housing community to agree to these lease provisions as a condition of selling its loan to an Enterprise. However, if an Enterprise decided to include this Regulatory Activity in its Plan, the Enterprise could receive Duty to Serve credit for those transactions with community owners who did adopt the specified lease provisions. FHFA would take into consideration market competition and the relative difficulty of encouraging community owners to adopt these lease provisions in assessing Duty to Serve credit.

A number of commenters addressed the specific tenant pad lease protections in the proposed rule. Commenters clustered into two groups, with most manufactured housing industry commenters and the Enterprises opposing the proposed pad lease protections, and most consumer advocacy groups favoring even stronger pad lease protections. The manufactured housing industry commenters opposed the pad lease protections because the industry prefers a funding option unconstrained by pad lease protection requirements. The Enterprises also opposed pad lease protections on the grounds that tenant protections are better handled by the state legislatures.

Policy advocacy organizations and nonprofit organizations supported having tenant pad lease protections, either as a stand-alone Regulatory Activity, or as an eligibility requirement for all manufactured housing community loans purchased by the Enterprises. One policy advocacy organization supported the Enterprises' developing a standardized lease containing pad lease protections, and urged that it include free speech rights and rights of association.

A manufactured housing tenants' organization recommended that FHFA adopt the pad lease protections contained in the American Association of Retired Persons (AARP) Model Act.[41] The commenter further advised that 14 states lack any pad lease protection laws for manufactured housing community tenants. The commenter expressed concern that states might adopt FHFA's proposed pad lease protections as a ceiling on tenant protections rather than as the minimum baseline that FHFA intended. A policy advocacy organization stated that the Enterprises should use their market influence to support the proposed pad lease protections or those in state or local laws, whichever are more protective.

A state housing finance agency recommended including safeguards in the final rule against large rent increases in manufactured housing communities. In developing this Regulatory Activity, FHFA sought to address the most concerning reported practices in designing the tenant pad lease protections for the proposed and final rule[42] and has determined that wholesale adoption of the AARP Model Act into tenant lease protections in the final rule would not be practical. However, after considering the comments, FHFA has determined that certain modifications and clarifications to the proposed tenant lease protections should be made in the final rule, which are discussed below.

Equivalent Pad Lease Protection Laws. The **SUPPLEMENTARY INFORMATION** to the proposed rule stated that where a jurisdiction has laws requiring certain pad lease protections for manufactured housing communities that are equal to or greater than the minimum pad lease protections in the proposed rule, communities in those jurisdictions would be eligible for Duty to Serve credit under the proposed Regulatory Activity. The text of the proposed rule referred to the protections as ''minimum'' protections. Some commenters apparently misunderstood this reference and stated that there could be conflicts between the proposed pad lease protections and state and local pad lease protection laws. Some manufactured housing community owners expressed concern about the impact of the proposed pad lease protections because they perceived conflicts between these requirements and state and local laws, and stated that it would be inappropriate to condition financing on these requirements.

FHFA did not intend that the minimum pad lease protections in the proposed rule be a suggested ceiling for pad lease protections to be adopted by states or localities. Instead, FHFA intends that the pad lease protections finalized here act as a floor for tenant protections in manufactured housing communities. The final rule clarifies this by stating explicitly that manufactured housing communities in jurisdictions with laws providing tenants with equal or greater pad lease protections than those specified in the Regulatory Activity are eligible for Duty to Serve credit.

Right to Sell Manufactured Homes and Sublease or Assign Pad Leases. The proposed rule would have provided that upon a default by tenants on their rent payments, the tenants would have the right to: (1) Sell their home without having to first relocate it out of the community; (2) post ''For Sale'' signs; (3) sublease or assign their pad lease for the unexpired term without unreasonable restraint; and (4) sell their home within a reasonable period of time after eviction. The final rule makes these protections available to tenants at all times regardless of whether they have defaulted on their rent payments.

[40] *See generally* Tony Petosa, Nick Bertino & Erik Edwards, ''Wells Fargo Multifamily Capital, Manufactured Home Community Financing Handbook,'' pp. 5–8 (10th ed., 2d Qtr. 2016). *See* Peter Grant, ''Singapore's Sovereign-Wealth Fund Is in Talks to Buy Manufactured-Home Owner,'' Wall Street Journal (June 28, 2016) (''Well-capitalized private equity and publicly traded REITs are eager to acquire these properties.''), *available at http://www.wsj.com/articles/singapores-sovereign-wealth-fund-is-in-talks-to-buy-manufactured-home-owner-1467106203*. For a discussion of the high desirability of manufactured housing communities as an investment, *see generally* Nancy Olmsted, Marcus & Millichap, ''Investors Competing for Limited Supply of Manufactured Home Communities,'' First Half 2015, Manufactured Housing Research Report (2015).

[41] *See generally* Carolyn L. Carter, Odette Williamson, Elizabeth DeArmond & Jonathan Sheldon, ''Manufactured Housing Community Tenants: Shifting the Balance of Power—A Model State Statute,'' AARP Public Policy Institute (Rev. Ed. 2004), [hereinafter cited ''AARP Model Act''], *available at http://assets.aarp.org/rgcenter/consume/d18138_housing.pdf*.

[42] *See generally* Darren Cunningham, ''Another Mobile Home Tenant Facing $25k Lawsuit After Selling Her Own Home,'' Fox17online (Apr. 7, 2014) (Web site), *available at http://fox17online.com/2014/04/07/another-mobile-home-tenant-sued-for-25k-after-selling-her-own-home/*.

A manufactured housing industry consultant supported the proposed right for tenants to be able to sell their homes in place and advertise the sale. The commenter stated, however, that after eviction of a tenant, the trial court judge usually determines a reasonable period of time for the tenant to sell the home. The commenter further noted that most leases in the Midwest are verbal, month-to-month leases, with most tenants declining a written lease.

Advance Notice Period for Planned Sale or Closure of Community. Under the proposed rule, tenants would have had the right to receive at least 120 days advance notice of a planned sale or closure of the community, within which time the tenants, or an organization acting on behalf of a group of tenants, may match any bona fide offer of sale, and the community owner must consider the tenants' offer and negotiate with them in good faith.

Some manufactured housing trade organizations opposed a right for advance notice to tenants of a planned sale of the community except when the sale involves a change in land use. In their view, the sale of the property does not harm tenants because their leases simply transfer to the new owner.

With one exception, commenters did not specifically address the length of the proposed advance notice period. The exception was a policy advocacy organization that conducted a review of the manufactured housing community laws in all 50 states. The commenter reported that only Vermont and Connecticut have a 120-day advance notice period, that Florida, Massachusetts, and Rhode Island have a 45-day ''purchase opportunity'' period, and that Oregon has a 25-day advance notice period. The commenter concluded that the proposed 120-day advance notice to tenants is too long and that the other state advance notice periods are effective.

FHFA also considered the AARP Model Act, which provides for a 90-day advance notice period for the sale of a community.[43] The 90-day period is extended by an additional 180 days where a tenant association provides timely notice to the community owner of its intent to purchase the community.[44] The AARP Model Act provides a two-year advance notice period for a change in use (*i.e.,* closing) of a community.[45]

Based on the commenter's states survey and the AARP Model Act, FHFA is persuaded to change the proposed 120-day advance notice period in the final rule. In view of the wide range of advance notice periods among the states and to balance the needs of tenants with the needs of community owners, the final rule adopts a minimum advance notice period of 60 days. In application, the final rule makes it possible for the 60-day advance notice period and the expiration of the last pad lease term then in effect to expire on the same day.

Tenants' Right of First Refusal. A ''right of first refusal'' is a right in a contract where the seller must give the other party an opportunity to match the price offer that a third party has made to buy a certain asset.[46] Several manufactured housing trade associations mistakenly believed that the proposed Regulatory Activity included a right of first refusal for the tenants to purchase their manufactured housing communities where the communities are being sold or closed. The proposed rule did not include a right of first refusal for tenants. Rather, the proposed rule stated that the ''community owner shall *consider* the tenants' offer and negotiate with them in good faith.'' [47] (emphasis added)

Many policy advocacy organizations favored including a tenants' right of first refusal in the Regulatory Activity, stating that the absence of such a right is a fundamental risk to tenants.

In contrast, several manufactured housing trade associations stated that a tenants' right of first refusal would limit community owners' ability to finance and sell their communities and would expose the Enterprises as investors.

After considering the comments, FHFA has determined that incorporating a tenants' right of first refusal in this Regulatory Activity would add an overly expansive role for the Enterprises and potentially involve significant implementation issues.[48] Accordingly, consistent with the proposed rule, the final rule does not include a tenants' right of first refusal in the Regulatory Activity.

Negotiation of Community Sale. Under the proposed rule, as part of the pad leases protections, the tenants, or an organization acting on behalf of a group of tenants, would have the right to match any bona fide offer for sale, and the community owner would be required to consider the tenants' offer and negotiate with them in good faith. FHFA has determined that it is not necessary for the rule to specify a right for the tenants to make an offer to purchase their community, as this right exists irrespective of the Duty to Serve. FHFA also determined that, while state laws and the AARP Model Act [49] may specify tenant purchase rights, it is not feasible to include them in pad leases.

(d) Determining Affordability of Manufactured Housing Communities—§ 1282.38(f)

The Safety and Soundness Act provides that Duty to Serve activities must be for very low-, low-, and moderate-income families. Manufactured housing community owners and loan sellers are unlikely to know the incomes of all of the community residents at the time a blanket loan on the community is sold to an Enterprise. Thus, in order for an Enterprise's purchase of the loan to be eligible to receive Duty to Serve credit, an alternative to requiring the Enterprises to obtain the incomes of the community residents is needed. FHFA has previously established a methodology in 12 CFR 1282.19 for determining affordability under the Enterprises multifamily affordable housing goals that uses the tenants' total monthly housing costs (rent payments plus utility costs, adjusted for number of bedrooms) instead of their incomes.[50] That methodology will also be used generally for determining the affordability of multifamily properties for Duty to Serve purposes. However, the methodology cannot be used where the total monthly housing costs of the residents are not known to the property owners or the loan sellers. For manufactured housing communities, the total monthly housing costs of the residents (note payments on manufactured home plus pad rent payments plus utility costs, adjusted for bedroom size) are generally not known to the owners of the community or the loan sellers.

Accordingly, to determine the affordability of manufactured housing communities under the Duty to Serve, § 1282.38(f) of the final rule provides that, unless otherwise determined by

[43] *See* AARP Model Act, Sec. 113(b).

[44] *See id.* at Sec. 113(c).

[45] *See id.* at Sec. 112(b).

[46] *See* The Law Dictionary (Black's Law Dictionary Free Online Legal Dictionary, 2d Ed.) (Web site), *available at http://thelawdictionary.org/right-of-first-refusal/.*

[47] 80 FR at 79217 (2015).

[48] *See generally* Matthew Silver, ''Lawsuit Attempts to Block Sale of Manufactured Home Community,'' MHProNews (July 5, 2016), *available at http://www.mhmarketingsalesmanagement.com/blogs/daily-business-news/lawsuit-attempts-to-block-sale-of-manufactured-home-community/*; David I. Walker, ''Rethinking Rights of First Refusal,'' p. 5 Stan. J.L. Bus. & Fin. 1 (1999); Joshua Stein, ''Why Rights of First Offer and Rights of First Refusal Don't Work'' (Nov. 26, 2013), *available at https://commercialobserver.com/2013/11/why-rights-of-first-offer-and-rights-of-first-refusal-dont-work/.*

[49] *See* AARP Model Act, sec. 113(b), (e).

[50] *See* 12 CFR 1282.15(d)(1), 1282.19.

FHFA, the affordability of homes in the community shall be determined using one of the two methodologies discussed below, as applicable, as a proxy for the number of homes in the community that are affordable, except that for purposes of determining extra Duty to Serve credit for residential economic diversity activities or objectives, the methodology in paragraph (f)(2) may not be used:

(1) *Methodology for government-, nonprofit- or resident-owned manufactured housing communities.* Section 1282.38(f)(1) of the final rule provides that, for a manufactured housing community owned by a government unit or instrumentality, a nonprofit organization, or the residents, if laws or regulations governing the affordability of the community, or the community's or ownership entity's founding, chartering, governing, or financing documents, require that a certain number or percentage of the community's homes be affordable consistent with paragraph (d)(1) of § 1282.38, then any homes subject to such affordability restriction are treated as affordable for Duty to Serve purposes.

The proposed rule text did not include this methodology but specifically requested comment on whether governing or financing documents for the community could provide a proxy for resident incomes. For those communities that are owned by government units or instrumentalities, the proposed rule asked whether regulations, handbooks, or financing documents specifying income criteria for the residents would be an appropriate indicator of tenant incomes. For those communities that are nonprofit-owned and resident-owned communities, the proposed rule asked whether the founding documents for the community, which describe its mission as serving lower-income families, or financing agreements or other documents from funding sources specifying the required income levels of intended beneficiaries, would be appropriate indicators of tenant incomes. The proposed rule also asked whether there is any comparable documentation that could be applicable to communities with for-profit owners (*e.g.,* where they have accepted income restrictions in order to accept Section 8 vouchers).

These questions received few comments. A nonprofit organization stated that governing or financing documents would provide a good proxy for the incomes of residents in limited equity cooperatives (*i.e.,* resident-owned communities) because the land is preserved over the long term for manufactured housing, and home sales prioritize low-income buyers for purchases. An organization that assists in financing resident-owned communities also favored this methodology, although it stated that all resident-owned communities should be deemed income-qualifying under the Duty to Serve regardless of any income documentation. Neither Enterprise commented on the questions.

FHFA has considered the comments and is persuaded that manufactured housing communities owned by government units or instrumentalities, nonprofits, or residents generally are driven by public missions to provide affordable homes to very low-, low-, and moderate-income households, consistent with the purposes of the Duty to Serve. Accordingly, FHFA has determined that it is reasonable to rely on these entities' or communities' founding, chartering, governing, or financing documents as proxies for affordability of homes in the community where the documents contain restrictions that require affordability of homes to the income groups targeted by the Duty to Serve. A manufactured housing community will also be considered affordable to the income groups targeted by the Duty to Serve if laws or regulations governing the community require that it be affordable to such income groups.

To facilitate Enterprise support for financing for the types of communities discussed above, the final rule provides the Enterprises with the option of using either this methodology or the census tract methodology discussed below.

(2) *Census tract methodology for any type of manufactured housing community.* Section 1282.38(f)(2) of the final rule provides that for any type of manufactured housing community, except for purposes of determining extra credit for residential economic diversity activities or objectives,[51] the affordability of the homes in the community is determined as follows:

(A) If the median income of the census tract in which the manufactured housing community is located is less than or equal to the area median income, then all homes in the community are treated as affordable;

(B) If the median income of the census tract in which the manufactured housing community is located exceeds the area median income, then the number of homes that are treated as affordable is determined by dividing the area median income by the median income of the census tract in which the community is located and multiplying the resulting ratio by the total number of homes in the community.

Consistent with the proposed rule, § 1282.38(f)(2) of the final rule includes a methodology that uses the median income of the census tract in which the community is located, as determined by FHFA, to proxy for the incomes of the community's residents. This methodology is available regardless of the type of ownership structure of the community.

As an example of the second scenario, if the area median income is $100,000, the census tract's median income is $125,000, and the number of homes in the community is 100, the number of homes treated as affordable is:

Step 1: $100,000 ÷ $125,000 = 80%
Step 2: 80% × 100 = 80 (number of homes treated as affordable)

The final rule adopts the proposed census tract methodology's first step for determining the appropriate ratio of the area median income to the census tract median income. The second step in the final rule multiplies that ratio by the total number of homes in the community. This is a change from the proposed rule where step 2 would have multiplied the step 1 ratio by the unpaid principal balance of the blanket loan.

Duty to Serve credit under the loan purchase evaluation area is generally measured based on the number of dwelling units affordable to very low-, low-, and moderate-income families. Measuring credit for purchases of blanket loans on manufactured housing communities based on the number of homes in the community rather than on the unpaid principal balance is not a substantive change because it will not affect the proportion of each community that is treated as affordable. Measuring based on the number of homes is more consistent with the evaluation methods for other types of mortgage purchases, and it will permit easier comparisons of volumes across different mortgage purchases under the Duty to Serve.

Several commenters addressed the proposed census tract methodology. A policy advocacy organization favored the methodology, describing it as simple and reasonable. A trade association also supported the methodology, but preferred that a matrix with parameters tailored to accommodate family stresses like major medical expenses be added.

A manufactured housing tenants' organization opposed the methodology on the basis that it would not work well if the manufactured housing community is located in more affluent areas or in

[51] Estimating affordability under § 1282.38(f)(2) assumes that a community's affordability mirrors the income characteristics of the tract in which it is located, which is not useful for determining whether the community contributes to residential economic diversity.

commercial areas. A state housing finance agency stated that the methodology is flawed because census tract, American Community Survey, and HUD area median income data may not be a good proxy for affordability. The commenter recommended that the chosen methodology be based on use of actual data. Neither commenter offered a recommended substitute for the proposed methodology and these standard measures of affordability.

Fannie Mae suggested instead using the affordability estimation methodology for the Enterprises' housing goals in § 1282.15(e), which is available when rental data is missing,[52] but did not elaborate on its reasons for recommending that methodology. Fannie Mae stated that it would need to incur additional expenditures to operationalize the proposed census tract methodology.

Freddie Mac did not address the reasonableness of the proposed methodology directly, but stated that its support for affordable manufactured housing communities is confirmed by various measures, including the proposed methodology.

An organization that specializes in supporting resident-owned manufactured housing communities commented that in its many years of training and financing resident-owned communities in numerous states, it has not seen any manufactured housing communities in which fewer than 50 percent of homeowners earn less than 80 percent of area median income. The commenter stated that 86 percent of homeowners in its current manufactured housing community portfolio earn less than 80 percent of area median income. The commenter recommended, therefore, that the final rule treat all manufactured housing communities as serving low- and moderate-income households.

FHFA understands the view that manufactured housing communities overwhelmingly serve lower-income households. However, not all manufactured housing communities can be deemed to meet the Duty to Serve income requirements, as some communities are not affordable to households at the Duty to Serve income levels.[53]

FHFA also appreciates the suggestion that the proxy methodology be tailored more to the individual financial circumstances of the community's residents. However, community owners and loan sellers would not be expected to know or share the personal financial circumstances of each resident, making tailored matrices challenging to develop.

In response to the suggestion that the § 1282.15(e) estimation methodology for the housing goals[54] be used for manufactured housing communities under the Duty to Serve, FHFA notes that the housing goals methodology was developed for other types of multifamily rental housing. Accordingly, FHFA has determined that the methodology established in the rule is more appropriate to that task.

FHFA also recognizes that under the census tract methodology, the Enterprises could receive Duty to Serve credit for purchases of blanket loans on manufactured housing communities that may include some residents with incomes exceeding the area median income. The methodology takes this into account through its partial credit calculation for manufactured housing communities in higher income census tracts. FHFA has determined that the census tract methodology is a reasonable approach that will result in Duty to Serve credit being provided for manufactured housing communities that largely serve income-eligible households. In addition, mixed-income communities may contribute significant benefits to the lower-income households in the community and to the success and sustainability of the community.

The final rule also provides that FHFA may approve the use of another methodology for determining the affordability of homes in a manufactured housing community is appropriate. If an Enterprise believes that an alternative methodology would be feasible and preferable to the methodologies in the final rule for a particular type of manufactured housing community transaction, the Enterprise should raise the matter with FHFA for consideration.

2. Affordable Housing Preservation Market—§ 1282.34

The below section describes the final rule provisions for the affordable housing preservation market. The section discusses the scope of eligible preservation activities for Duty to Serve credit as including both affordable rental housing preservation and affordable homeownership preservation. It also identifies the circumstances under which eligible Duty to Serve activities may involve permanent construction take-out loans. The section further identifies the Statutory Activities enumerated for housing projects under the Safety and Soundness Act.[55] It also discusses the seven Regulatory Activities identified by FHFA, which are: (1) Financing of small multifamily rental properties; (2) energy or water efficiency improvements on multifamily rental properties; (3) energy or water efficiency improvements on single-family, first lien properties; (4) shared equity programs for affordable homeownership preservation; (5) HUD Choice Neighborhoods Initiative; (6) HUD Rental Assistance Demonstration program; and (7) purchase and rehabilitation of certain distressed properties. Finally, the section sets out requirements for Additional Activities that the Enterprises may propose in the affordable housing preservation market for Duty to Serve credit.

a. Eligible ''Preservation'' Activities—§§ 1282.34(b); 1282.37(b)(6), (c)

Consistent with the proposed rule, § 1282.34(b) of the final rule provides that Enterprise activities eligible to be included in a Plan under the affordable housing preservation market are activities that facilitate a secondary market for mortgages on residential properties for very low-, low-, or moderate-income families consisting of affordable rental housing preservation and affordable homeownership preservation.

Under the final rule, only certain permanent construction take-out loans are eligible for Duty to Serve credit under the affordable housing preservation market.[56] Section 1282.37(c)(1) of the final rule establishes two categories of these loans that are eligible for Duty to Serve credit. The first category is Enterprise activities related to permanent construction take-out loans for replacement properties that preserve existing subsidies on affordable housing for a regulatory period of required affordability. This period must be at least as restrictive as the longest affordability restriction applicable to the subsidy or subsidies being preserved. The second category is Enterprise activities related to permanent construction take-out loans

[52] *See* 12 CFR 1282.15(e).

[53] *See, e.g.,* Tom Delavan, ''America's Most Glamorous Trailer Park,'' The New York Times Style Magazine (Nov. 11, 2015), *available at http://www.nytimes.com/2015/11/11/t-magazine/paradise-cove-malibu-million-dollar-trailer-parks.html?_r=1*; Deborah Jellett, ''Ten of the Best Luxury Trailer Parks in the World,'' The Richest (Web site) (Apr. 28, 2014), *available at http://www.therichest.com/luxury/celebrity-home/ten-of-the-best-luxury-trailer-parks-in-the-world/.*

[54] *See generally* 12 CFR 1282.15(e).

[55] 12 U.S.C. 4565(a)(1)(B).

[56] A permanent construction take-out loan is a long-term mortgage that replaces a short-term construction loan for a new property. The Enterprises currently purchase permanent construction take-out loans but not acquisition/development/construction loans.

for housing that was developed under state or local inclusionary zoning, real estate tax abatement, or loan programs, where the property owner has agreed to restrict a portion of the units for occupancy by very low-, low-, or moderate-income families, and to restrict the rents that can be charged for those units at affordable rents to those populations, or where the property is developed for a shared equity program that meets the requirements to be eligible for Duty to Serve credit as discussed below and in § 1282.34(d)(4). For these loans to be eligible for Duty to Serve credit, there must be a regulatory agreement, recorded use restriction, or deed restriction in place that maintains affordability for the term defined by the state or local program. These limitations on eligible activities related to permanent construction take-out loans apply to Statutory, Regulatory, and Additional Activities in this market, which are described in detail below.

Permanent construction take-out loans that do not meet the requirements of either of these two categories are not included in the final rule's interpretation of ''preservation'' under the affordable housing preservation market. However, such permanent construction take-out loans are eligible for Duty to Serve credit under the manufactured housing and rural markets subject to meeting the eligibility requirements for those markets as provided in the final rule. Additional guidance on preservation activities and affordability periods may be provided in FHFA's Evaluation Guidance as necessary.

A further discussion of the final rule's provisions on permanent construction take-out loans is below.

b. Permanent Construction Take-Out Loans

As discussed in the **SUPPLEMENTARY INFORMATION** to the proposed rule, the Safety and Soundness Act enumerates nine statutory programs for Duty to Serve credit under the affordable housing preservation market, which are discussed below, but does not otherwise define the term ''preservation'' for this market.[57] Preservation strategies for affordable rental housing and homeownership differ. For affordable rental housing, preservation in the affordable housing industry is generally understood to mean preserving the affordability of rents to tenants in existing properties.[58] This includes preventing the conversion of affordable properties to market rate rents at the end of long-term affordability periods, which are typically 15 years, 20 years, or 30 years, at which time major rehabilitation of the properties may be needed. This is consistent with the plain meaning of the term ''preservation,'' which is maintaining something in its existing state.[59] The concept of ''preservation'' in the rental housing context is not generally understood to include new construction of rental properties.

However, in the post-financial crisis years, the number of renters has been expanding while the stock of affordable rental housing has been shrinking. The rate of new construction of affordable rental housing has not kept pace with the demand for such housing. Further, more desirable markets face particular upward rent pressure. One way to preserve affordability is to give Duty to Serve credit for permanent construction take-out loans for rental properties where long-term affordability periods are required by regulatory agreements, which for several federal programs are set at 15 years, 20 years, or 30 years. Some of the specifically enumerated programs under the affordable housing preservation market in the Safety and Soundness Act involve new construction, which could indicate congressional intent to include support for new construction under this market. However, Congress may have instead intended only that support for existing properties under these programs at the point of their expiring regulatory agreements be included in the affordable housing preservation market.

The proposed rule specifically requested comment on whether the term ''preservation'' should be interpreted to allow Duty to Serve credit to be provided to Enterprise purchases of permanent construction take-out loans on new rental properties with long-term affordability regulatory agreements that restrict incomes and rents, and whether 15 years or some other term would be an appropriate minimum period of long-term affordability. The proposed rule also specifically requested comment on whether the term ''preservation'' should be interpreted to include Enterprise purchases of refinance mortgages on existing rental properties with long-term affordability, and whether the preservation activities should be required to extend the property's regulatory agreement restricting household incomes and rents for some minimum number of years, such as 10 years, beyond the date of the Enterprises' loan purchases and, if so, what an appropriate minimum period of long-term affordability would be for the extended use regulatory agreement.

FHFA received numerous comments regarding the interpretation of ''preservation.'' Commenters generally agreed that Enterprise support for extending long-term affordability for existing rental properties should be included as ''preservation.'' However, commenters differed on whether and to what extent FHFA should include Enterprise support for permanent construction take-out loans as ''preservation.'' Both Enterprises recommended that FHFA include new construction as ''preservation'' in order to address the lack of supply of affordable rental housing, which they stated cannot be met by preservation of existing properties alone. Fannie Mae did not specify whether FHFA should limit the types of new construction that should be eligible as ''preservation'' for Duty to Serve credit. Freddie Mac recommended that new construction for properties with regulatory agreements requiring long-term affordability be considered.

Support for Including New Construction for Replacement Properties That Preserve Existing Subsidies

The majority of commenters who responded to FHFA's questions on the interpretation of ''preservation'' and on whether FHFA should provide credit for Enterprise support for certain permanent construction take-out loans stated that they only supported new construction that preserves existing subsidy under ''preservation'' for Duty to Serve purposes. These commenters included an individual, several nonprofit organizations, policy advocacy organizations, and governmental entities. A nonprofit organization cited the complicated and labor intensive nature of preserving existing properties as a reason for limiting the definition of ''preservation'' and argued that the Safety and Soundness Act's meaning of ''preservation'' was well understood as preserving the deep affordability of federally-supported affordable rental housing. The nonprofit organization, along with two policy advocacy organizations, cited transfers of Section 8 subsidy contracts, Rental Assistance Demonstration transactions, and projects that use project-basing of tenant protection vouchers and project-based vouchers as examples that would fit within this category of permanent construction take-out loans. One of these policy advocacy organizations

[57] 12 U.S.C. 4565(a)(1)(B).

[58] This is the focus of HUD's Office of Affordable Housing Preservation (recently renamed the Office of Recapitalization).

[59] *See* Cambridge Dictionaries Online, definition of ''preserve.''

commented that given the difficulty of preserving existing affordable housing stock, the Enterprises would likely choose not to engage in such activities if less difficult options were included as eligible activities under the Duty to Serve. The commenter, along with a nonprofit organization, stated that Enterprise support of new construction with long-term affordability restrictions in high opportunity areas is an important need, but should fall under the Enterprises' housing goals.

A local government entity commented that Duty to Serve credit the Enterprises receive for activities related to Choice Neighborhood Initiative grants should include new construction for replacement housing units, which could help the government entity with the final stages of its project through the program. A nonprofit organization and a coalition of practitioners working with the Rental Assistance Demonstration program stated that much of the existing affordable housing stock, especially public housing, is very old and beyond the point of upgrades to modernize properties. The commenters noted that new construction would allow these subsidized properties to be replaced with properties that may be less dense, more energy efficient, and more mixed-income. Several policy advocacy organizations and an individual commented that new construction should only be considered ''preservation'' if Enterprise proposals on new construction encourage residential economic diversity or provide financing for replacement housing that preserves the subsidies on existing affordable units specifically in areas of opportunity. These commenters noted that the new multifamily construction market currently does not appear to need additional liquidity.

Support for Including New Construction With Regulatory Periods of Affordability

Some commenters supported treating new construction with regulatory agreements to maintain affordability as ''preservation,'' though they differed on how long the regulatory periods should be. Freddie Mac and a nonprofit organization recommended that FHFA include as ''preservation'' new construction with regulatory agreements requiring long-term affordability. A nonprofit organization, a policy advocacy organization, and a trade association supported including permanent construction take-out loans on rental properties with long-term affordability regulatory agreements as ''preservation.'' The policy advocacy organization recommended a minimum affordability period of 15 years, and added that permanent construction take-out loans with longer regulatory periods should be scored higher in FHFA's evaluation process for the Enterprises' Duty to Serve performance. A state housing finance agency suggested a 30-year regulatory affordability period for new construction, noting that the standard for regulatory agreements is considerably higher than 15 years. Another state government entity recommended new construction developments with perpetual affordability restrictions as the only kind of new construction that should be treated as ''preservation,'' stating that the preservation of existing housing stock should be the focus of the Duty to Serve rule. A trade association recommended that FHFA require 50-year or ''life of the building'' regulatory affordability periods. The commenter stated that it is inefficient to reinvest public and private funds after a 15-year regulatory term expires in order to recapitalize a property and retain its affordability.

Support for New Construction Under Other Parameters

Several commenters supported some types of new construction under ''preservation'' for the Duty to Serve subject to certain parameters other than regulatory agreements requiring long-term affordability periods or replacement housing that preserves existing subsidies.

A nonprofit organization, along with one of its nonprofit affiliates, recommended that new construction, if included, be treated as ''preservation'' only if it is limited to places of targeted need, such as high-needs rural regions. The commenters expressed concern that if new construction without such limitations is included as ''preservation,'' it could distract from the challenging task of preserving existing affordable properties and stray from the statutory intent of the Duty to Serve.

A trade association commented that new construction should be counted under the Duty to Serve with the preservation of affordability assumed through the underwriting of the property, factors in the market, and amenities in the property and its units, rather than through a requirement for long-term regulatory agreements, which the commenter stated could add barriers and compliance burdens.

A policy advocacy organization recommended that Enterprise support of permanent financing for new construction that adds affordable housing in neighborhoods that need more affordable housing should be eligible for Duty to Serve credit. The commenter further suggested that FHFA provide the bulk of the Duty to Serve credit to traditional preservation of existing properties, stating that there is a core mission to preserve existing and largely irreplaceable subsidized housing.

Support for Treating ''Preservation'' Only as Preserving Existing Properties

A number of commenters recommended that ''preservation'' be interpreted specifically as preserving existing rental properties. Two individuals, two policy advocacy organizations, and a nonprofit organization commented that ''preservation'' should include purchasing or refinancing loans on existing rental properties where units are being converted from market rate to affordable. A nonprofit organization noted as reasons for limiting the interpretation of ''preservation'' that new construction of affordable housing falls under the Enterprises' housing goals and that existing federally supported rental housing properties are often the most affordable properties available in communities. Two state government entities commented that the Enterprises already purchase permanent, multifamily construction take-out loans and, therefore, do not need Duty to Serve credit to encourage such activities. A number of policy advocacy organizations expressed concern that unless new construction that replaces existing affordable housing being demolished is built in gentrifying or high opportunity areas, it could exacerbate segregation. These policy advocacy organizations cited this concern as a reason for opposing new construction being part of FHFA's interpretation of ''preservation.''

After considering the comments, as discussed above, FHFA has determined in § 1282.37(b)(6) of the final rule that Enterprise activities related to permanent construction take-out loans should be treated as eligible ''preservation'' activities under the affordable housing preservation market only if such loans meet the requirements of either of two categories. The first category is permanent construction take-out loans for replacement properties that preserve existing subsidies on affordable housing. The permanent construction take-out loan must preserve existing subsidy with a regulatory period of required affordability that is at least as restrictive as the longest affordability restriction applicable to the subsidy or subsidies being preserved.

The second category is permanent construction take-out loans for housing that was developed under state or local inclusionary zoning, real estate tax abatement, or loan programs, where the property owner has agreed to restrict a portion of the units for occupancy by very low-, low-, or moderate-income families, and to restrict the rents that can be charged for those units at affordable rents to those populations, or where the property is developed for a shared equity program that meets the requirements to be eligible for Duty to Serve credit as discussed below and in § 1282.34(d)(4). There must be a regulatory agreement, recorded use restriction, or deed restriction in place that maintains affordability for the term defined by the state or local program.

Including these limited types of permanent construction take-out loans as eligible for Duty to Serve credit could encourage the Enterprises to make a needed impact in the affordable housing preservation market, which would benefit lower-income households. These requirements will tie permanent construction take-out loans under the affordable housing preservation market more closely to preserving the subsidy on existing housing, which is difficult and complex to preserve, and to preserving long-term affordability of affordable housing developed through state or local inclusionary zoning, real estate tax abatement, or loan programs.

The final rule does not make the above requirements for permanent construction take-out loans under the affordable housing preservation market applicable to permanent construction take-out loans under the manufactured housing and rural markets. This is because the Safety and Soundness Act does not require ''preservation'' as a component of the activities serving those markets. In addition, the manufactured housing and rural markets may have unique needs for new construction of affordable housing without being tied to replacement of existing housing that preserves subsidy, or to housing developed under state or local inclusionary zoning, real estate tax abatement, or loan programs, where a regulatory agreement, recorded use restriction, or deed restriction maintains affordability of a portion of the property's units for the term defined by the state or local program. For example, rural areas have a specific need for small multifamily properties, given the lower population densities in rural communities. Developers considering financing affordable multifamily housing in rural areas may face challenges with transaction and operational costs, which can be spread more cost-effectively across larger multifamily properties, and they may be reluctant to finance affordable rural multifamily housing if they believe revenues will not cover costs.

c. Statutory Activities—§ 1282.34(c)

The Safety and Soundness Act provides that the Enterprises ''shall develop loan products and flexible underwriting guidelines to facilitate a secondary market to preserve housing affordable to very low-, low-, and moderate-income families, including housing subsidized under the following government programs:

- The project-based and tenant-based rental assistance programs under Section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f);
- The program under Section 236 of the National Housing Act (rental and cooperative housing for lower-income families) (12 U.S.C. 1715z–1);
- The program under Section 221(d)(4) of the National Housing Act (housing for moderate-income and displaced families) (12 U.S.C. 1715l);
- The supportive housing for the elderly program under Section 202 of the Housing Act of 1959 (12 U.S.C. 1701q);
- The supportive housing program for persons with disabilities under Section 811 of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 8013);
- The programs under title IV of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11361 *et seq.*), but only permanent supportive housing projects subsidized under such programs;
- The rural rental housing program under Section 515 of the Housing Act of 1949 (42 U.S.C. 1485);
- The low-income housing tax credit (LIHTC) under Section 42 of the Internal Revenue Code of 1986 (26 U.S.C. 42); and
- Comparable state and local affordable housing programs.'' [60]

Under § 1282.34(c) of the final rule, Enterprise activities related to facilitating a secondary market for mortgages on housing under these statutorily enumerated programs are eligible for Duty to Serve credit. Enterprise activities under these statutory programs are referred to as ''Statutory Activities'' in the final rule. Under § 1282.32(d) of the final rule, FHFA will designate a minimum number of Statutory Activities and Regulatory Activities in the Evaluation Guidance that the Enterprises must consider whether to undertake. The HUD Section 811 program and McKinney-Vento Homeless Assistance programs, do not, at this time, lend themselves to Enterprise support, so FHFA does not expect the Enterprises to address these two programs in their Plans for the reasons discussed below. For each Statutory Activity that is addressed in their Plans under this requirement in § 1282.32(d), the Enterprises must describe how they choose to undertake the activity and related objectives, or the reasons why they will not undertake the activity.

The status of each statutory program, the relevant comments received, and the role that the Enterprises could play in assisting each statutory program, are discussed below. There were relatively few comments on Enterprise support for the statutory programs.

(i) HUD Section 8 Rental Assistance Program

Under HUD's Section 8 rental assistance program, property owners receive rent payment subsidies from HUD covering the difference between the market rent for a unit and the tenant's rent contribution. The proposed rule specifically requested comment on ways, including potential changes to their underwriting and reserve requirements, the Enterprises could extend their support for Section 8-assisted properties consistent with safety and soundness.

Two nonprofit intermediaries and a trade association requested that the Enterprises evaluate their underwriting practices on loans for properties supported by Section 8 subsidies and, in particular, reconsider how they underwrite their reserve requirements. The commenters stated that the Enterprises' reserve requirements, by taking into account the risk that Congress will not appropriate funds for the Section 8 program, make refinancing more difficult or infeasible, or result in smaller loan amounts with less money available for property rehabilitation. One of the nonprofit intermediaries emphasized that Congress has repeatedly renewed funding for Section 8 rental assistance and, thus, the risk of Congress not appropriating Section 8 funding is quite low. Several commenters also recommended that the Enterprises reconsider their underwriting requirements for minimum vacancies in light of the very low historical vacancy rates for the Section 8 program.

The final rule does not dictate specific underwriting requirements for Enterprise engagement with the Section 8 rental assistance program. FHFA encourages the Enterprises to consider,

[60] 12 U.S.C. 4565(a)(1)(B).

in contemplating whether to make any loan product changes to support the Section 8 rental assistance program, whether the commenters' suggestions on underwriting should be included.[61]

(ii) HUD Section 236 Interest Rate Subsidy Program

Under HUD's Section 236 interest rate subsidy program, HUD subsidizes the interest rate down to one percent on mortgages on multifamily properties, in exchange for restrictions that keep rents at affordable levels for the term of the mortgage, but no fewer than 20 years. The proposed rule specifically requested comment on ways the Enterprises could extend their support for the Section 236 program.

A nonprofit intermediary requested that the Enterprises evaluate their underwriting standards to recognize the importance of rent restrictions and tenant protection requirements. Additionally, the commenter requested that the Enterprises establish loan purchase guidelines that recognize the importance of rent increase phase-in periods as a way to both protect tenants and maximize the loan proceeds available to recapitalize and preserve the property.

The final rule does not dictate specific underwriting requirements for Enterprise engagement with the Section 236 program. FHFA encourages the Enterprises to consider, in contemplating whether to make any loan product changes to support the Section 236 program, whether the commenters' suggestions on underwriting should be included.

Where an Enterprise is considering whether to include the Section 236 program in its Plan, FHFA encourages the Enterprise to consider loan product changes allowing tenant protection vouchers to preserve the affordability of the Section 236 properties. Tenants in Section 236 properties may be statutorily eligible for Enhanced Vouchers, a type of Tenant Protection Voucher which can be project-based and helps preserve long-term affordability.[62] In addition, FHFA encourages the Enterprises to consider whether a Section 236 property has a Rent Supplement or Rental Assistance Program contract and is, therefore, eligible for conversion under the Rental Assistance Demonstration program (see § 1282.34(d)(6) of the final rule). Finally, the Enterprises are encouraged to consider refinancing Section 236 properties that are still receiving interest rate reduction payments and are still subject to the original Section 236 Use Restrictions.

(iii) HUD Section 221(d)(4) FHA Insurance Program

HUD's Federal Housing Administration (FHA) insurance program under Section 221(d)(4) provides financing for the new construction or substantial rehabilitation of multifamily properties, and for permanent financing when construction is completed. The proposed rule specifically requested comment on ways the Enterprises could support properties currently funded under the Section 221(d)(4) program. A nonprofit intermediary requested that the Enterprises provide underwriting clarity and flexibility in the treatment of subordinate debt, which the commenter noted is often a feature in refinancing Section 221(d)(4) loans.

The final rule does not dictate specific underwriting requirements for Enterprise purchases of Section 221(d)(4) loans. FHFA encourages the Enterprises to consider, in contemplating whether to make any loan product changes to support the Section 221(d)(4) program, whether the commenter's suggestion should be included.

(iv) HUD Section 202 Housing Program for Elderly Households

HUD's Section 202 program for low-income elderly households is a direct loan and capital advance program under which HUD provides construction or rehabilitation funds and rental subsidies. The proposed rule specifically requested comment on ways the Enterprises could support properties currently funded under the Section 202 program.

A nonprofit intermediary requested that the Enterprises provide underwriting guidance that is consistent with FHA's treatment of Section 202 loans. Specifically, the commenter requested that the Enterprises develop standards that, like FHA's standards, permit Section 202 refinance loans to be underwritten to the above-market rents that reflect the presence of a long-term Section 8 contract. Additionally, the commenter requested that the Enterprises adopt underwriting standards that, like FHA's standards, adequately account for property tax abatements and exemptions when purchasing a Section 202 loan.

The final rule does not dictate specific underwriting requirements for Enterprise engagement with the Section 202 program. FHFA encourages the Enterprises to consider, in contemplating whether to make any loan product changes to support the Section 202 program, whether the commenter's suggestions should be included.

As described by a nonprofit intermediary, where an Enterprise is considering whether to include the Section 202 program in its Plan, FHFA encourages the Enterprise to consider loan product changes allowing current HUD policies on the prepayment and refinancing of Section 202 Direct Loans.[63] Further, the Enterprises are encouraged to consider the potential eligibility of Section 202 Direct Loan tenants to receive an Enhanced Voucher which, as discussed above, is a type of Tenant Protection Voucher that can be converted to project-based vouchers and preserve long-term eligibility upon mortgage maturity.[64] In addition, the Enterprises are encouraged to consider underwriting the operating costs of providing service coordinators, who are responsible for assuring that elderly residents are linked to the supportive services they need to continue living independently in Section 202 properties.[65]

(v) HUD Section 811 Housing Program for Disabled Households

HUD's Section 811 program is a capital advance and rental assistance program for low-income disabled persons, which carries no debt. As discussed in the proposed rule, because of the absence of debt, there is no obvious role for the Enterprises to support projects funded under this program, and FHFA is not aware that the Enterprises have ever supported mortgage financing under this program.

The proposed rule specifically requested comment on ways the Enterprises could support the Section 811 program. Several commenters mentioned this question in their comments, but did not provide specific suggestions for an appropriate role for the Enterprises to support projects funded under this program. FHFA does not expect the Enterprises to be able to address this program in their Plans.

[61] Commenters in a number of circumstances addressed individual underwriting recommendations. As noted throughout, FHFA encourages the Enterprises to consider this feedback, although FHFA also notes that this should not be construed as an endorsement by FHFA of those comments and FHFA will review any underwriting guidelines as part of its review of Enterprise Plans for Non-Objection.

[62] *https://www.hudexchange.info/course-content/hud-multifamily-affordable-housing-preservation-clinics/Preservation-Clinic-Tenant-Protection-Vouchers.pdf.*

[63] *http://portal.hud.gov/hudportal/documents/huddoc?id=PIH2015-07.pdf.*

[64] *Id.* at 6.

[65] *http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/scp/scphome.*

(vi) McKinney-Vento Homeless Assistance Act Programs

McKinney-Vento Homeless Assistance Act programs provide supportive housing grants to help homeless persons, especially homeless families with children, transition to independent living. Because projects under these programs typically do not involve debt financing, there is no obvious role for the Enterprises to support projects funded under these programs, and FHFA is not aware that the Enterprises have ever supported mortgage financing under these programs.

The proposed rule specifically requested comment on ways the Enterprises could support McKinney-Vento Homeless Assistance Act programs. State housing finance agencies and their trade organization mentioned this question in their comments, but did not provide specific suggestions for an appropriate role for the Enterprises to support projects funded under these programs. FHFA does not expect the Enterprises to be able to address these programs in their Plans.

(vii) USDA Section 515 Rural Housing Program

Under the USDA Section 515 program, USDA provides direct loans and rental assistance to develop rental housing for low-income households in rural locations. The proposed rule specifically requested comment on ways the Enterprises could extend their support for the Section 515 program.

Multiple nonprofit organizations, policy advocacy groups, state government entities, and trade associations urged greater Enterprise participation in supporting financing for rehabilitating Section 515 multifamily properties. A state government entity requested that the Enterprises support financing rehabilitation of Section 515 properties that remain subject to the Section 515 use restrictions. A policy advocacy organization requested that the Enterprises consider allowing small Section 515 properties to be bundled and financed together, making use of economies of scale, in order to help preserve the properties' affordability. Several nonprofit intermediaries and a state government entity requested that the Enterprises consider purchasing loans where an existing Section 515 mortgage is being re-amortized in order to maintain the financing when the Section 515 mortgage is subordinated to the new debt.

The final rule does not dictate specific underwriting requirements for Enterprise engagement with the Section 515 program. FHFA encourages the Enterprises to consider, in contemplating whether to make any loan product changes to support the Section 515 program, whether the commenters' suggestions should be included.

(viii) Federal Low-Income Housing Tax Credits (LIHTCs)

Under the LIHTC program, investors provide developers with funds to develop affordable rental housing properties by purchasing the developers' tax credits (LIHTC equity). LIHTC projects also often have loans (debt) that are eligible for purchase by the Enterprises, like any other multifamily property. LIHTC properties have long-term regulatory use agreements requiring the housing to remain affordable for very low- or low-income households for the specified long-term retention period.

FHFA interprets the Duty to Serve statutory provision for the LIHTCs to apply to debt, as it requires the Enterprises to ''develop loan products and flexible underwriting guidelines to facilitate a secondary market'' to preserve LIHTC-subsidized properties.[66] Accordingly, Duty to Serve credit under this Statutory Activity is limited to Enterprise support for *debt* on LIHTC-subsidized properties. The Enterprises offer specialized loan purchase programs to refinance and rehabilitate existing LIHTC properties in conjunction with extending their regulatory use agreements, and are an important source of financing for preservation of older LIHTC projects. Commenters had no specific suggestions on new approaches the Enterprises could take to further support debt on projects that have received LIHTC equity investment.

Pursuant to a different Duty to Serve statutory provision on investments and grants[67] and under § 1282.37(b)(5), LIHTC equity investments by the Enterprises in rural areas are eligible for Duty to Serve credit under certain circumstances. This is discussed further below in the rural markets section.

(ix) Comparable State and Local Affordable Housing Programs

In addition to the specifically-enumerated programs in the Safety and Soundness Act discussed above, the Act provides that the Enterprises shall facilitate a secondary market for ''comparable state and local affordable housing programs.''[68] Consistent with the proposed rule, the final rule provides that an Enterprise may include such programs in its Plan subject to FHFA determination of whether the programs are eligible for Duty to Serve credit. The proposed rule specifically requested comment on whether there are other state or local affordable housing programs for multifamily or single-family housing the Enterprises could support that should be eligible to receive Duty to Serve credit.

A state government entity and a trade association requested that the Enterprises provide a secondary market for seasoned loans made by state housing trust funds, state housing finance agencies, and other state and local lending programs. The trade association and several civil rights organizations commented that the Enterprises could do more to assist state and local programs that support neighborhood revitalization activities. A nonprofit intermediary and a policy advocacy organization expressed concern that some state and local programs provide very little subsidy, and requested that FHFA set up a review process for determining which programs should qualify under this Statutory Activity. The nonprofit intermediary also requested that FHFA limit Duty to Serve credit to only the portion of a mixed-income multifamily rental property that is deemed affordable to income-eligible households.

Based upon a review of the comments, FHFA encourages the Enterprises to consider including in their Plans state or local programs that provide subsidized housing to very low-, low-, and moderate-income families. If an Enterprise chooses to include a state or local affordable housing program in its Plan, the Enterprise must provide a sufficient explanation of how the program is comparable to one of the other statutory programs in § 1282.34(c) discussed above in the way it provides subsidy and preserves affordable housing for the income-eligible households. If FHFA determines that the program is not comparable, FHFA will object to including it under this Statutory Activity.

As discussed in the proposed rule, examples of comparable state and local programs for single-family affordable housing that could receive Duty to Serve credit under this Statutory Activity include local neighborhood stabilization programs that enable communities to address problems related to mortgage

[66] *See* 12 U.S.C. 4565(a)(1)(B)(viii).

[67] *See* 12 U.S.C. 4565(d)(2)(D).

[68] *See* 12 U.S.C. 4565(a)(1)(B)(ix).

foreclosure and abandonment through the purchase and redevelopment of foreclosed or abandoned homes for very low-, low-, or moderate-income households. Examples of comparable state and local programs for multifamily affordable housing that could receive Duty to Serve credit include support for state low-income housing tax credit programs, programs for redevelopment of government-owned land or buildings as affordable multifamily housing, and inclusionary zoning requirements for multifamily housing.[69]

For purposes of considering and addressing comparable state and local programs in their Plans, the Enterprises clearly cannot be expected to consider the many state and local affordable housing programs operating throughout the country. However, FHFA encourages the Enterprises to make a reasonable effort to consider a cross-section of programs across the country.

Other Federal Affordable Housing Programs

The proposed rule specifically requested comment on whether there are other federal affordable housing programs that the Enterprises could support that should receive Duty to Serve credit. Commenters including nonprofit intermediaries, trade associations, policy advocacy organizations, and state government entities provided suggestions about many additional federal programs. The most common federal affordable housing program identified by multiple nonprofit intermediaries, trade associations, and policy advocacy organizations was the USDA Section 538 program. A trade association and a policy advocacy organization identified the USDA Section 514 and 516 programs, and a nonprofit intermediary identified the Section 184 Indian Housing Loan Guarantee Program.

In the rural markets discussion under § 1282.35(c) below, FHFA has specifically identified these programs as examples of programs eligible for Duty to Serve credit under the rural Regulatory Activities where the loans are made to very low-, low-, or moderate-income families as defined under the Duty to Serve.

Several nonprofit organizations and policy advocacy organizations identified the National Housing Trust Fund and Capital Magnet Fund as federal affordable housing programs that should be eligible for Duty to Serve credit. As stated in the Safety and Soundness Act and in § 1282.37(b)(1) of the final rule, and as discussed in the **SUPPLEMENTARY INFORMATION** to the proposed rule, Enterprise grant contributions to the National Housing Trust Fund and the Capital Magnet Fund, as well as Enterprise mortgage purchases funded with such grant amounts, are not eligible activities to receive Duty to Serve credit.[70] The feedback from commenters raised several points of clarification about when FHFA may award Duty to Serve credit for Enterprise mortgage purchases when the underlying property has received Housing Trust Fund or Capital Magnet Fund funding.

FHFA may provide Duty to Serve credit for an eligible activity under this final rule—such as supporting the Regulatory Activity of small multifamily housing—where the property underlying an Enterprise mortgage purchase happens to have received Housing Trust Fund or Capital Magnet Fund funding through a source other than the Enterprise. The Safety and Soundness Act states that FHFA may award Duty to Serve credit ''only to the extent that such purchases by the enterprises are funded other than with such grant amounts [Housing Trust Fund and Capital Magnet Fund].'' This language prohibits FHFA from providing any Duty to Serve credit if an Enterprise were to use Housing Trust Fund or Capital Magnet Fund grant amounts to fund the Enterprise's mortgage purchase. However, while the Enterprises provide assessments toward the Housing Trust Fund and Capital Magnet Fund, there are no instances where the Enterprises use these grant amounts to fund their own mortgage purchases.

d. Regulatory Activities—§ 1282.34(d)

Consistent with the proposed rule, § 1282.34(d)(1)–(6) of the final rule identifies six specific affordable housing preservation activities as Regulatory Activities. In addition, § 1282.34(d)(7) of the final rule includes a new affordable housing preservation Regulatory Activity for Enterprise support for lending programs for purchase or rehabilitation of certain distressed properties. The seven Regulatory Activities are discussed below.

(i) Small Multifamily Rental Properties—§ 1282.34(d)(1)

Section 1282.34(d)(1) of the final rule establishes a Regulatory Activity for Enterprise support for financing small multifamily rental housing, where the financing is provided by community development financial institutions (CDFIs), insured depository institutions, or federally insured credit unions, each of whose total assets do not exceed $10 billion. This is a change from the proposed Regulatory Activity, which would have required Enterprise purchase and securitization of loan pools backed by existing small multifamily rental properties from CDFIs, community financial institutions, or federally insured credit unions, each of whose total assets are within an inflation-adjusted asset cap of $1.123 billion ($1.128 billion with 2016 inflation adjustment),[71] where the loan pools are backed by existing small multifamily rental properties. Consistent with the proposed rule, § 1282.1 of the final rule defines ''small multifamily property'' to mean a property with 5 to 50 rental units. The purpose of this Regulatory Activity is to increase the volume of small multifamily lending, and to increase the number of smaller lenders that the Enterprises work with on small multifamily lending.

The proposed rule specifically requested comment on whether Enterprise purchase and securitization of loan pools backed by existing small multifamily properties from small lenders should be a Regulatory Activity. A number of commenters, including affordable housing nonprofit organizations and trade organizations of lenders, generally supported a Regulatory Activity to encourage small multifamily property lending because small multifamily buildings are an important source of affordable housing that is often unsubsidized. Both Enterprises commented that support for small multifamily property lending should be an Additional Activity rather than a Regulatory Activity.

Asset Cap Level

The proposed rule also specifically requested comment on whether the proposed definitions of ''community development financial institution,'' ''community financial institution,'' and ''federally insured credit union'' subject to the proposed $1.123 billion asset cap sufficiently capture smaller banks and community-based lenders for Duty to Serve purposes. A number of commenters generally supported the proposed asset cap level.

A nonprofit real estate developer stated that CDFIs should not be subject

[69] Inclusionary zoning refers to local government planning ordinances that require a specified portion of the units in newly constructed housing to be reserved for and affordable to very low- to moderate-income households.

[70] *See* 12 U.S.C. 4565(d)(4).

[71] *See* 81 FR 9196 (Feb. 24, 2016) (FHFA Notice of annual inflation adjustment for community financial institutions).

to any asset cap but did not provide a reason.

Freddie Mac and an unaffiliated individual commenter opposed the proposed asset cap level. The individual stated that the predominant lenders for small multifamily properties are commercial banks and thrifts with assets of $2 billion to $10 billion, that the proposed asset cap level would be impractically small and cost-inefficient, and that it would not significantly increase the Enterprises' purchases of loans on small multifamily properties. Freddie Mac expressed a similar concern, noting that there are over 5,000 banks that would fall within the proposed cap, but that only 19 of those banks have more than $100 million each in multifamily assets, which Freddie Mac identified as the amount of multifamily assets necessary to support sustainable pooling or securitization models. Freddie Mac recommended instead that the final rule use the asset cap level in the Federal Reserve Board's (FRB) definition of ''community banking organization,'' which includes financial institutions with $10 billion or less in total consolidated assets.[72]

FHFA finds compelling the comments that the proposed $1.123 billion asset cap should be increased. Because the goal of this Regulatory Activity is to encourage financing for small multifamily properties, if the asset cap is so low that the entities actually originating loans on small multifamily properties would not be able to qualify, then any impact on the small multifamily market would be de minimis.

In analyzing what an appropriate asset cap level should be for financial institutions in this Regulatory Activity, FHFA considered the definitions of small financial institutions/community banks from the CRA ($304 million), CFPB ($2 billion), FRB ($10 billion), and OCC ($1 billion). Because the feedback about the proposed asset cap level was that it was too low, both the CRA and OCC definitions would also be problematic as $304 million and $1 billion, respectively, are even lower than the proposed $1.123 billion cap. In considering the FHFA, CFPB, and FRB definitions, FHFA analyzed bank call report data to see how many banks would be eligible under each definition. FHFA's analysis validated Freddie Mac's comment that FHFA's proposed $1.123 billion asset cap is likely not high enough to support substantially increasing the volume of small multifamily loan purchases.

The CFPB definition raises the same issue. The CFPB definition of ''small creditor''—an institution with less than $2 billion in assets—would add approximately 241 eligible banks and an additional $12 billion in potential multifamily assets. Of these 241 additional banks, only 25 have at least $100 million each in multifamily assets.

In contrast, if the asset cap in the FRB definition of ''community banking organization''—an institution with $10 billion or less in total consolidated assets—were used, approximately 6,000 banks would be eligible, and these banks have a combined $108 billion in multifamily assets. Of these 6,000 banks, approximately 174 have at least $100 million each in multifamily assets.

For these reasons, FHFA is adopting an asset cap of $10 billion in the final rule. The final rule also replaces the reference to ''community financial institutions'' in the proposed rule with the broader term ''insured depository institutions'' and includes a definition of the latter in § 1282.1.

FHFA recognizes that this increase in the asset cap for smaller multifamily lenders may create an incentive for the Enterprises to increase their activities with lenders whose assets are closer to the asset cap. To ensure that there are incentives for the Enterprises to increase their activities with smaller lenders, including CDFIs, § 1282.35(c)(3) of the final rule, discussed below, establishes a new Regulatory Activity for Enterprise activities with financial institutions with less than $304 million in assets in rural areas.

Purchase and Securitization of Loan Pools

The final rule does not include the requirement in the proposed Regulatory Activity for purchase and securitization of loan pools backed by existing small multifamily rental properties. FHFA recognizes that purchase and securitization of loan pools is just one means to accomplish Enterprise purchases of small multifamily mortgage loans. The Enterprises have the expertise to determine the best method for purchasing small multifamily mortgage loans. FHFA has determined that it should not dictate to the Enterprises a particular loan purchase channel, but rather has set the overall objective through the Regulatory Activity, leaving the specific process to the discretion of the Enterprises. This is consistent with the treatment of other Regulatory Activities in the final rule, for which FHFA does not dictate a particular loan purchase channel. Although FHFA expects that the primary way the Enterprises will implement this Regulatory Activity is through purchase and securitization of pools from lenders, FHFA recognizes that there are multiple ways to support small multifamily housing, and that the limitation in the proposed rule is not needed. The higher asset cap will give the Enterprises the flexibility to increase small multifamily lending in whatever way is most efficient for them that broadens the market of small multifamily mortgage loan sellers.

(ii) Energy or Water Efficiency Improvements on Multifamily Properties—§ 1282.34(d)(2)

Section 1282.34(d)(2) of the final rule establishes a Regulatory Activity for Enterprise support for financing of energy or water efficiency improvements on multifamily rental properties, with several modifications from the proposed rule discussed below. Under the revised Regulatory Activity, Enterprise support for financing of energy or water efficiency improvements is eligible for Duty to Serve credit provided there are projections made based on credible and generally accepted standards that (1) the improvements financed by the loan will reduce energy or water consumption by the tenant or the property by at least 15 percent, and (2) the utility savings generated over an improvement's expected life will exceed the cost of installation.

Lowering energy and water use in multifamily rental buildings will reduce the total amount that tenants spend for the energy and water that they use, thus reducing their utility consumption. This can be considered ''preservation'' under the affordable housing preservation market because housing costs are typically defined as rent plus utility costs. Thus, savings in utility consumption that reduce utility expenses may help maintain the overall affordability of rental housing for tenants.

The proposed rule specifically requested comment on whether Enterprise support for multifamily properties that include energy efficiency improvements resulting in a reduction in the tenant's energy and water consumption and utility costs should be a Regulatory Activity. A significant number of nonprofit organizations, trade associations, government entities, and affordable housing advocacy organizations supported making Enterprise support for financing of energy improvements on multifamily rental properties a Regulatory Activity because of their experience

[72] *See* Board of Governors of the Federal Reserve System, Supervisory and Regulation Letter, SR 13–14 (July 8, 2013), *available at https://www.federalreserve.gov/bankinforeg/srletters/sr1314.pdf.*

demonstrating that energy efficiency and water conservation improvements help to preserve affordable housing.

Credible Projections

The final rule provides that under this Regulatory Activity, the projections of energy or water savings must be made based on credible and generally accepted standards that the improvements will reduce energy or water consumption by at least 15 percent. This is a change from the proposed rule, which would have required that there be ''verifiable, reliable projections or expectations'' of reductions in consumption.

The proposed rule specifically requested comment on whether the Enterprises should require the lender to verify before the closing of an energy improvement loan that there are reliable and verifiable projections or expectations that the proposed energy improvements will likely reduce the tenant's energy and water consumption and utility costs and, if so, what standards of reliability, verifiability and likelihood of reduced consumption and costs should be required. The proposed rule also asked whether the Enterprises should be required to verify, after the closing of an energy improvement loan, that the energy improvements financed actually reduced the tenant's energy and water consumption and utility costs and, if so, how the Enterprises could verify this.

Although it was not the intent of the proposed Regulatory Activity to require verification of energy or water savings after installation of the improvements, a number of trade associations, policy advocacy organizations, and affordable housing providers stated that the rule should not include such a requirement, citing the practical issues involved. Commenters pointed out that demonstration by a property owner of an immediate reduction in utility consumption was impractical because it requires comparing long-term, weather-normalized, pre-retrofit and post-retrofit usage data. Freddie Mac questioned the availability of the requisite usage data since utility companies generally do not share energy consumption figures, for privacy and operational reasons. Post-retrofit verification is particularly problematic when a property is undergoing major renovations and no baseline usage level is readily available.

Freddie Mac and a trade association pointed out that a post-loan verification requirement would be further complicated by the Enterprises' inability to monitor and adjust for tenant utility usage behavior, resulting in inaccurate comparisons between projected and actual tenant utility consumption. A nonprofit organization with energy expertise asserted that low-income households that are financially constrained to very low utility usage might increase usage to a more normal level once energy or water improvements are installed. In increasing their utility consumption, financially constrained households may enhance their quality of life while maintaining the same level of utility expenses. As the commenter pointed out, because a comparison of utility usages would not account for tenants' reactions to improvements, inspectors might wrongly assume that the improvements failed to address energy or water inefficiencies when in reality the improvements' effects were offset by tenants' increasing their utility usage to a more normal level.

A nonprofit organization with energy expertise recommended instead that the Enterprises require verification that the energy and water improvements were installed as specified in an energy audit. Other nonprofit organizations and Freddie Mac supported relying on credible projections by third-party certifiers and utilizing accepted industry standards, such as a recognized point value system or a list of acceptable energy improvements. Additionally, both Enterprises advocated for Duty to Serve credit for properties that achieve a green building certification and, therefore, meet a standard for high energy efficiency.

For properties not earning a green certification, nonprofit organizations and policy advocacy organizations generally supported requiring a one-time energy assessment/audit that meets a national certification standard and is conducted by a qualified third-party certifier, utility company, or state/local agency in order to avoid having to conduct a baseline assessment and a follow-up assessment to verify actual savings. A nonprofit organization recommended that the scope of the energy audit vary based on the type and extent of the improvements in order to lower project costs and maintain the cost effectiveness of smaller improvements.

A trade association opposed requiring energy audits and utility benchmarking, claiming that audits or benchmarks would prove challenging and cost prohibitive.

FHFA agrees with the commenters that an after-the-fact verification requirement would be impractical and overly burdensome. As many commenters noted, there are several practical issues with post-loan verifications of energy and water savings. Immediate verifications would not be possible because the long-term, weather-normalized post-retrofit data needed for comparison with pre-retrofit data will likely not be available for at least one year. Moreover, obtaining the requisite tenant utility usage data would require the property owner to get permission from the utility companies and employ sampling techniques, which is further complicated because utility companies across the country do not consistently capture or store this data. Additionally, the Enterprises have little ability to monitor and adjust for tenant utility usage. As a result, a comparison of projected and actual tenant utility consumption could be inaccurate through no fault of the lender, energy auditor, or Enterprise.

Instead, as recommended by some commenters, FHFA finds that if a multifamily property meets a credible and generally accepted standard, such as the U.S. Green Building Council's Leadership in Energy and Environmental Design (LEED), EarthCraft, Greenpoint, the National Green Building Standard (NGBS), or the U.S. Environmental Protection Agency's (EPA's) ENERGY STAR certifications, or other standards that may be developed that are credible and generally accepted, then a projected reduction of at least 15 percent in energy or water consumption can reasonably be assumed under the standard. Additionally, FHFA finds that if a property undergoes an energy audit that meets a credible and generally accepted standard, such as the American Society of Heating, Refrigerating, and Air-Conditioning Engineers (''ASHRAE'') Level II Energy Audit, and the audit shows a projection of at least a15 percent reduction in energy or water consumption, then the project will be eligible for Duty to Serve credit.

Accordingly, § 1282.34(d)(2) of the final rule replaces the reference to ''verifiable, reliable projections or expectations'' in the proposed rule with ''projections made based on credible and generally accepted standards.''

Utility Savings Exceed Upfront Installation Costs

The final rule provides that under this Regulatory Activity, the reduced utility savings generated over an improvement's expected life must be projected to exceed the upfront costs of its installation. This is a change from the proposed rule, which would have required that the reduced consumption in a project offset the upfront costs of the improvement within a reasonable time period.

The proposed rule specifically requested comment on whether a ''reasonable time period'' should be defined, and, if so, how. Nonprofit organizations, trade associations, and affordable housing advocacy groups stated that since the payback period for energy efficiency improvements can vary widely depending on the type of improvements and geographic location of the property, requiring a specified payback period could arbitrarily limit what energy efficiency improvements lenders are willing to finance. As a result, cost-effective improvements that would significantly improve property performance over the long term might not be financed because of long payback periods. Other trade associations and nonprofit organizations criticized a specified payback period requirement as potentially eliminating cost-effective long-term improvements because of smaller short-term savings.

Based on these concerns, a number of trade associations and nonprofit organizations recommended instead that the Regulatory Activity require a Savings-to-Investment Ratio (SIR), a common benchmark among energy efficiency programs, which allows financing as long as the lifetime utility savings exceed or are equal to the installation costs. The commenters pointed out that a SIR equal to or greater than one suggests that the energy efficiency improvements are cost-effective.

FHFA agrees that the improvements should be cost-effective in order to receive Duty to Serve credit. One way to measure this is to use a SIR or other recognized measure to demonstrate whether the energy efficiency improvements can provide value to property owners over the improvement's expected life. This would allow for Duty to Serve credit as long as the savings generated over an improvement's life exceed or are equal to the cost of its installation. A SIR of greater than one ensures that the present value of energy savings exceeds the present value of the cost of installation and, thus, yields a positive return. As a methodology common to energy efficiency programs, the SIR's benefits are well understood among energy efficiency experts.

A key benefit of any cost-benefit analysis such as the SIR is that it avoids arbitrarily defined payback periods, which could eliminate cost-effective energy improvements that take longer to realize the full savings. Decreasing property owners' costs can help preserve affordable housing. It follows that energy efficiency improvements should be assessed on the basis of whether or not they yield a long-run positive return to the property owner, not on the length of their payback periods.

For these reasons, in a change from the proposed rule, the Regulatory Activity in the final rule provides that the reduced utility savings generated over an improvement's expected life must exceed the cost of installation. Demonstrating that an energy improvement is cost-effective will only be required for projects undergoing an energy audit that meets a national standard, because the other methods of credibly demonstrating reduction in energy and water consumption are presumed to show that the improvements are cost-effective.

Savings Offset by Higher Rents or Other Charges

The final rule does not include the proposed requirement in this Regulatory Activity that the reduced utility costs derived from reduced consumption must not be offset by higher rents or other charges imposed by the property owner.

Several nonprofit organizations, both Enterprises, an organization with energy efficiency expertise, and a trade association raised concerns about the practicality and desirability of the proposed restriction on increases in rents or other charges. Commenters stated that the proposed restriction would likely remove the incentive for property owners to improve their properties, diminishing the number of properties potentially undergoing upgrades. Consequently, rather than helping tenants, the proposed restriction could reduce the potential benefits tenants would receive from living in an upgraded property, such as improved health and savings on their monthly utility bills. FHFA finds these comments persuasive and, therefore, has not included the proposed restriction on increases in rents or other charges in the final rule.

FHFA notes that tenants who are responsible for paying utilities costs could still be subject to an increase in their rents or other charges. FHFA expects the Enterprises to design and implement their energy efficiency improvement loan programs under this Regulatory Activity to ensure the preservation of affordable housing, which includes affordable energy costs. FHFA considered requiring the Enterprises to use their quality control systems to monitor rental properties receiving energy efficiency improvements in order to ensure that the properties' rents remain affordable over time. However, the final rule does not include such a requirement because there is no practical way for the Enterprises to undertake this responsibility.

Reduction of Energy or Water Consumption by Tenant or Property

The final rule includes in this Regulatory Activity a requirement that the energy efficiency improvements reduce energy or water consumption by the tenant or the property by at least 15 percent. This is a change from the proposed rule, which would have applied the requirement only to reductions in energy and water consumption by the tenant and not by the property as a whole.

Several nonprofit organizations stated that energy efficiency improvements would provide benefits to tenants from living in an upgraded property, such as improved health, savings on monthly utility bills, and increases in the value of the property. Further, the improvements would likely provide greater stability in the affordable housing market and decrease the size of future rent increases resulting from increases in energy or water costs.

Several trade associations, policy advocacy organizations, and nonprofit organizations recommended revising the proposed Regulatory Activity to provide Duty to Serve credit not only for a reduction in energy and water consumption by the tenant, but also by the property as a whole. The commenters stated that measuring a reduction in energy and water consumption only by the tenant could miss energy and water savings in common areas of multifamily buildings and remove the incentive for property owners to improve their properties.

After considering the comments, FHFA finds the arguments compelling that the proposed requirement would likely remove the incentive for property owners to improve their properties, thereby diminishing the benefits to the tenants and hindering affordable housing preservation. For these reasons, the Regulatory Activity in the final rule includes reductions in energy or water consumption by the tenant or the property as a whole.

When an Enterprise is considering whether to include this Regulatory Activity for energy efficiency improvements on multifamily rental properties in its Plan, FHFA encourages the Enterprise to specifically consider objectives related to collecting utility usage data and utility benchmarking. FHFA finds that utility benchmarking creates a wide variety of benefits for owners, tenants, and the public. Utility benchmarking helps building owners

discover billing errors and malfunctioning equipment which, once corrected, can result in immediate financial savings. Collecting utility data can also save tenants money by identifying areas where they can realize savings and enhance comfort. The EPA currently offers free utility benchmarking software—Energy Star Portfolio Manager—to collect and analyze utility data.[73] Additionally, a multifamily Energy Star Score, which compares a multifamily building's energy and water use intensity to like buildings, is available from EPA for buildings with greater than 20 units.

Efficiency Improvements That Reduce Energy or Water Consumption

The final rule includes in this Regulatory Activity a requirement that the energy efficiency improvements reduce energy *or* water consumption by at least 15 percent. This is a change from wording of the proposed rule, which was interpreted by some commenters to require that the energy efficiency improvements reduce both energy *and* water consumption by at least 15 percent.

Both Enterprises recommended making this change. Fannie Mae stated that many quality projects would not be able to reduce both energy and water consumption at the same time because improvements typically are undertaken addressing only one of these types of consumption at a given time. Freddie Mac stated that energy and water are separate utilities, and their consumption involves distinct behaviors and technology. Freddie Mac further stated a belief that FHFA's intent was to promote both energy and water efficiency improvements, but not to require the achievement of both simultaneously.

FHFA's intent was not to mandate that the improvements address both energy and water consumption at the same time. Instead, any energy or water improvements could be used to project a reduction in the respective utility consumption by at least 15 percent. FHFA recognizes that requiring reductions in both energy and water efficiency might arbitrarily restrict cost-effective improvements that address only energy- or water-related inefficiencies. Accordingly, the reference in the proposed Regulatory Activity to reducing energy *and* water consumption is changed in the final rule to reducing energy *or* water consumption.

(iii) Energy or Water Efficiency Improvements in Single-Family, First Lien Properties—§ 1282.34(d)(3)

Section 1282.34(d)(3) of the final rule establishes a Regulatory Activity for Enterprise support for financing energy or water efficiency improvements on single-family, first lien properties, with similar modifications from the proposed rule as made for the Regulatory Activity for energy efficiency improvements on multifamily properties discussed above. Under this revised Regulatory Activity, Enterprise support for financing of energy or water efficiency improvements is eligible for Duty to Serve credit provided there are projections made based on credible and generally accepted standards that (1) the improvements financed by the loan will reduce energy or water consumption by the homeowner, tenant, or the property by at least 15 percent, and (2) the utility savings generated over an improvement's expected life will exceed the cost of installation.

As with multifamily rental properties, preservation of affordable single-family properties (homeownership or rental) may also encompass lowering home energy and water costs. Lowering energy and water costs can help a homeowner or tenant to continue to afford mortgage or rent payments, as well as other housing costs.

The comments on this Regulatory Activity mirrored the comments that FHFA received on corresponding requirements for the Regulatory Activity for energy efficiency improvements on multifamily rental properties discussed above.

Credible Projections

As addressed above in the discussion of the Regulatory Activity for energy efficiency improvements on multifamily properties, there are two types of credible and generally accepted standards for projecting energy savings of 15 percent or more from energy efficiency improvements on the property—a certification such as LEED or EPA ENERGY STAR, and energy audits.[74]

These certifications and energy audits may also be used to project energy savings under the Regulatory Activity for energy efficiency improvements on single-family properties. A credible and generally accepted standard for demonstrating energy improvements on a single-family property is to undergo an energy audit that meets a generally accepted standard, such as the Home Energy Rating System, the Department of Energy's Home Energy Scoring Tool, or an audit conducted by a qualified auditor/assessor trained and certified by the state or the Building Performance Institute.[75] In order to receive Duty to Serve credit through the use of an energy audit, the assessment needs to show a projection of at least a 15 percent reduction in energy or water consumption.

A number of nonprofit, trade association, and state government entities noted, however, that requiring very low-, low-, and moderate-income families to verify savings by paying for an energy audit, which typically costs $300–$600, is likely to inhibit Duty to Serve program participation. Additionally, for households that can afford an energy audit, requiring one in all cases would likely limit Duty to Serve credit to only energy efficiency improvements occurring as part of a major single-family property rehabilitation that would justify the upfront costs of the improvements. Nonprofit organizations recommended allowing homeowners to utilize one of the many successful state, local, tribal, or utility energy savings programs for which they may qualify. A state housing finance agency commented that partnering with state and local programs has the potential to provide additional resources to benefit low-income homeowners while simultaneously reducing risk to the Enterprises. An FHFA analysis of successful state, local, tribal, and utility programs shows that almost all of them have well-established lists of qualifying products or methodologies that generate energy savings and reduce consumption. These lists would streamline the process of demonstrating credible savings and present homeowners with options for implementing improvements that are projected to bring them predictable energy savings.

FHFA finds the comments compelling for including this third option for projecting energy savings in the Regulatory Activity for energy efficiency improvements on single-family properties. This could help expand the availability and use of energy efficiency improvement loan products and, thus, help preserve affordable single-family housing. FHFA expects the Enterprises to use their quality control systems to

[73] *https://www.energystar.gov/buildings/facility-owners-and-managers/existing-buildings/use-portfolio-manager.*

[74] A manufactured home that has met a credible and generally accepted standard for projecting energy savings, such as the Energy Star certification, would be eligible for Duty to Serve credit under this energy efficiency Regulatory Activity.

[75] *See,* for example, qualified assessors permitted for FHA's Energy Efficient Mortgage Program at *http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/eem/energy-r.*

monitor the quality of state, local, tribal, and utility programs to ensure that these programs effectively encourage cost-effective improvements.

(iv) Preservation of Long-Term Affordable Homeownership Through Shared Equity Programs—§ 1282.34(d)(4)

For affordable homeownership, there are no regulatory agreements similar to those with affordable rental properties that expire after certain regulatory periods, such as 15 years, 20 years, or 30 years. Rather, preservation for affordable homeownership entails ensuring that the price of the home is affordable over a long-term period to initial and subsequent purchasers, whether purchasing a newly constructed home or an existing home. Certain shared equity programs, which offer this type of sustainable affordable homeownership, fit within the final rule's interpretation of ''preservation.''

Consistent with the proposed rule, § 1282.34(d)(4) of the final rule establishes a Regulatory Activity for Enterprise activities related to affordable homeownership preservation through shared equity programs. The approach to shared equity in the final rule closely tracks the proposed rule approach, with certain modifications based on the comments received.[76] The purpose of this Regulatory Activity is to help income-eligible families build wealth through sustainable homeownership.

Shared equity programs are divided into: (i) Resale restriction programs, where the resale price is explicitly limited, and (ii) shared appreciation loan programs, where second mortgage loans are due upon sale and typically—but not necessarily—structured with zero percent interest. While the shared appreciation subsidy retention vehicle is technically a second mortgage, it does not have many of the features commonly associated with mortgage debt. Shared appreciation second mortgage loans that function as subsidy retention vehicles and do not expose borrowers or the Enterprises to the risks associated with typical second mortgage loans are eligible for Duty to Serve credit.

Properties that were purchased with shared appreciation loans sell at market value, but the homeowner repays the loan amount and a portion of the appreciation to the nonprofit organization or state or local government entity administering the program. The program administrator uses its share of the appreciation to make the same home affordable to a subsequent income-eligible homebuyer. In the shared appreciation model, the administering entity may form a partnership with a for-profit lender that provides shared appreciation loans if the nonprofit organization or state or local government entity does not itself make qualifying loans.

Resale restriction programs and shared appreciation programs have the following common characteristics specified in the final rule:

(1) Provide homeownership opportunities to very low-, low-, or moderate-income families;

(2) Utilize a ground lease, deed restriction, subordinate loan or similar legal mechanism that includes a provision that the program will keep the home affordable for subsequent very low-, low-, or moderate-income families, an affordability term of at least 30 years after recordation, a resale formula that limits the homeowner's proceeds upon resale, and a preemptive option for the program administrator or its assignee to purchase the homeownership unit from the homeowner at resale; and

(3) Support the homeowners to promote sustainable homeownership for very low-, low-, or moderate-income families, including reviewing and pre-approving refinances or home equity lines of credit.

Over 30 comment letters addressed the proposed shared equity homeownership provisions. Commenters included both Enterprises, a local government, local and national nonprofit organizations including some that are engaged in shared equity programs and some that specialize in multifamily rental housing, a state housing finance agency, an academician, and others. Most of the commenters supported the proposed Regulatory Activity because they said this model is the way to most efficiently help as many families as possible build wealth through sustainable homeownership.

A nonprofit affordable multifamily rental housing developer and a trade organization representing nonprofit affordable multifamily rental housing providers opposed the proposed Regulatory Activity. The commenters stated that the Duty to Serve should focus on affordable housing preservation for multifamily rental housing rather than for homeownership based on their interpretation of the statute as applying only to rental housing preservation and because they believe renters' needs are more acute than homebuyers' needs.

FHFA has considered these comments and has decided to adopt the Regulatory Activity in the final rule for shared equity homeownership. While multifamily rental housing is an essential part of affordable housing preservation, FHFA does not interpret the statute as being limited to preservation of affordable rental housing. In addition, the multifamily and single-family business units in both Enterprises are sufficiently distinct from each other that establishing a Regulatory Activity for affordable homeownership preservation should not materially detract from Enterprise efforts to preserve the affordability of multifamily rental housing.

The academician commented that Duty to Serve credit should be based on successful homeownership rather than homeownership creation. Among the main reasons that FHFA has chosen to encourage shared equity models in the Duty to Serve is that risk mitigation, sustainability, and affordability for the new homebuyer are built into the shared equity product design.

Several commenters urged FHFA to include an explicit homeownership counseling requirement in the Regulatory Activity to ensure successful homeownership. The final rule does not include a counseling requirement because almost all shared equity programs already include effective homeownership counseling, and it could result in shared equity programs having to meet differing counseling requirements from each Enterprise and from lenders. Instead, FHFA has added in the final rule a specific requirement that the shared equity program administrators review and pre-approve refinances or home equity lines of credit, which require a greater ongoing role to support homeowners. This requirement also gives the Enterprises a specific way to determine whether the program administrators are promoting successful homeownership.

Fannie Mae endorsed including Enterprise support of shared equity homeownership programs in the final rule, and made several specific suggestions to facilitate smoother mortgage loan purchases which have been carefully considered in the modifications made in the final rule.

Consistent with Freddie Mac's overall comment favoring Additional Activities over Regulatory Activities, Freddie Mac suggested that Enterprise support for shared equity programs be an Additional Activity or extra credit activity, rather than a Regulatory Activity, on the basis that the

[76] A detailed discussion of the various models and operation of shared equity homeownership programs and further rationale for establishing a Regulatory Activity for affordable homeownership preservation are in the **SUPPLEMENTARY INFORMATION** for the proposed rule, 80 FR at 79182, 79202–79204 (Dec. 18, 2015).

Enterprises should not be required to consider any activities.

A trade association of shared equity providers suggested that the proposed preemptive purchase option requirement, discussed above, is sufficient to ensure the long-term affordability of an ownership unit, without the need for the additional proposed requirement that the unit be preserved for a longer period when state law permits a longer period than 30 years. Freddie Mac favored state or local law determining the periods of affordability on the basis that using state law definitions of affordability might expand the shared equity market.

Eliminating the proposed requirement that the affordability period exceed 30 years when permitted by state law would reduce complexity in the loan origination process, and avoid the potential problem of a preservation period being longer than the loan term. FHFA is persuaded by these comments. Accordingly, the final rule omits the requirement in the proposed rule that a unit be preserved for a longer period when state law permits a longer period than 30 years.

The trade association also suggested clarifying how nonprofit and for-profit organizations, which administer the shared appreciation programs, could collaborate under the Regulatory Activity. The commenter noted that the shared equity market is small, and most nonprofit organizations and state and local governments do not originate mortgage loans. FHFA finds that partnerships between nonprofit organizations or state or local governments and for-profit lenders could help achieve the scale that would make the shared appreciation market more viable. Because shared appreciation loans must be underwritten, the Enterprises could develop shared appreciation loan products that they would be willing to purchase from private mortgage lenders partnering with the nonprofit organizations or state or local governments, who would monitor resales and support homeowners. Freddie Mac also requested clarification that the shared appreciation programs could be administered by for-profit entities so long as a nonprofit entity participates in the program.

FHFA is persuaded by these comments. Accordingly, in a change from the proposed rule, the final rule provides that shared appreciation programs administered by nonprofit organizations or state or local governments that enter into partnerships with for-profit lenders who provide the shared appreciation loans, are included in this Regulatory Activity.

The provision in the proposed rule that would have required the Enterprises to monitor homeownership units to ensure affordability is preserved over resales is not included in the final rule. FHFA has determined that this provision is not specific enough to facilitate Enterprise monitoring to ensure preservation of affordability over resales. Instead, the proposed 30-year affordability term requirement, the proposed preemptive option to purchase requirement, and a new requirement limiting proceeds at resale, all of which are included in the final rule, should ensure that affordability is preserved at resales without the Enterprises having to actively monitor the resales. FHFA expects that the Enterprises will document, at the time they purchase shared equity loans, that the loans are part of a structure meeting the above requirements.

(v) Preservation of Affordable Housing Through the Choice Neighborhoods Initiative—§ 1282.34(d)(5)

Consistent with the proposed rule, § 1282.34(d)(5) of the final rule establishes a Regulatory Activity for Enterprise activities supporting financing for HUD's Choice Neighborhoods Initiative (CNI). Created after the enactment of HERA, CNI seeks to preserve and transform distressed, HUD-supported affordable housing. CNI focuses on creating mixed-income housing and investing in neighborhood improvements and upgrades.

The proposed rule specifically requested comment on whether Enterprise activities supporting CNI should be considered a ''residential economic diversity'' activity, rather than a Regulatory Activity under the affordable housing preservation market.

Several nonprofit organizations favored making Enterprise activities supporting CNI a Regulatory Activity under the affordable housing preservation market, rather than under residential economic diversity. Another commenter recommended making CNI activities both a Regulatory Activity under the affordable housing preservation market and a residential economic diversity activity, given the large need for Enterprise support of neighborhood revitalization efforts.

FHFA has determined that establishing a Regulatory Activity for Enterprise activities supporting CNI will sufficiently encourage the Enterprises to consider such activities. Separately, FHFA has decided not to add a neighborhood revitalization component under residential economic diversity activities (see Section IV. Extra Credit-Eligible Activities—§ 1282.36(c)(3)). Accordingly, the final rule retains the proposed rule's approach.

(vi) Preservation of Affordable Housing Through the Rental Assistance Demonstration Program—§ 1282.34(d)(6)

Consistent with the proposed rule, § 1282.34(d)(6) of the final rule establishes a Regulatory Activity for Enterprise activities supporting financing for HUD's Rental Assistance Demonstration (RAD). RAD seeks to improve and preserve distressed, HUD-supported affordable housing by allowing public housing authorities to access outside sources of capital for renovation and preservation.

A number of nonprofit organizations and one Enterprise favored establishing a Regulatory Activity for Enterprise activities supporting RAD, arguing that Enterprise support for RAD is consistent with other activities in the affordable housing preservation market.

A trade organization stated that the RAD program was too small to warrant inclusion as a Regulatory Activity, and that the Enterprises should instead be encouraged to creatively and innovatively support the underserved markets.

FHFA has determined that financing debt associated with RAD is an important way that the Enterprises can support affordable housing preservation. RAD has already supported conversions of more than 30,000 units and resulted in over $2 billion in needed rehabilitation. [77] The program also appears likely to support preservation of additional units into future. Accordingly, consistent with the proposed rule, the final rule establishes a Regulatory Activity for Enterprise activities supporting RAD. Additionally, FHFA clarifies that both RAD Component 1 (applicable to public housing) and Component 2 conversions (applicable to Rent Supplement, Rental Assistance Payments, and Mod Rehab contracts) are eligible under this Regulatory Activity.

(vii) Purchase or Rehabilitation of Certain Distressed Properties—§ 1282.34(d)(7)

Section 1282.34(d)(7) of the final rule establishes a Regulatory Activity for Enterprise activities that facilitate financing the purchase or rehabilitation by very low-, low-, or moderate-income families or by nonprofit organizations or local or tribal governments serving such

[77] *http://portal.hud.gov/hudportal/documents/huddoc?id=RAD_Newsltr_Summer2016.pdf.*

income-qualifying families, of homes eligible for a short sale, homes eligible for a foreclosure sale, or a property that a lender acquires as the result of foreclosure (sometimes referred to as ''Real Estate Owned'' or ''REO''). This Regulatory Activity was not included in the proposed rule.

In response to a question FHFA asked in the proposed rule on how to interpret ''preservation,'' some nonprofit organizations and policy advocacy organizations commented together that FHFA include in its interpretation of preservation activities that literally preserve the physical integrity, habitability, and functionality of properties located in neighborhoods with naturally occurring affordable housing. FHFA finds that financing to address blighted properties is critical to preserve the affordability of those properties as well as naturally occurring affordability in their surrounding neighborhoods. Accordingly, FHFA's interpretation of ''preservation'' includes the Regulatory Activity established in § 1282.34(d)(7). FHFA will provide additional guidance on such purchase and rehabilitation in the Evaluation Guidance.

The proposed rule discussed the important role the Enterprises can play in stabilizing neighborhoods but did not include purchasing and rehabilitating distressed properties as a specific Regulatory Activity. Local neighborhood stabilization programs were discussed in the proposed rule, and are discussed under § 1282.34(c)(9) above, as examples of ''comparable state and local affordable housing programs'' that an Enterprise could include in its Plan to address foreclosure and abandonment prevention programs benefiting Duty to Serve income-eligible households. A number of commenters, primarily organizations that advocate for stabilizing disinvested neighborhoods, recommended providing Duty to Serve credit for Enterprise activities that support local neighborhood stabilization programs to combat the deterioration of foreclosed and abandoned homes and the destabilizing effect those properties have on low-income neighborhoods. The commenters urged FHFA to be more aggressive in overseeing the Enterprises' management of their foreclosed properties and urged FHFA to ensure that the Enterprises have effective policies and practices to preserve foreclosed properties in the best possible condition. Some of the commenters recommended giving the Enterprises Duty to Serve credit for responsible disposition of REO stock, such as under FHFA's Neighborhood Stabilization Initiative (NSI).[78]

FHFA agrees that problems related to foreclosed and abandoned properties can create blight and other negative economic, social, and health outcomes for neighborhoods. Distressed properties threaten the values of surrounding properties and ultimately the stability of neighborhoods. Many of these properties require extensive repairs, but homeowners in the Duty to Serve income-qualifying range often face difficulties obtaining financing to make those repairs. Potential homebuyers in this income-qualifying range also often face difficulties obtaining financing to purchase distressed properties. Establishing a Regulatory Activity in the final rule for Enterprise support for such financing could help address the credit gap for these homeowners, potential homebuyers, and nonprofit organizations.

While both Enterprises already offer purchase money mortgage products targeting lower-income families, in the neighborhood stabilization context there is a need not only for purchase money mortgages, but also for loan products that support repairs, rehabilitation, and demolition work. Several commenters also cited a need for loan products that address the breakdowns in markets that occur when appropriate comparison data is not available to support home appraisals. The Duty to Serve presents an opportunity to complement existing neighborhood stabilization programs and efforts, such as the NSI, with financing tools that could jump-start neighborhood stabilization efforts. Some economists suggest that homeowners are more likely than other buyers to invest in their homes, neighborhoods and local economies.[79]

Investors often profit from the lack of credit availability for repair and rehabilitation of vacant and abandoned homes because investors have credit access that individual homeowners and nonprofit organizations operating in distressed communities often lack. An Enterprise loan product for purchase or rehabilitation of distressed properties could enable income-qualifying homeowners, as well as nonprofit organizations or local or tribal governments acting on behalf of homeowners and renters, to obtain rehabilitation financing without involving for-profit investors, thereby ensuring that more of the benefits of financing flow to homeowners.

FHFA finds the commenters' arguments and the need for financing for distressed properties compelling. Accordingly, the final rule establishes a Regulatory Activity for Enterprise support of financing for certain distressed properties.

FHFA considered limiting this Regulatory Activity to homes located only in blighted neighborhoods, where most vacant and abandoned homes are found. However, FHFA determined that very low-, low-, and moderate-income families also should have the opportunity to purchase vacant and abandoned homes in other areas. Accordingly, the final rule sets no geographic limits on this Regulatory Activity.

There are key differences between this Regulatory Activity and the NSI, which is not part of the Duty to Serve. First, this Regulatory Activity targets all homes eligible for a short sale, eligible for a foreclosure sale, or REO, rather than just homes owned by the Enterprises. Second, this Regulatory Activity supports the financing of repairs, rehabilitations, and demolitions, in addition to simply purchase money mortgages. Third, this Regulatory Activity targets the purchase or rehabilitation of vacant and in default or abandoned homes, rather than the sale or disposition of those homes.

The Duty to Serve is limited under the statute to support for financing products that promote affordable housing or neighborhood stabilization.[80] Therefore, Duty to Serve credit is not available for Enterprise activities under the NSI or for any neighborhood stabilization efforts other than stabilization efforts directly related to creating Enterprise loan purchase products.

Enterprise loan purchase products that could receive Duty to Serve credit under this Regulatory Activity include those that support purchases, repairs, rehabilitations, or demolition work on homes eligible for short sale, homes eligible for foreclosure sale, or REO, including rental homes. Loan products that reach Duty to Serve income-eligible families through nonprofit organizations

[78] *See* NSI Fact Sheet 11/10/2015, *available at http://www.fhfa.gov/PolicyProgramsResearch/Programs/Pages/Neighborhood-Stabilization-Initiative.aspx.* The NSI was launched as a pilot to facilitate the disposition of REO properties in ways that will stabilize neighborhoods. *Id.* The NSI leverages the National Community Stabilization Trust, a national nonprofit organization that works closely with local governments and other community resources to make informed decisions on treatment of individual properties. *Id.*

[79] *See generally* Atif Mian and Amir Sufi, ''House of Debt: How They (and You) Caused the Great Recession, and How We Can Prevent It from Happening Again'' (consumers underwater on their mortgages—even those who are current on payments—consume less, thereby weakening local economies), *available at http://press.uchicago.edu/ucp/books/book/chicago/H/bo20832545.html.*

[80] *See* 12 U.S.C. 4565(a)(1).

or local or tribal governments are also included in the Regulatory Activity. This Regulatory Activity extends to purchase loans and rehabilitation loans regardless of who owns the loan or the home, or the neighborhood in which the home is located, as long as the loan product includes Enterprise control of the resulting first mortgage loan.

(e) Additional Activities

Section 1282.37(c)(2) of the final rule also sets out requirements for eligible Additional Activities in the affordable housing preservation market, specifying that these activities must preserve affordability of existing affordable housing. Preservation can include Additional Activities that involve preserving existing subsidy where the term of affordability required for the subsidy is followed, or where there is a deed restriction for the life of the loan. It may also involve preserving the affordability of properties in conjunction with state or local inclusionary zoning, real estate tax abatement, or loan programs, where a regulatory agreement, recorded use restriction, or deed restriction maintains affordability of a portion of the property's units for the term defined by the state or local program.

3. Rural Markets—§ 1282.35

The below section describes the final rule provisions for the rural market and explains FHFA's rationale for adopting four Regulatory Activities for this market. The four Regulatory Activities are: (1) High-needs rural regions; (2) high-needs rural populations; (3) financing by small financial institutions of rural housing; and (4) small multifamily rental properties in rural areas. The below section also explains FHFA's definitions of ''rural area,'' ''high-needs rural areas,'' and ''high-needs rural populations,'' which have been expanded from those in the proposed rule.

a. Regulatory Activities

Section 1282.35(c)(1)–(4) of the final rule identifies four specific types of activities as Regulatory Activities under the rural markets. Two of these Regulatory Activities—Enterprise activities supporting high-needs rural regions and Enterprise activities supporting high-needs rural populations—were included in the proposed rule under one Regulatory Activity. The other two Regulatory Activities—Enterprise activities related to the financing of housing by rural small financial institutions and Enterprise activities related to the financing of small multifamily rental properties in rural areas—are new. The Regulatory Activities and definition of ''rural area'' are discussed below.

Definition of ''Rural Area''—§ 1282.1

Section 1282.1 of the final rule defines ''rural area'' as: (1) A census tract outside of a metropolitan statistical area (MSA) as designated by the Office of Management and Budget (OMB); or (2) a census tract in an MSA but outside of the MSA's Urbanized Areas as designated by the U.S. Department of Agriculture's (USDA) Rural-Urban Commuting Area (RUCA) Code #1,[81] and outside of tracts with a housing density of more than 64 housing units per square mile in USDA's RUCA Code #2.[82] This is a change from the proposed rule, which also relied on USDA RUCA codes. The proposed rule's definition included the first prong in the final rule's definition of ''rural area''—a census tract outside of an MSA as designated by OMB. However, the proposed rule's definition excluded all Urbanized Areas and Urban Clusters—RUCA Codes 1, 4, and 7—within an MSA from being considered rural.

There is no single, universally accepted definition of ''rural area'' because varying definitions achieve different policy objectives.[83] FHFA developed its definition of ''rural area'' for the Duty to Serve based on three primary criteria: (1) The definition should be broad enough to include rural residents living in outlying counties of metropolitan areas; (2) the definition should remain stable over time to support the Enterprises' Plans; and (3) the definition should remain easy to implement and operationalize by the Enterprises. As discussed in the **SUPPLEMENTARY INFORMATION** to the proposed rule, FHFA considered the U.S. Census Bureau, CFPB, and USDA definitions of ''rural'' but determined that the definition it proposed would better serve the Duty to Serve policy objectives under these three criteria.

The USDA definition of ''rural'' is based on the Housing Act of 1949 and defines ''rural'' areas generally as those that are not part of or associated with an urban area and that meet certain population thresholds, along with requirements associated with those thresholds.[84] The CFPB definition defines ''rural'' as counties that are outside of MSAs and outside of micropolitan statistical areas adjacent to MSAs, as well as census blocks designated as ''rural'' by the U.S. Census Bureau.[85] The U.S. Census Bureau designates rural areas as those outside of Urban Areas and Urban Clusters based on the decennial Census.[86] FHFA developed its proposed definition by considering its criteria for a definition of ''rural area,'' the USDA, CFPB, and U.S. Census Bureau definitions of ''rural,'' and comments on the 2010 Duty to Serve proposed rule.

Both Enterprises supported the proposed definition of ''rural area'' but did not expound on their rationale. A trade association similarly supported FHFA's proposed definition but did not elaborate on why it preferred the definition.

A nonprofit organization, a state housing finance agency, and several policy advocacy organizations preferred the USDA definition of ''rural,'' stating that it is well understood and its limitations are already accepted by the market. However, FHFA has determined that the commenters did not provide any compelling evidence addressing how the USDA definition meets FHFA's primary criteria discussed above for a definition of ''rural area.''

Several commenters, including nonprofit organizations, policy advocacy organizations, and a state housing finance agency, recommended modification of the proposed definition of ''rural area.'' The commenters stated that the proposed definition is overly inclusive within metropolitan areas by including suburban/exurban communities that are not truly rural in character, and overly restrictive within metropolitan areas by excluding certain small towns, particularly in the Western U.S., that are truly rural in character.

FHFA has decided to modify the proposed definition of ''rural area'' in the final rule in accordance with these comments to more accurately target areas that are truly rural in character and exclude those that are more realistically classified as suburban/exurban communities, which do not share the challenges to accessing credit that rural markets face. FHFA has determined that the revised definition

[81] RUCA Code #1 is a tract that is in an urbanized area within a metropolitan area (a town with over 50,000 people).

[82] RUCA Code #2 describes a tract where 30 percent or more of the population commutes to a town with 50,000 people or more.

[83] *See generally* David A. Fahrenthold, ''What does rural mean? Uncle Sam has more than a dozen answers,'' Washington Post (June 8, 2013), *available at http://www.washingtonpost.com/politics/what-does-rural-mean-uncle-sam-has-more-than-a-dozen-answers/2013/06/08/377469e8-ca26-11e2-9c79-a0917ed76189_story.html.*

[84] 42 U.S.C. 1490.

[85] *See* 80 FR 59944, 59968 (Oct. 2, 2015), *to be codified at* 12 CFR 1026.35(b)(2)(iv)(A), effective January 1, 2016.

[86] *See* United States Census Bureau, ''Urban and Rural Classification,'' Web. 20 (Feb. 2015), *available at https://www.census.gov/geo/reference/ua/urban-rural-2010.html.*

will best serve the policy objectives of the Duty to Serve.

The modified definition in the final rule maintains the first part of the definition of ''rural area'' from the proposed rule—a census tract outside of an MSA as designated by OMB. The final rule's definition allows micropolitan areas and small towns to be considered rural. These tracts, described by RUCA Codes #4 [87] and #7,[88] were excluded in the proposed rule's definition. In addition, the final rule eliminates tracts described by RUCA Code #2 [89] that have a housing density threshold of more than 64 units per square mile from being considered rural. Such tracts would have been classified as rural areas under the proposed rule's definition. FHFA added the threshold of more than 64 units per square mile in order to differentiate suburban/exurban tracts from rural tracts within RUCA Code #2.

FHFA modeled the final rule's definition of ''rural area'' on the definition proposed by a national nonprofit organization, the Housing Assistance Council, which was echoed by several other commenters. The threshold measure of housing density of 64 units per square mile, also recommended by the Housing Assistance Council and other commenters, was chosen because it is an accepted methodology.[90] For example, the USDA Forest Service classifies private forest lands as exurban/urban if they have more than 64 housing units per square mile.[91] These modifications, while adding minor complexity to the definition, meet FHFA's criteria and objectives for the definition of ''rural area.'' The modifications result in a definition that targets areas that are truly rural in character while excluding areas that are suburban/exurban and already well served by the Enterprises. In order to make the definition easy to implement and operationalize, FHFA will provide to the Enterprises, and post on FHFA's Web site, a data file that lists all of the census tracts that are eligible under the final rule's definition of ''rural area.'' The Enterprises are encouraged to incorporate the data file into mapping and other tools that can further facilitate use of the final rule's definition.

(i) Housing in High-Needs Rural Regions—§ 1282.35(c)(1)

Section 1282.35(c)(1) of the final rule establishes a Regulatory Activity for Enterprise support for financing of housing located in high-needs rural regions. Section 1282.1 of the final rule defines a ''high-needs rural region'' as any of the following regions located in a rural area: (i) Middle Appalachia; (ii) the Lower Mississippi Delta; (iii) a colonia; or (iv) a tract located in a persistent poverty county and not included in Middle Appalachia, the Lower Mississippi Delta, or a colonia. This definition is similar to the definition in the proposed rule, with the addition of rural tracts located in persistent poverty counties as provided in (iv) above. The final rule also makes a change to the definition of ''colonia.'' Changes from the proposed rule are discussed below.

FHFA chose the proposed rural regions for a Regulatory Activity because they are characterized by a high concentration of poverty and substandard housing conditions. The proposed rule specifically requested comment on whether Enterprise support for housing for high-needs rural regions and high-needs rural populations should be a Regulatory Activity. A number of policy advocacy organizations, nonprofit organizations, government entities, and a trade association supported including the proposed high-needs rural regions and rural populations as a Regulatory Activity, stating that there are extensive challenges to serving these regions and populations, and that these regions and populations have historically lacked necessary investment. Additionally, in FHFA's discussions with both Enterprises, the Enterprises highlighted certain regions and populations, such as colonias and members of a Federally recognized Indian tribe in an Indian area, as unique areas and populations that will likely take significant time and resources in order to make a meaningful difference to improve housing conditions.

To create an incentive for the Enterprises to serve both high-needs rural regions and high-needs rural populations, the final rule splits this category into two separate Regulatory Activities. FHFA concludes that this change could lead the Enterprises to devise more narrowly tailored and responsive strategies to target the unique challenges in these high-needs rural regions and populations.

Significant data gaps exist in rural areas in part because under the Home Mortgage Disclosure Act, financial institutions with $44 million or less in assets or that do not have a branch in a metropolitan area are not required to collect and publicly disclose data on loans for home purchases and home improvements, or data on refinancings.[92] FHFA has determined that more granular data on rural areas could help the Enterprises, researchers, housing providers, and mortgage lenders better understand the characteristics and housing and credit needs of these areas, including high-needs rural regions and high-needs rural populations, and how best to serve them. To address these data gaps, FHFA encourages the Enterprises to collect and share granular data with researchers, lenders, and housing providers.

The final rule makes several changes or clarifications to the definitions of the specific high-needs rural regions from those in the proposed rule, as discussed below.

a. *Middle Appalachia.* Consistent with the proposed rule, the final rule includes Middle Appalachia as a high-needs rural region. There was widespread support from commenters, including several nonprofit organizations and policy advocacy organizations, for including Middle Appalachia in the specific high-needs rural regions identified by FHFA in the proposed rule, due to the neglect and persistent poverty the region faces. Neither Enterprise took a position on including Middle Appalachia as a high-needs rural region. The proposed rule discussed generally the Appalachian Regional Commission's (ARC) definition of ''Middle Appalachia'' as a sub-region of Appalachia consisting of 230 ARC-designated counties in Kentucky, North Carolina, Ohio, Tennessee, Virginia, and West Virginia. The ARC definition of ''Middle Appalachia'' was not specifically included in the proposed § 1282.1. Commenters did not recommend changes to the ARC definition for purposes of this Regulatory Activity, but Fannie Mae requested that FHFA incorporate a specific definition of ''Middle Appalachia'' in the final rule text.

FHFA has determined that incorporating a specific definition of

[87] RUCA Code #4 describes a tract that is in a micropolitan area with a primary commuting flow within a large urban cluster of 10,000 to 49,999 people.

[88] RUCA Code #7 describes a tract that is in a small town with a primary commuting flow within a small urban cluster of 2,500 to 9,999 people.

[89] RUCA Code #2 describes a tract where 30 percent or more of the population commutes to a town with 50,000 people or more.

[90] David M. Theobold, ''Land-Use Dynamics beyond the American Urban Fringe,'' Geographical Review, Vol. 91, No.3 (July 2001), pp. 544–564.

[91] ''Forests on the Edge—Housing Development of America's Private Forests,'' U.S. Department of Agriculture, Forest Service (May 2005).

[92] *See* Federal Financial Institutions Examination Council, ''A Guide to HMDA Reporting: Getting It Right!'' (2013); Consumer Financial Protection Bureau, ''2016 Informational Guide Letter'' (2015), *available at https://www.ffiec.gov/hmda/pdf/2016letter.pdf.*

''Middle Appalachia'' in the final rule text can assist the Enterprises in proposing their activities under the Duty to Serve. Accordingly, § 1282.1 of the final rule defines ''Middle Appalachia'' as the ''central'' sub-region of Appalachia under the Appalachian Regional Commission's subregional classification of Appalachia. In order to make the definition easy to implement and operationalize, FHFA will provide to the Enterprises, and post on FHFA's Web site, a data file that lists all of the census tracts that are eligible under the final rule's definition of ''Middle Appalachia.''

b. *The Lower Mississippi Delta.* Consistent with the proposed rule, the final rule includes the Lower Mississippi Delta as a high-needs rural region. There was widespread support from commenters for including the Lower Mississippi Delta as a high-needs rural region because of its unique challenges and housing conditions, as with the other high-needs rural regions identified in the proposed rule. Neither Enterprise took a position on including the Lower Mississippi Delta as a high-needs rural region.

The proposed rule discussed generally the Lower Mississippi Delta Development Act's and former Lower Mississippi Delta Development Commission's definition of ''Lower Mississippi Delta'' as the counties and parishes in portions of Arkansas, Louisiana, Mississippi, Missouri, Illinois, Tennessee, Kentucky, and Alabama. This definition of ''Lower Mississippi Delta'' was not specifically included in proposed § 1282.1. Commenters did not recommend changes to this definition for purposes of this Regulatory Activity or request clarification of the scope of the definition. Fannie Mae requested that FHFA add a specific definition of ''Lower Mississippi Delta'' in the final rule text.

As with the ''Middle Appalachia'' high-needs rural region, FHFA has determined that incorporating a specific definition of ''Lower Mississippi Delta'' in the final rule text can assist the Enterprises in proposing their activities under the Duty to Serve. The Rural Development, Agriculture, and Related Agencies Appropriations Act for FY 1989, Public Law 100–460, included the Lower Mississippi Delta Act, which authorized the Lower Mississippi Delta Development Commission and identified counties in the Lower Mississippi Delta. The Consolidated Appropriations Act of 2001, Public Law 106–554, and the Farm Security and Rural Investment Act of 2002, Public Law 107–171, added counties to the definition. Accordingly, § 1282.1 of the final rule defines ''Lower Mississippi Delta'' as the counties identified by these laws, along with any future updates Congress may make to the definition of the region. In order to make the definition easy to implement and operationalize, FHFA will provide to the Enterprises, and post on FHFA's Web site, a data file that lists all of the census tracts that are eligible under the final rule's definition of ''Lower Mississippi Delta.''

c. *Colonias.* Consistent with the proposed rule, the final rule includes colonias as high-needs rural regions but revises the definition of ''colonia'' from that in the proposed rule, as discussed below. A number of commenters supported including colonias as high-needs rural regions because of their economic distress and persistent poverty. Neither Enterprise took a position on including colonias as high-needs rural regions.

Section 1282.1 of the final rule defines a ''colonia'' as an identifiable community that meets the definition of a colonia under a federal, state, tribal, or local program. This is a change from the proposed rule, which would have defined a ''colonia'' as any identifiable community that (i) is designated as a colonia by the state or county in which it is located; (ii) is located in Arizona, California, New Mexico, or Texas; and (iii) is located in a U.S. census tract with some portion of the tract being within 150 miles of the U.S.-Mexico border. FHFA chose this proposed definition in order to incorporate certain elements of the definition used by the Cranston-Gonzales National Affordable Housing Act, discussed below, while also providing a broad scope for Enterprise activities, including the purchase of mortgage loans, in colonias.

The proposed rule specifically requested comment on how FHFA should define a ''colonia'' for Duty to Serve purposes. Few commenters made recommendations on the proposed definition, and no commenters specifically supported it. Fannie Mae recommended that FHFA modify the proposed definition to include the entire county in which a colonia is located, due to the impact that a colonia may have on the economy and housing needs of the county as a whole. A state housing finance agency expressed concern about the potential for confusion and operational difficulties that could arise from the many conflicting definitions of colonia. The commenter recommended that FHFA define ''colonias'' as the eligible communities under the commonly used HUD and USDA programs, as well as any federally established definition used by state and local programs.

FHFA finds that definitions used by HUD and USDA would pose challenges under the Duty to Serve because they include a requirement that to be considered a ''colonia,'' the community must lack a potable water supply and adequate sewage systems.[93] As noted in the **SUPPLEMENTARY INFORMATION** to the proposed rule, if such requirements were applied for Duty to Serve purposes, the Enterprises would likely be able to receive little or no Duty to Serve credit for activities in colonias because the Enterprises' property eligibility requirements would not permit them to purchase mortgages on properties that lack potable water supplies and adequate sewage systems.

In addition, FHFA has determined that the geographic limitation in HUD and USDA definitions of ''colonia'' that was included in FHFA's proposed definition could discourage the Enterprises from serving communities designated as colonias by state, tribal or local programs that have similar indicia of poverty and needs, but do not meet the geographic requirement. Both the HUD and USDA definitions require that to be considered a colonia, the community must be located in an area within 150 miles of the U.S.-Mexico border. FHFA's proposed definition of ''colonia'' would have included a requirement that the community be located in a U.S. census tract with some portion of the tract within 150 miles of the U.S.-Mexico border. FHFA notes that, for example, several counties in Texas with communities designated as colonias by the state are not within 150 miles of the U.S.-Mexico border, as the State of Texas includes a category of ''non-border colonias'' in its water code. These colonias do not meet the 150-mile requirement, yet share similar indicia of

[93] The Cranston-Gonzalez National Affordable Housing Act defines a ''colonia'' as an identifiable community that (A) is in the State of Arizona, California, New Mexico, or Texas; (B) is in the area of the United States within 150 miles of the U.S.-Mexico border (not including any standard MSA with a population exceeding 1 million), or is in the United States-Mexico border region (the applicable criterion depends on the particular housing program); (C) is determined to be a colonia on the basis of objective criteria, including lack of potable water supply, lack of adequate sewage systems, and lack of decent, safe and sanitary housing; and (D) was in existence as a colonia before November 28, 1990. *See* 42 U.S.C. 1479(f)(8); 42 U.S.C. 5306 note. Previous statutory definitions included the criteria that a state or county in which a community is located designate a particular community as a ''colonia.'' *See* Public Law 101–625, 104 Stat. 4290, 4396 (1990). HUD and USDA definitions of ''colonia'' rely on previous and current statutory definitions of ''colonia,'' based on the specific housing program. *See* 7 CFR 1777.4; 24 CFR 570.411.

poverty and needs as other colonias in Texas that meet the 150-mile requirement. The Texas Secretary of State identifies Marion, Newton, Red River, and Sabine Counties, which are located more than 150 miles from the Texas-Mexico border, as counties that include colonias.

FHFA notes that in many cases, state and local governments play an important role in the level of public controls related to factors such as the initial designation of colonias, their ongoing conditions, and local initiatives to improve their conditions. Some colonias are incorporated communities under the control of a city, some are unincorporated and under the control of a county, and some may be under the control of both a city and a county if they are located in extra-jurisdictional territories of a city that shares some level of control with the county. The motivation to improve conditions for residents of colonias has led to a variety of projects that combine funding from multiple federal and non-federal sources.

After considering the comments and the varying definitions of ''colonia,'' FHFA has determined that broadening the proposed definition of ''colonia'' could encourage Enterprise support for colonias, as defined by federal, state, tribal, or local programs. Accordingly, § 1282.1 of the final rule defines a ''colonia'' as an identifiable community that meets the definition of a colonia under a federal, state, tribal, or local program. Since FHFA is adopting a broad definition of ''colonia,'' it will be unable to provide the Enterprises a data file that lists all of the census tracts that are eligible under the final rule's definition of ''colonia,'' as it plans to do for the other high-needs rural regions. To address the data challenges that exist in specifically identifying the census tracts that contain ''colonias,'' FHFA encourages the Enterprises to collect and share granular data with researchers, lenders, and housing providers.

Enterprise purchases of loans that are made under any HUD or USDA programs that serve a ''colonia,'' are eligible for Duty to Serve credit under this Regulatory Activity, provided they are located in a ''rural area'' as defined in the final rule and are for very low-, low, or moderate-income households as defined under the Duty to Serve.

d. *Tracts in Persistent Poverty Counties.* Section 1282.1 of the final rule includes rural tracts that are located in ''persistent poverty counties,'' and that are not located in Middle Appalachia, the Lower Mississippi Delta, or colonias, in the definition of ''high-needs rural regions.'' This is a change from the proposed rule, which would not have included rural tracts located in persistent poverty counties in the definition.

The proposed rule specifically requested comment on whether there are high-needs rural regions or high-needs rural populations in addition to those identified that should be included and, if so, how they should be defined in order to receive Duty to Serve credit. A number of commenters, including several nonprofit organizations and policy advocacy organizations, pointed out that certain regions similar in nature to the high-needs rural regions in the proposed rule were omitted from the proposed rule's definition of ''high-needs rural region.'' The regions identified by the commenters include: Rural areas of Puerto Rico; much of mainland Alaska; the central valley of California; and the region described by commenters as the ''Southern Black Belt'' in Alabama, Georgia, and the Carolinas. Of these regions, the one most frequently cited by commenters as a high-needs rural region was the ''Southern Black Belt.''

The most common recommendation from commenters who supported changes to the definition of ''high-needs rural region'' was to include areas struggling with ''persistent poverty'' as high-needs rural regions, which would capture rural regions struggling with the same types of challenges as the specific high-needs rural regions identified in the proposed rule. Commenters supporting this approach included several nonprofit organizations and policy advocacy organizations.

Some commenters either referenced or recommended a particular definition for ''persistent poverty'' areas. A nonprofit organization recommended that FHFA use the definition of ''persistent poverty county'' used by the U.S. Department of Treasury's CDFI Fund, which defines a ''persistent poverty county'' as a county that had poverty rates of 20 percent or more over the past 30 years, as measured by the 1990, 2000, and 2010 decennial censuses. A policy advocacy organization recommended the same definition without naming the CDFI Fund. Another policy advocacy organization recommended the definition of ''persistent poverty county'' used by the USDA Economic Research Service, which defines a ''persistent poverty county'' as one with poverty rates of 20 percent or more over the past 30 years, as measured by the 1980, 1990, and 2000 decennial censuses and the 2007–2011 American Community Survey. Some nonprofit organizations used the USDA Economic Research Service's definition in describing what a ''persistent poverty county'' means, but did not explicitly recommend that FHFA use that definition. Several other policy advocacy organizations recommended that FHFA add persistent poverty counties located in the rural Southeast's ''Black Belt'' as a fourth high-needs rural region, but they did not propose a specific definition of ''persistent poverty county.''

FHFA finds compelling the comments that tracts in rural areas that are located in persistent poverty counties should be included as high-needs rural regions in the final rule because, as the commenters noted, this would capture many of the regions which commenters identified as high-needs that were omitted from the proposed rule's definition of ''high-needs rural region.'' In choosing a measure for persistent poverty areas, FHFA analyzed both the CDFI Fund definition and the USDA Economic Research Service definition. The CDFI fund identified 384 counties with persistent poverty under its definition, using data from the 1990 census, the 2000 census, and the 2006–2010 American Community Survey.[94] Under its methodology, the USDA Economic Research Service identified 353 counties with persistent poverty. FHFA has selected the CDFI Fund's definition for the final rule because it includes both 31 more counties and 286 additional rural area tracts than the USDA Economic Research Service definition along with having a greater level of support from commenters.

The persistent poverty counties identified by the CDFI Fund capture regions, such as the ''Southern Black Belt'' and parts of Alaska, that were omitted from the proposed rule's definition of a ''high-needs rural region.'' The CDFI Fund definition of ''persistent poverty counties'' does overlap to a large extent with the other high-needs rural regions and populations identified in the final rule, such as Middle Appalachia, the Lower Mississippi Delta, colonias, and Indian areas. Accordingly, to prevent double-counting for Duty to Serve purposes, tracts in ''persistent poverty counties'' considered ''high-needs rural regions'' will be limited to those places that are not already included in Middle Appalachia, the Lower Mississippi Delta, or colonias.

The CDFI Fund definition of ''persistent poverty counties'' does not distinguish between rural poverty

[94] Consolidated Appropriations Act, 2012, Public Law 112–74, 125 Stat. 887 (2011).

counties and urban poverty counties. For example, the CDFI Fund definition includes Kings County, N.Y. and Bronx County, N.Y., located in New York City, which are not rural by any definition. Since the CDFI Fund definition is not limited to rural areas, the final rule provides that the tracts in persistent poverty counties must be located in ''rural areas,'' as defined in the final rule, in order to be considered ''high-needs rural regions.'' In the 384 counties identified by the CDFI Fund as persistent poverty counties, FHFA has identified 2,127 tracts that are located in such ''rural areas.''

In short, § 1282.1 of the final rule defines ''high-needs rural region'' to include a rural tract in a ''persistent poverty county'' that is not located in Middle Appalachia, the Lower Mississippi Delta, or a colonia. Section 1282.1 defines a ''persistent poverty county'' as a county that has had 20 percent or more of its population living in poverty over the past 30 years, as measured by the most recent successive decennial censuses. For the first Duty to Serve Plan evaluation cycle, the counties identified by the CDFI Fund as ''persistent poverty counties'' will be used. In order to make the definition easy to implement and operationalize, FHFA will provide to the Enterprises, and post on FHFA's Web site, a data file that lists all of the census tracts that are eligible under the final rule's definition of ''persistent poverty counties.''

(ii) Housing for High-Needs Rural Populations—§ 1282.35(c)(2)

Section 1282.1 of the final rule defines ''high-needs rural population'' as any of the following populations located in a rural area: (i) Members of a Federally recognized Indian tribe located in an Indian area; or (ii) agricultural workers. This definition is the same as the definition in the proposed rule except that the final rule includes all agricultural workers instead of only migrant and seasonal agricultural workers. FHFA chose these specific rural populations for a Regulatory Activity because they experience a high concentration of poverty and live in substandard housing conditions. A discussion of comments on whether Enterprise support for high-needs rural populations should be a Regulatory Activity is included under the ''high-needs rural regions'' discussion above.

a. *Members of a Federally Recognized Indian Tribe Located in an Indian Area.* Section 1282.1 of the final rule defines ''Federally recognized Indian tribe'' and ''Indian area'' consistent with the definitions in the proposed rule. Several nonprofit organizations and policy advocacy organizations supported providing Duty to Serve credit for this population because of its unique needs and the historical lack of mortgage lending that has been available to it.

Both Enterprises proposed an alternative approach that would target geographical areas as a way to assist this population. The Enterprises stated that this change would achieve operational efficiencies by providing Duty to Serve credit for loan purchases in ''Indian areas'' without requiring that a borrower actually be a member of a Federally recognized Indian tribe. FHFA considered this recommendation, but finds that the Enterprises' suggested geographical areas would be over-inclusive and would direct support away from the targeted population. The Enterprises' suggested changes would potentially drive lending to areas where it is far less challenging to finance housing and where the needs of this population are much less severe, such as housing within the bounds of an Indian area that is titled as fee simple property, or housing that is not owned by a member of a Federally recognized Indian tribe. Accordingly, the final rule does not adopt this recommendation.

Loans made under the HUD Section 184 and Title VI programs serve members of a Federally recognized Indian tribe in Indian areas consistent with the final rule's definition of this high-needs rural population. Enterprise purchases of loans that are made through these programs and that are provided to a Federally recognized Indian tribe or its members, located in an Indian area, are eligible for Duty to Serve credit under this Regulatory Activity, provided they are located in a ''rural area'' as defined in the final rule and are for very low-, low, or moderate-income households as defined under the Duty to Serve.

b. *Agricultural Workers.* Section 1282.1 of the final rule also includes agricultural workers within the definition of ''high-needs rural population.'' Section 1282.1 defines ''agricultural worker'' to mean any person that meets the definition of an agricultural worker under a federal, state, tribal, or local program. This is a change from the proposed rule, which would have included only migrant and seasonal agricultural workers, as defined by the U.S. Department of Labor.

The proposed rule specifically requested comment on whether FHFA should define ''high-needs rural population'' to include other categories of agricultural workers with high-needs housing issues in addition to seasonal and migrant agricultural workers, and whether agricultural workers with permanent annual employment should be included.

Several policy advocacy organizations and nonprofit organizations supported including seasonal or migrant workers as a high-needs rural population due to their significant housing needs, and some expressed optimism about how the Enterprises could do more to interact with these communities.

A nonprofit organization recommended that other categories of migrant workers, such as those employed in commercial agricultural production centers like saw mills, be included in this high-needs rural population, but did not provide reasons for expanding the definition.

A state housing finance agency noted that housing finance agencies and other state, local, and nonprofit organizations currently serve migrant and seasonal agricultural workers through a variety of federal programs, and advocated for Enterprise support for successful existing programs and for the development of new programs for Duty to Serve credit.

Both Enterprises expressed concerns about limiting the Duty to Serve rule to seasonal and migrant agricultural workers, and Freddie Mac specifically recommended that annual farmworkers be considered a high-needs rural population. Fannie Mae opposed applying the U.S. Department of Labor's definition of ''migrant and seasonal agricultural workers,'' citing a potential operational burden that the definition could impose because: (1) Fannie Mae does not collect the data needed for the definition, and (2) people may not accurately self-identify as beneficiaries. Both Enterprises proposed an alternative approach that would target geographical areas as a way to assist agricultural workers. Fannie Mae provided a more detailed explanation of this methodology, suggesting that FHFA consider using USDA data to identify areas that include a certain threshold percentage of migrant agricultural workers. FHFA considered this recommendation, but finds that the Enterprises' suggested geographical areas would be over-inclusive and would direct support away from the agricultural worker population.

FHFA has considered the comments and finds the arguments compelling that the final rule should not be limited to migrant and seasonal agricultural workers, which would exclude people working on dairy farms, animal processing plants, or fisheries, as well as those who work on a farm year-round engaged in activities such as irrigation

work. FHFA finds no evidence that annual agricultural workers have lesser housing needs than migrant and seasonal agricultural workers. In fact, some data shows that agricultural workers as a whole are among the poorest populations, with families living in poverty at twice the national rate.

Accordingly, § 1282.1 of the final rule includes agricultural workers rather than only migrant and seasonal workers as a ''high-needs rural population.'' Section 1282.1 defines ''agricultural worker'' as any person that meets the definition of an agricultural worker under a federal, state, tribal, or local program. FHFA has determined that this definition of ''agricultural worker'' could include farmworkers who have significant housing needs but may not migrate or work in seasonal patterns, and broadens the types of farmworker programs across states, localities, and tribal jurisdictions that the Enterprises could support for Duty to Serve credit.

The USDA 514 and 516 programs provide loans or grants for properties with affordable housing for agricultural workers. Because the final rule's definition of ''agricultural worker'' allows for use of the definition of ''agricultural worker'' by another federal program, such as a USDA program, Enterprise purchases of loans associated with USDA Section 514 and 516 properties are eligible for Duty to Serve credit under this Regulatory Activity, provided the properties are located in a ''rural area'' as defined in the final rule and support affordable housing for very low-, low, or moderate income households as defined under the Duty to Serve.

(iii) Financing by Small Financial Institutions of Rural Housing—§ 1282.35(c)(3)

The final rule establishes a new Regulatory Activity for Enterprise activities related to the financing by small financial institutions of owner-occupied or multifamily rental housing in rural areas. This is a change from the proposed rule, which would not have included this as a Regulatory Activity.

The proposed rule specifically requested comment on what types of barriers exist to rural lending for housing and how the Enterprises could best address them. The proposed rule also asked what types of Enterprise activities could help build institutional capacity and expertise among market participants serving rural areas. A number of commenters identified barriers to rural lending and discussed how the Enterprises could address these challenges. A nonprofit organization that specializes in rural housing identified bank consolidation as a barrier to rural lending for housing, citing Home Mortgage Disclosure Act data showing that nearly 30 percent of all reported rural and small town home purchase loans were made by just ten banks. Additionally, the commenter stated that large banks serving communities far from their headquarters may not be as attached to the communities in comparison to smaller community banks based in those communities. The commenter asserted that this has resulted in large banks not fully knowing their customer base, being less involved in the community, and potentially making fewer loans in the community.

To help address this issue, the commenter recommended encouraging the Enterprises to work with community-based lenders in rural areas by giving Duty to Serve credit for Enterprise purchases of rural mortgage loans generated by small bank lenders. The commenter recommended defining ''small bank lenders'' using the Community Reinvestment Act's (CRA) classification of small financial institutions under the CRA threshold for ''intermediate small institutions,'' which is currently $304 million in assets.[95]

Identifying a different concern, a state-based rural advocacy organization suggested that small financial institutions in rural areas may lack the experience necessary to address rural lending challenges. The commenter stated that the Enterprises can help address these capacity shortcomings by providing technical and product-related support to small lenders. A state housing finance agency commented that current Enterprise requirements for small financial institutions to become seller/servicers can be onerous and expensive. A nonprofit organization specializing in rural housing development commented that small financial institutions, particularly CDFIs, have been focused on serving rural areas for many years and are well positioned to work with the Enterprises to help address barriers to rural lending.

FHFA finds the comments compelling that the rural market would benefit from adding a Regulatory Activity in the final rule that specifically encourages Enterprise activities related to lending in rural areas by small financial institutions. This is an area where the Enterprises have the capacity to make an immediate difference by providing technical assistance and working with small financial institutions to help them become approved seller/servicers.

Consolidation of the financial services industry has hit rural areas particularly hard. The number of banks headquartered in farm-dependent rural areas declined from about 1,500 in 1995 to less than 600 in 2015.[96] Overall, the number of banks with less than $1 billion in assets has decreased dramatically over the last 30 years. In 1985, there were 17,467 FDIC-insured institutions with less than $1 billion in assets; by 2010, this number had declined to 6,992.[97] With mergers, consolidations, and acquisitions dramatically reducing the number of community banks,[98] opportunities for the Enterprises to support affordable housing through small financial institutions have diminished.

FHFA considered the definitions of small financial institutions/community banks from the CRA, CFPB, FRB, and OCC, and found that there are no operational impediments that would make any of those definitions impractical for the Enterprises. The Enterprises currently have a variety of programs, such as the cash window delivery process, that make it possible for even very small lenders to engage in business with the Enterprises, as long as they meet the Enterprises' minimum net worth requirements.

FHFA analyzed the rationales for the CRA, CFPB, FRB, and OCC definitions, and finds that the purpose of the CRA definition aligns most closely with FHFA's policy goal for including support for small financial institutions in the final rule. Under the CRA, a small bank is defined as a financial institution with assets of less than $1.216 billion. A small bank becomes an ''intermediate small bank'' when it has assets of at least $304 million and less than $1.216 billion.[99] Small lenders play an important role in providing affordable housing, but face certain operational

[95] *See* 80 FR 81162 (Dec. 29, 2015) (as adjusted annually for inflation).

[96] Julie Stackhouse, Federal Reserve Bank of St. Louis, Presentation at the Federal Reserve Board Conference, ''The Future of Rural Communities: Implication for Housing'' (May 10, 2016).

[97] FDIC Community Banking Research Project, ''Community Banking by the Numbers—Federal Deposit Insurance Corporation,'' p. 3 (February 16, 2012) (PowerPoint Presentation), *available at https://www.fdic.gov/news/conferences/communitybanking/community_banking_by_the_numbers_clean.pdf*>.

[98] Federal Deposit Insurance Corporation, ''Community Banking Study'' (December 2012), *available athttps://www.fdic.gov/regulations/resources/cbi/report/cbi-full.pdf*.

[99] Board of Governors of the Federal Reserve System, ''Agencies Release Annual CRA Asset-Size Threshold Adjustments for Small and Intermediate Small Institutions,'' Press release, December 22, 2015, *available athttp://www.federalreserve.gov/newsevents/press/bcreg/20151222a.htm*.

challenges that put them at a disadvantage in relation to larger financial institutions. Because the asset size of small financial institutions is a barrier to lending in the rural market and there are limited opportunities for the Enterprises to more robustly engage these institutions, especially those with less than $304 million in assets, FHFA finds that the CRA definition of small banks below the ''intermediate small bank'' threshold can serve as a reasonable asset cap to define ''small financial institution.''

Accordingly, § 1282.35(c)(3) of the final rule establishes a Regulatory Activity for Enterprise activities related to financing by small financial institutions of housing in rural areas. Section 1282.1 defines ''small financial institution'' consistent with CRA's classification of small banks below the threshold for ''intermediate small banks'' (*i.e.,* those financial institutions with less than $304 million in assets).

Enterprise purchases of loans made by small financial institutions and that support housing under the USDA Section 502, 504, 514, 515, 516, and 538 programs would be eligible for Duty to Serve credit under this Regulatory Activity, provided the housing is located in a ''rural area'' as defined in the final rule, and serves very low-, low, or moderate-income families as defined under the Duty to Serve. The Enterprises may consider working with aggregators that facilitate such lending from small financial institutions in rural areas for Duty to Serve credit.

(iv) Small Multifamily Rental Properties in Rural Areas—§ 1282.35(c)(4)

Section 1282.35(c)(4) of the final rule establishes a new Regulatory Activity for Enterprise support for financing of small multifamily rental properties in rural areas. Section 1282.1 defines ''small multifamily rental property'' as a property with 5 to 50 rental units. This Regulatory Activity was not included in the proposed rule.

The proposed rule specifically requested comment on what types of barriers exist to rural lending for housing and how the Enterprises can best address them. The proposed rule also asked what types of Enterprise activities could help build institutional capacity and expertise among market participants serving rural areas. A number of commenters identified barriers to rural lending and discussed what the Enterprises could do about these challenges. One nonprofit organization that specializes in rural housing responded that there is a great need for financing to preserve rural small multifamily properties. The commenter and a policy advocacy organization stated that multifamily properties in rural areas tend to be small. The commenter noted that there are very few multifamily properties with more than 30 units and that two of the largest rural multifamily financing programs, the USDA Section 514 and 515 programs, average just 30 units per project. Given the smaller scale of these properties, developers may encounter challenges with transaction and operational costs, which can be spread across large properties in a more cost-effective way. A rural housing trade association labelled the challenges of refinancing Section 515 small multifamily properties a crisis, and identified data showing that a significant share of Section 515 multifamily units will be paid off by 2024 and will require refinancing to maintain their affordability.[100]

Financing of small multifamily housing faces unique challenges compared to financing of larger multifamily developments. Many properties in the unsubsidized small multifamily market suffer from deferred maintenance, energy inefficiency, and faulty plumbing, which make it difficult for the rents to cover operating costs.[101] Financial institutions and developers may be reluctant to finance rural housing if they believe their revenues will not cover costs. Data from the Residential Finance Survey indicate that in 2001, 12 percent of low-cost rental properties with average monthly rents of $400 or less reported negative net operating income, an unsustainable condition that could lead to accelerating losses of these units in the future.[102] Almost two-thirds of the nation's nearly 26 million unsubsidized rental units were owned by individuals or couples in 2001.[103] Small-scale multifamily properties often are not well-capitalized, and their owners may struggle with the costs and processes that are critical when managing tenants and properties.[104]

FHFA is persuaded by the comments and its research that rural markets could benefit from adding a Regulatory Activity in the final rule that specifically encourages Enterprise support for financing of small multifamily rental properties in rural areas, including Enterprise technical assistance to rural lenders for such properties. Due to the significant need for small multifamily rental housing in rural areas, the Regulatory Activity is not limited to support for rural lenders of a specific size, as under the Regulatory Activity in § 1282.34(d)(1) for small multifamily rental properties under the affordable housing preservation market. An Enterprise purchase of a loan on small multifamily rental housing in a rural area is eligible for Duty to Serve credit under both the affordable housing preservation market and the rural market, provided the activity complies with both §§ 1282.34(d)(1) and 1282.35(c)(4).

Examples of channels that the Enterprises could use to help address the need for financing of small multifamily rental housing in rural areas include: (1) Purchasing loans that support properties financed through the USDA Section 514, 515, and 538 programs; (2) purchasing loans originated under the HUD Small Building Risk Sharing Initiative; (3) purchasing loans originated under the USDA 538 program; and (4) providing technical assistance to lenders serving rural areas, as long as the housing being supported through the Enterprises' activities is located in a ''rural area'' as defined in the final rule, and serves very low-, low-, or moderate-income households as defined under the Duty to Serve.

(v) Low-Income Housing Tax Credit Equity Investments—§ 1282.37(b)(5)

The Safety and Soundness Act requires FHFA to consider the amount of an Enterprise's investments and grants in projects that assist in meeting the needs of the underserved markets in evaluating the Enterprise's Duty to Serve performance.[105] Low-Income Housing Tax Credit (LIHTC) equity investments by the Enterprises would fall within this investments category but FHFA, to date, has not permitted the Enterprises to make LIHTC equity investments during their conservatorships.

The proposed rule did not include any specific provisions on Enterprise LIHTC equity investments, but requested comment on a number of related issues. Numerous commenters provided responses to FHFA's questions, with the views expressed

[100] FHFA recognizes that new data was recently released by the USDA suggesting that the spike in maturing Section 515 mortgages may be later than was anticipated when this comment letter was submitted. The latest data released by USDA on this topic is at: *http://www.sc.egov.usda.gov/data/data_files.html.*

[101] William Apgar & Shekar Narasimhan, Joint Center for Housing Studies, ''Enhancing Access to Capital for Smaller Unsubsidized Multifamily Rental Properties,'' p. 6 (RR07–8) (Harvard University, March 2007), *available at http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/rr07-8_apgar.pdf.*

[102] *Id.* at 11.

[103] *Id.* at 13.

[104] *Id.* at 11, 15.

[105] *See* 12 U.S.C. 4565(d)(2)(D).

generally falling into three broad categories: (i) Duty to Serve credit should be permitted only for targeted or limited Enterprise LIHTC equity investments; (ii) Duty to Serve credit should be permitted for Enterprise LIHTC equity investments with few or no restrictions; and (iii) FHFA should maintain its prohibition on all LIHTC-related activities by the Enterprises.

After considering the comments, under § 1282.37(b)(5) of the final rule, Enterprise LIHTC equity investments will be eligible for Duty to Serve credit in rural areas only. FHFA will consider the extent to which an Enterprise's LIHTC equity investments serve high-needs rural regions and populations during the evaluation process and may provide greater Duty to Serve credit for such investments. Any Enterprise LIHTC equity investments are conditioned on receiving a separate approval of the investments by FHFA as conservator. The comments received and the final rule provision concerning LIHTC equity investments are discussed below.

A majority of the commenters, consisting primarily of nonprofit organizations and policy advocacy organizations, fell into the first group, favoring providing Duty to Serve credit only for targeted or limited Enterprise re-entry into the LIHTC equity investment market. Many of these commenters favored targeting any LIHTC equity investments made by the Enterprises to certain geographic areas or limited by other specific criteria, with some commenters favoring volume caps. Several policy advocacy organizations, a nonprofit organization, and a banking trade association recommended that if the Enterprises are allowed to re-enter the LIHTC equity investment market, FHFA should require targeting of the investments to underserved areas where Enterprise support is most needed, including rural markets and high-needs rural regions such as Indian Country. A nonprofit organization commented that Enterprise LIHTC equity investment in rural areas is needed because rural projects cannot offer the economies of scale or the profit potential needed to attract financing or LIHTC equity investment from large commercial lenders. A nonprofit intermediary favored Duty to Serve credit for LIHTC equity investments in properties assisted under the statutorily-enumerated affordable housing preservation programs and in rural areas with persistent poverty. Commenters stated that restricting the Enterprises to LIHTC equity investments in limited areas would prevent the distortion of LIHTC equity prices and the pricing out of private investors, while giving the Enterprises flexibility to respond to underserved market needs.

Among this first group, a housing advocacy organization recommended providing Duty to Serve credit based on the condition and long-term affordability of the project at the end of the LIHTC compliance period, rather than by geographic targeting. A nonprofit organization involved in lending, developing, and managing affordable properties highlighted several specific markets needing LIHTC equity investment: (1) Long-term Section 8 properties; (2) 4 percent LIHTC preservation projects; (3) rural housing; (4) Native American housing; (5) assisted living housing for low-income elderly households; and (6) supportive housing with intensive supportive services.

The second group of commenters, including both Enterprises, a trade organization, and a nonprofit housing developer, preferred that Duty to Serve credit be available for Enterprise LIHTC equity investments with few or no restrictions. The commenters stated that there is an ongoing need for unrestricted Enterprise support, especially for projects outside of major banks' Community Reinvestment Act (CRA) assessment areas. Fannie Mae and a private nonprofit investor and lender specializing in financing affordable housing and community development specifically objected to limiting Enterprise LIHTC equity investments to pre-determined geographic areas, arguing that this would preclude the Enterprises from investing in multi-investor funds.

Commenters in this group also recommended that the Enterprises be positioned to serve as ''investors of last resort'' should the LIHTC equity market soften. They stated that in order to be able to respond quickly and effectively to changing market conditions, the Enterprises must have organizational structures and staff in place with expertise in LIHTC equity investments.

A smaller third group of commenters, which included a banking trade association, an organization for LIHTC investors, and several housing advocacy organizations, favored prohibiting all LIHTC-related activities by the Enterprises. Their general view was that the demand for LIHTCs is extremely high and that Enterprise re-entry into the LIHTC equity investment market would drive prices higher, drive private investors out of the market, and obstruct banks' CRA compliance. A nonprofit housing organization stated that Enterprise LIHTC equity investments should not be allowed because the Treasury Department sweeps the Enterprises' profits.

After considering the comments, FHFA is persuaded that despite a vibrant LIHTC equity investment market in some areas of the country, other limited areas have significant LIHTC equity needs that the Enterprises could safely assist. The financial crisis did not affect all regions of the country equally. Certain parts of the country, including cities such as New York and San Francisco, have avoided the sharp decrease in LIHTC demand and prices, and affordable housing construction in these areas has continued on pace. In fact, the demand for LIHTC equity investments in affluent urban markets has escalated, with prices reaching as high as $1.17 per $1.00 of LIHTCs. It would not currently serve the purposes of the Duty to Serve for the Enterprises to re-enter these markets because the Enterprises could displace private investors, as pointed out by some commenters.

Other areas of the country, notably certain rural regions, have seen the demand for LIHTC equity investments disappear, with fewer LIHTC projects being completed during and following the financial crisis. A 2014 report found that the proportion of LIHTC-financed housing units developed in rural communities fell by 69 percent between 1987 and 2010.[106] More specifically, in 1987, 24 percent of all LIHTC-financed housing was developed in rural areas,[107] but in 2010, this percentage had dropped to 7.5 percent.[108] The report determined that this decline resulted in large part from a 97 percent reduction in funding for the Section 515 Rural Rental Housing Loan program, which many LIHTC projects had used to keep rents low enough to serve the most vulnerable populations in rural areas.[109] This has had a material impact as the absence of LIHTC funding has translated into less money being available for projects serving very low-, low-, and moderate-income families in certain areas, primarily rural areas.

After considering the comments and available data, FHFA has determined that, under the final rule, Enterprise LIHTC equity investments in rural areas will be eligible for Duty to Serve credit,

[106] *See* National Rural Housing Coalition, ''Rural America's Rental Housing Crisis—Federal Strategies to Preserve Access to Affordable Rental Housing in Rural Communities,'' 17–18 (2014) [hereinafter cited ''Coalition Study''], *available at http://ruralhousingcoalition.org/wp-content/uploads/2014/07/NRHC-Rural-America-Rental-Housing-Crisis_FINALV3.compressed.pdf.*

[107] *See* Coalition Study, 17.

[108] *See id.*

[109] *See* Coalition Study, 16–17.

subject to approval of such investments by FHFA as conservator. In addition, for the reasons discussed below, FHFA has determined that it may provide greater Duty to Serve credit for LIHTC equity investments that support properties located in high-needs rural areas or that serve high-needs rural populations. While the final rule does not designate Enterprise LIHTC equity investments as a stand-alone Regulatory Activity, an Enterprise Plan could have LIHTC equity investment as an objective within a Regulatory Activity or within an Additional Activity for the rural market. For example, an Enterprise could include LIHTC equity investment in a small Section 515 project as an objective under the Regulatory Activity for supporting small multifamily properties in rural areas.

FHFA considered limiting Duty to Serve credit to Enterprise LIHTC equity investments in rural areas outside of CRA assessment areas but determined that this was not operationally feasible, despite the needs of these areas. One study found that LIHTC projects in non-CRA assessment areas garnered between $0.10 and $0.24 less per $1.00 in LIHTCs than projects in CRA assessment areas.[110] In fact, some non-CRA projects received as much as $0.35 less per LIHTC project.[111] Lower pricing means less equity and a higher debt burden for projects, which makes them less affordable to low- and moderate-income tenants.[112]

These pricing disparities may be affected by incentives that banks have under the CRA. CRA ratings are principally driven by the location of banks' deposits, with the result that the largest, most densely populated cities and money centers attract the most CRA investment from the largest banks.[113] At the same time, community banks face less encompassing CRA oversight than large banks and, therefore, generally lack the same CRA incentives to invest in LIHTC projects.[114] Community banks also have simpler means available to comply with their CRA requirements than investing in LIHTC projects.[115]

While targeting Duty to Serve assistance to areas outside of CRA assessment areas could be an effective approach in theory, this would be operationally difficult and burdensome in practice. The federal banking regulators responsible for CRA compliance (FDIC, FRB, and OCC) permit each bank to define its own CRA assessment area according to a set of guidelines, and the banks' lists of CRA assessment areas are not readily publicly available. In addition, the banks' CRA assessment areas may fluctuate on a yearly basis.[116] FHFA has determined that it would be impractical for the Enterprises to maintain locale-by-locale information on banks' individual CRA assessment areas. No commenter identified a method for consistently defining and identifying non-CRA assessment areas.[117]

High-needs rural regions largely overlap with areas outside of the banks' CRA assessment areas,[118] and FHFA considered limiting Duty to Serve credit for Enterprise LIHTC equity investments to high-needs rural regions and populations. Several nonprofit organizations and policy advocacy organizations advised that Middle Appalachia, the Lower Mississippi Delta, colonias, and persistent poverty counties all share high incidences of poverty and housing problems, and likewise that Native Americans on Tribal Lands and agricultural workers experience a disproportionate amount of inadequate housing. A nonprofit organization stated that projects in these specific high-needs rural regions lie in ''lending deserts'' and face significant hurdles in acquiring the equity needed to finance affordable housing.[119] A policy advocacy organization and a nonprofit organization specializing in rural markets recommended that all Enterprise LIHTC investments be limited to high-needs rural regions and populations.

After considering the comments and needs in the overall rural market, FHFA is striking a balance by making LIHTC equity investments in all rural areas eligible for Duty to Serve credit under the final rule, and by indicating that FHFA may choose to provide greater Duty to Serve credit for LIHTC equity investments in high-needs rural areas or that serve high-needs rural populations in the Evaluation Guidance. FHFA acknowledges that serving rural areas through LIHTC equity investments—and high-needs rural regions and populations in particular—will present considerable challenges. High-needs

[110] CohnReznick, ''The Community Reinvestment Act and Its Effect on Housing Tax Credit Pricing,'' pp. 7–8, 45 (2013), *available at https://www.cohnreznick.com/sites/default/files/CohnReznick_CRAStudy.pdf.*

[111] *Id.* at 45.

[112] *See generally* Patrick Barbolla, ''Prepared Testimony for a Hearing on the Low-Income Housing Tax Credit in front of the U.S. Senate Banking, Housing and Urban Affairs Committee's Subcommittee on Housing and Transportation'' (May 12, 1999), *available at http://www.banking.senate.gov/99_05hrg/051299/barbolla.htm.*

[113] CohnReznick, ''The Community Reinvestment Act and Its Effect on Housing Tax Credit Pricing,'' p. 17 (2013), *available at https://www.cohnreznick.com/sites/default/files/CohnReznick_CRAStudy.pdf.* In addition, federal regulations specify that assessment areas may not extend substantially beyond a metropolitan statistical area boundary. *See* 12 CFR 25.41(e)(4). *See generally* Joint Center for Housing Studies of Harvard University, ''The Disruption of the Low-Income Housing Tax Credit Program: Causes, Consequences, Responses, and Proposed Correctives,'' pp. 4–5 (Dec. 2009), *available at http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/disruption_of_the_lihtc_program_2009_0.pdf*; Buzz Roberts, ''Modifying CRA to Attract LIHTC Investments,'' 13 (Federal Reserve Bank of St. Louis, CAO 925 11/09) [hereinafter cited ''Roberts Article''], *available at https://www.stlouisfed.org/~/media/Files/PDFs/Community%20Development/LIHTC.pdf.*

[114] *See generally* 12 CFR part 228, subpart B, *available at http://www.ecfr.gov/cgi-bin/text-idx?SID=f07982420e6efaeb841c66f8580b323e&mc=true&node=pt12.3.228&rgn=div5#se12.3.228_121.* National Community Reinvestment Coalition, ''A Brief Description of CRA,'' *available at http://www.ncrc.org/programs-a-services-mainmenu-109/policy-and-legislation-mainmenu-110/the-community-reinvestment-act-mainmenu-80/a-brief-description-of-cra-mainmenu-136.* A bank unfamiliar with LIHTCs usually requires 6 to 12 months to make an LIHTC equity investment decision after a CRA-relevant project receives an LIHTC allocation. Roberts Article, p. 14.

[115] National Community Reinvestment Coalition, ''A Brief Description of CRA,'' *available at http://www.ncrc.org/programs-a-services-mainmenu-109/policy-and-legislation-mainmenu-110/the-community-reinvestment-act-mainmenu-80/a-brief-description-of-cra-mainmenu-136.* Smaller community banks also face minimum investment requirements for multi-investor funds, which often start at around $1 million per investor. *See generally* Roberts Article, p. 14. Direct investment minimums can be even higher. *See id.*

[116] *See generally* Kenneth Benton & Donna Harris, ''Understanding the Community Reinvestment Act's Assessment Area Requirements,'' Consumer Compliance Outlook (First Qtr. 2014), *available at https://consumercomplianceoutlook.org/2014/first-quarter/understanding-cras-assessment-area-requirements/.*

[117] The CohnReznick study referred to previously that discussed the effects of CRA on LIHTC pricing was not based upon a comprehensive listing of geographies not covered by CRA assessment areas, but instead relied on data for only 20 of the largest banks, and then used branch locations to proxy for assessment areas. *See* CohnReznick, ''The Community Reinvestment Act and Its Effect on Housing Tax Credit Pricing,'' p. 21 (2013), *available at https://www.cohnreznick.com/sites/default/files/CohnReznick_CRAStudy.pdf.*

[118] *See generally* Housing Assistance Council, ''The Community Reinvestment Act and Mortgage Lending in Rural Communities,'' pp. 25–26 (Jan. 2015), *available at http://www.ruralhome.org/storage/documents/publications/rrreports/rrr-cra-in-rural-america.pdf)*; Charles Wehrwein, NeighborWorks America, ''Community Reinvestment Act: Interagency Questions and Answers Regarding Community Reinvestment'' p. 1 (Nov. 3, 2014) (comment letter), *available at http://www.neighborworks.org/Documents/AboutUs_Docs/PublicPolicy_Docs/CommentLetters_Docs/NeighborWorks-America-Comment-Letter-Community-Rei.aspx.*

[119] *See* Charles Wehrwein, NeighborWorks America, ''Community Reinvestment Act: Interagency Questions and Answers Regarding Community Reinvestment'' p. 1 (Nov. 3, 2014) (comment letter), *available at http://www.neighborworks.org/Documents/AboutUs_Docs/PublicPolicy_Docs/CommentLetters_Docs/NeighborWorks-America-Comment-Letter-Community-Rei.aspx.*

rural regions and populations not only have significant needs, but also face greater barriers to investment, even compared to other rural regions. For instance, according to comments from Fannie Mae and a private nonprofit investor and lender, multi-investor funds are typically structured to include a cross-section of properties, and investors in these funds generally lack control over the selection of the underlying projects. Instead, they rely on general underwriting and investment criteria to control risk. In response to Enterprise demand for LIHTC equity investments in these rural markets, however, syndicators could develop multi-investor funds targeting rural regions, including funds targeting high-needs rural regions and populations. The intent of the Duty to Serve rule is to create incentives for the Enterprises to engage in eligible transactions, and by limiting the Enterprises' eligible LIHTC equity investments, FHFA intends to drive Enterprise innovation in rural markets.

FHFA also considered the safety and soundness of LIHTC equity investments in rural areas, including in high-needs rural regions and populations, and found that they would not expose the Enterprises to inappropriate risk, as some commenters suggested. Historically, foreclosure rates on LIHTC properties have fallen below 1 percent,[120] and few LIHTCs are recaptured.[121] In addition, Fannie Mae advised that while non-CRA LIHTC projects and those in challenging submarkets are often viewed as more risky to investors, they typically perform as well as conventional LIHTC projects and are consistent with the Enterprises' conservative risk management structures. Historic returns on investments and loans in LIHTC projects have been competitive with similar alternative investment opportunities.[122]

[120] *See* CohnReznick, ''The Low-Income Housing Tax Credit at Year 30: Recent Investment Performance (2013–2014),'' pp. 228–229 (Dec. 2015), *available at https://www.cohnreznick.com/sites/default/files/pdfs/CR_LIHTC_DEC2015.pdf.*

[121] *See* Letter of US Bank to OCC, Federal Reserve & Security and Exchanged Commission, p. 3 (Feb. 10, 2012), *available at https://www.sec.gov/comments/s7-41-11/s74111-195.pdf.*

[122] Office of the Comptroller of the Currency, Community Affairs Department, ''Low-Income Housing Tax Credits: Affordable Housing Investment Opportunities for Banks,'' Community Development Insights, p. 7 (Mar. 2014), *available at http://www.occ.gov/topics/community-affairs/publications/insights/insights-low-income-housing-tax-credits.pdf.*

III. Evaluations, Ratings, and Evaluation Guidance—§ 1282.36

Under the Safety and Soundness Act, FHFA is required to conduct an annual evaluation of the Enterprises' activities to fulfill their Duty to Serve obligations and to assign an annual rating for their performance under each of the underserved markets.[123] The final rule establishes a framework for the evaluation and ratings process that FHFA will use to assess each Enterprise's Duty to Serve performance based on the Enterprise's implementation of its Plan during the relevant evaluation year. As part of this process, FHFA will publish its annual Duty to Serve evaluation and rating for each Enterprise, which will provide the public with a transparent description of the Enterprises' performance and FHFA's assessment of that performance.

After considering the comments received and further consideration of the evaluation and ratings process in the proposed rule, the final rule makes a number of significant changes to the proposed evaluation and ratings process. The final rule modifies the proposed process for evaluating Enterprise performance to use a three-step process as follows: (1) A quantitative assessment; (2) a qualitative assessment; and (3) an assessment of any extra credit-eligible activities, including residential economic diversity activities, for extra Duty to Serve credit. Each of these steps will assess the Enterprise's accomplishment of the objectives for the activities under each underserved market in its Plan. As part of the qualitative assessment, FHFA's evaluation will incorporate an assessment of each Enterprise's performance of its Plan objectives under one the following four evaluation areas—outreach, loan product, loan purchase, and investments and grants—as required by the statute.

At the end of each evaluation year, based on this three-step process, FHFA will assign one of the following five ratings for each underserved market in a Plan: Exceeds, High Satisfactory, Low Satisfactory, Minimally Passing, or Fails. This is a change from the four-level rating scale in the proposed rule. A rating of Exceeds, High Satisfactory, Low Satisfactory, or Minimally Passing will constitute compliance with the Duty to Serve each underserved market. A rating of Fails will constitute noncompliance with the Duty to Serve the underserved market. The final rule also provides that on an ongoing basis FHFA will make such determinations as appropriate based on evaluation of the program's parameters and operation, pursuant to the Evaluation Guidance, regarding implementation of the evaluation and rating process.

[123] *See* 12 U.S.C. 4565(d)(1), (2).

As in the proposed rule, FHFA will prepare Evaluation Guidance for the Enterprises. However, the final rule adjusts the nature of the Evaluation Guidance to better fit the three-step evaluation process, which is further described below. FHFA will prepare one Evaluation Guidance to be used by both Enterprises for their three-year Plans. The Evaluation Guidance will provide additional guidance on the Plans, how FHFA will conduct the quantitative, qualitative, and extra credit assessments, how final ratings will be determined, and other matters as appropriate. FHFA will provide the Enterprises with proposed Evaluation Guidance for the first Plan within 30 days after the posting of this final rule on FHFA's Web site. The proposed Evaluation Guidance will also be posted to FHFA's Web site, and the public will have 120 days to provide input on the proposed Evaluation Guidance after its posting on the Web site. For the first Plan, FHFA will publish the final Evaluation Guidance no later than the time FHFA delivers comments to each Enterprise on its proposed Plan. FHFA may modify the Evaluation Guidance prior to or during the course of the three-year period for the Evaluation Guidance, and the modified Evaluation Guidance will be effective for the following Plan year.

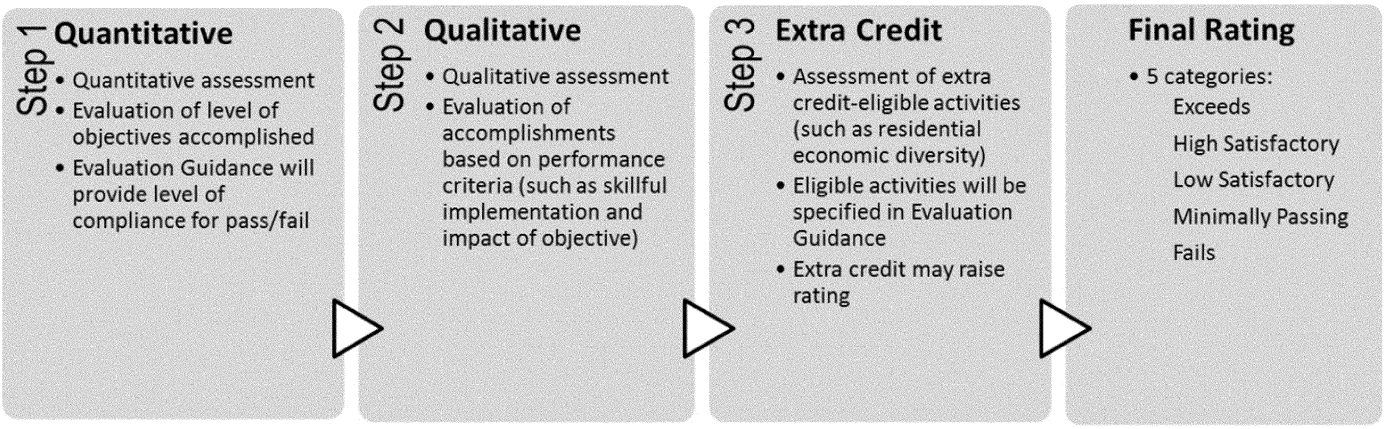
The section below describes the final rule provisions for the evaluation process and ratings applicable to each Enterprise's Duty to Serve performance. These provisions are presented under subsections for: (a) Evaluation process; (b) Determination of overall rating and compliance; and (c) Evaluation Guidance.

A. Evaluation Process

Consistent with the proposed rule, § 1282.36(b) of the final rule provides that FHFA will evaluate an Enterprise's performance of its Plan objectives, as designated by the Enterprise in its Plan pursuant to § 1282.32(f), under one of the following four evaluation areas: Outreach; loan product; loan purchase; and investments and grants. These four evaluation areas, and the comments received, are discussed above under § 1282.32, which addresses the Underserved Markets Plans.

Additionally, FHFA made substantive changes to the proposed evaluation process set forth in § 1282.36(c). The final rule authorizes FHFA to evaluate Enterprise performance using a three-

step process: (1) A quantitative assessment; (2) a qualitative assessment; and (3) an assessment of extra credit-eligible activities, including residential economic diversity activities.



This evaluation process is a change from the approach in the proposed rule, which would have established a scoring framework allocating points that the Enterprises could earn for specific Duty to Serve activities performed under their Plans. FHFA would have allocated 100 potential scoring points that an Enterprise could potentially earn in each underserved market, with extra credit for residential economic diversity activities as long as the score for the market did not exceed 100 points.

Although a few trade associations and policy advocacy organizations appreciated the transparency of the proposed approach, the majority of commenters—including several policy advocacy organizations, nonprofit organizations, governmental entities, trade associations, and both Enterprises—found the proposed process and scoring framework highly prescriptive and overly complex.

Fannie Mae commented that managing to the proposed point system might create an incentive for the Enterprises to take actions that optimize scores rather than responding to the needs and opportunities in the underserved markets. Among its suggested improvements, Fannie Mae recommended that FHFA consider adapting FHFA's annual Enterprise conservatorship scorecard approach for the Duty to Serve evaluation process. Freddie Mac stated that the evaluation and rating process should not be mechanical or based on rigid criteria. Referencing the Community Reinvestment Act evaluation framework, Freddie Mac suggested FHFA consider permitting ''substantial compliance'' with its objectives as sufficient to be considered in compliance with the Duty to Serve.

Commenters made numerous suggestions for the evaluation process, many of which FHFA has determined to adopt in the final rule. These suggestions included: Simplifying the numeric scoring; more closely aligning the evaluation with the objectives detailed in the Plans; clarifying the criteria used to assess Enterprise performance; improving how the evaluation process captures objectives that may not be inherently numeric or yield results in the short-term; modifying the scoring framework to encourage the Enterprises to undertake more challenging activities; and adding flexibility in the evaluation process to accommodate shifts in the market, innovation, and the degree to which the Enterprises are responsive to underserved market needs.

Section 1282.36(c) of the final rule specifies that the evaluation process will comprise a three-step process. The first step will evaluate the level of accomplishment of the objectives in each underserved market in an Enterprise's Plan (quantitative assessment). The second step will evaluate how well the Enterprise performed the objectives and their impact (qualitative assessment). The third step will evaluate each Enterprise's achievement of any extra credit-eligible activities, based on the qualitative assessment factors, for which the Enterprise could receive Duty to Serve extra credit.

In the quantitative assessment, FHFA will evaluate the level of an Enterprise's accomplishment of each objective in an underserved market in its Plan. In the Evaluation Guidance, FHFA will provide the method and level of accomplishment needed for the objectives to receive a passing rating for compliance with the Duty to Serve an underserved market in a Plan. At the conclusion of the quantitative assessment for an underserved market in a Plan, FHFA will determine whether the Enterprise receives one of the passing ratings, or a rating of Fails.

In the qualitative assessment, FHFA will evaluate the Enterprise's accomplishment of each objective for each activity in an underserved market in its Plan, based on the method and criteria that FHFA will establish in the Evaluation Guidance, such as how skillfully an objective was implemented, the impact of the objective, and such other criteria as FHFA may set forth in the Evaluation Guidance.

Based on the outcome of the quantitative and qualitative assessments, FHFA will assign a rating for the Enterprise's performance for each underserved market. If an Enterprise's rating is not changed due to the awarding of extra credit as described below, this rating will be the final rating for the Enterprise's performance for an underserved market in its Plan. The Evaluation Guidance will describe how the ratings are determined.

In the third step of the evaluation process, FHFA will assess the Enterprise's performance of any extra credit-eligible activities, including residential economic diversity activities and objectives that have been included in the Enterprise's Plan. The assessment will be based on the method and criteria that FHFA will establish in the Evaluation Guidance, such as how skillfully the Enterprise implemented the objective, the impact of the objective, and such other criteria as FHFA may set forth in the Evaluation Guidance. Depending upon the outcome of FHFA's assessment, extra credit

could increase an Enterprise's rating. Rating levels are described in detail below. Since an Enterprise cannot receive a rating higher than Exceeds, extra credit cannot increase an Exceeds rating. Nevertheless, FHFA will recognize these achievements of the Enterprise in FHFA's written evaluation of the Enterprise's performance for the year. Extra credit may not be awarded where an Enterprise has received a rating of Fails for an underserved market in a Plan. Residential economic diversity activities are further discussed below in Section IV.

B. Determination of Overall Rating and Compliance

At the end of the evaluation year, FHFA will award a separate rating for each underserved market based on the quantitative, qualitative, and extra credit-eligible activities assessments. Section 1282.36(c)(4) of the final rule provides that an Enterprise will receive one of five ratings: Exceeds, High Satisfactory, Low Satisfactory, Minimally Passing, or Fails. The final rule revises the proposed rule process by eliminating the conversion of a 100 point numeric scale specific to an Enterprises' Plan into a final rating. In addition, the final rule includes Minimally Passing as a fifth rating category, which was not included in the proposed rule Commenters generally supported the proposed approach of using rating categories to evaluate an Enterprise's performance under its Plan, with some suggesting FHFA consider a rating structure with more tiers. A trade association, for example, commented that the proposed rule's increase in the number of ratings categories from the pass/fail ratings in the 2010 Duty to Serve proposed rule would provide greater incentives for the Enterprises and help stakeholders identify areas for improvement in the Enterprises' activities under the Duty to Serve. Several policy advocacy organizations and one governmental entity recommended expanding the proposed four rating categories to five to enable FHFA to provide more meaningful distinctions in evaluations and ratings.

FHFA finds the comments compelling that the final rule should add a fifth rating category of Minimally Passing. The Minimally Passing rating will fall above the Fails rating and below the Low Satisfactory rating. The Minimally Passing rating will convey that an Enterprise has met a minimally compliant level of its Plan objectives but could better use its resources to fulfill the intentions of the Duty to Serve statute and regulation. Adding this fifth rating category will allow FHFA to apply more meaningful distinctions to its evaluation of an Enterprise's performance of its Plan objectives.

C. Ongoing Assessment of Evaluation and Rating Process

Because the process by which FHFA will evaluate and rate the Enterprises' compliance with the final rule is new and in an effort to consider the appropriate balance between compliance and regulatory burden, FHFA considers it appropriate to do ongoing assessments of the operational or other practical implications of the rating process. This will allow both FHFA and the Enterprises to begin fulfilling the intent of the Duty to Serve statute, while also recognizing that FHFA may wish to adjust the implementation of the evaluation and rating process over time. For this reason, § 1282.36(c)(4)(ii) of the final rule provides that FHFA will make such determinations as appropriate based on evaluation of the program's parameters and operation, pursuant to the Evaluation Guidance, regarding implementation of the rating process.

D. Evaluation Guidance

Section 1282.36(d) of the final rule requires that FHFA prepare Evaluation Guidance—a change in name from the proposed rule which used the term ''Evaluation Guide.'' The final rule's description of the content of the Evaluation Guidance is different from that of the proposed rule because, as discussed above, the evaluation process and scoring system are changed from the proposed rule. The final rule states that the Evaluation Guidance will provide additional guidance on the Plans, how the quantitative, qualitative, and extra credit assessments will be conducted, how final ratings will be determined, and such other matters as may be appropriate.

The final rule revises the process outlined in the proposed rule, which stated that FHFA would issue to each Enterprise an Evaluation Guide specifically tailored to its Plan after the Enterprises delivered their final Plans to FHFA. Commenters, including a governmental entity, a trade organization, several nonprofit lenders, several policy advocacy organizations, and both Enterprises, supported the proposed requirement that FHFA provide guidance on how it will evaluate Enterprise compliance. Several policy advocacy organizations, a governmental entity, and a trade organization also recommended that FHFA seek public input on the Evaluation Guides.

Commenters, including several policy advocacy organizations, a trade association, and both Enterprises, also provided feedback on the appropriate timing for the Evaluation Guide. Both Enterprises expressed concerns with the proposed timing and sequencing of the Evaluation Guide. Freddie Mac recommended that guidance be made available to the Enterprises substantially in advance of the required submission of the Plans to FHFA. Fannie Mae stated that being advised of FHFA's scoring methodology just 30 days before implementing a Plan could require mid-course corrections and potentially disrupt planned activities. Under the proposed rule process, FHFA would have developed the Evaluation Guide for each Enterprise after the Enterprises' Plans were finalized, based on the Enterprises' Plans and public input received on the proposed Plans.

FHFA finds the commenters' arguments persuasive and has revised the nature and timing of the Evaluation Guidance. Section 1282.36(d)(1) of the final rule provides that FHFA will prepare one Evaluation Guidance for both Enterprises, on a three-year cycle. This revises the approach in the proposed rule, which would have provided an annual Evaluation Guide to each Enterprise specifically tailored to its Plan. This change is based on the change in the nature of the Evaluation Guidance in the final rule, which will be applicable to both Enterprises and not specifically tailored to an individual Plan. The change also aligns the timing of the Evaluation Guidance with the Plan cycle. In addition, as described below, the final rule allows for modification of the Evaluation Guidance, which can address changes in circumstances, markets, or updates to the Enterprises' Plans.

In order to provide the Enterprises with sufficient time to develop quality draft Plans that are responsive to FHFA's expectations and public input, § 1282.36(d)(3) of the final rule provides that the first proposed Evaluation Guidance will be provided to the Enterprises within 30 days after the posting of the final rule on FHFA's Web site, and posted to FHFA's Web site as soon as practical thereafter. FHFA will provide timelines for the Evaluation Guidance for subsequent Plans after the first Plan, including public input periods, 300 days before the termination date of the Plan in effect, or a later date if additional time is necessary.

In discussing the importance of clearly defining evaluation criteria through guidance, one policy advocacy organization suggested that FHFA be permitted to adjust its evaluation

criteria during a Plan cycle as the results of initial efforts reveal new information. FHFA finds that providing Evaluation Guidance for a three-year period, which can remain the same over time where appropriate, but which can also be modified when there are lessons learned and best practices are developed, is appropriate. For this reason, the final rule provides that FHFA may modify the Evaluation Guidance prior to or during the three-year cycle and may obtain additional public input on the Evaluation Guidance. The modified Evaluation Guidance would be effective for the subsequent evaluation year.

FHFA agrees with the commenters' common theme that the Evaluation Guidance should help provide accountability for Duty to Serve implementation. Accordingly, § 1282.36(d)(3) of the final rule requires the Evaluation Guidance to be issued first as proposed Evaluation Guidance, with a 120-day period for the public to provide input on the proposed Evaluation Guidance to FHFA and the Enterprises. However, in order to implement the Plans in a timely fashion and retain operational flexibility, FHFA may revise the length of time the public will have to provide input on proposed Evaluation Guidance for subsequent Plans.

IV. Extra Credit-Eligible Activities, Including Residential Economic Diversity Activities—§ 1282.36(c)(3)

As the third step of the evaluation and rating process, the final rule designates two categories of extra credit-eligible activities: (1) Residential economic diversity activities, and (2) other activities that may be identified by FHFA as eligible for extra credit in the Evaluation Guidance. FHFA will establish the method and criteria for evaluating these extra credit-eligible activities in the Evaluation Guidance.

A. Residential Economic Diversity Activities

Consistent with the proposed rule, § 1282.36(c)(3) of the final rule provides that the Enterprises may receive Duty to Serve extra credit, which may be factored into their evaluation ratings, if their qualifying activities within an underserved market in their Plans contribute to residential economic diversity. FHFA will evaluate an Enterprise's performance of qualifying residential economic diversity activities using the qualitative assessment factors. As proposed, the final rule defines a ''residential economic diversity activity'' as an Enterprise activity in connection with mortgages on: (1) Affordable housing in a high opportunity area; or (2) mixed-income housing in an area of concentrated poverty. Definitions of these terms are discussed below.

Qualifying Activities for Residential Economic Diversity

Section 1282.1 of the final rule defines qualifying ''residential economic diversity activities'' to mean all eligible activities in the underserved markets except energy or water efficiency improvement activities and any additional activities determined by FHFA to be ineligible. The proposed rule would have excluded Enterprise support for energy or water efficient improvement activities from receiving residential economic diversity extra credit because they typically do not relate to the location of housing and, thus, do not appear to further residential economic diversity. The proposed rule also would have excluded Enterprise support for financing of manufactured housing communities from receiving residential economic diversity extra credit because the Enterprises generally do not have complete information on residents' monthly housing costs, which is necessary to determine the affordability of the community. The rule's census tract proxy methodology for determining the affordability of a community (the income level of the census tract) assumes that a community's affordability matches the incomes of nearby residents, which means it is not useful for determining whether a community contributes to residential economic diversity. The proposed rule specifically requested comment on whether this was the appropriate scope for the proposed extra credit.

A number of policy advocacy and governmental organizations recommended that FHFA treat Enterprise manufactured housing community activities as eligible for extra credit under residential economic diversity, and some noted that outside data can in some cases substantiate whether these activities contribute to residential economic diversity. Some nonprofit and governmental organizations also recommended that energy efficiency improvement activities be eligible for extra credit, as they may contribute to residential stability.

After considering the comments, FHFA agrees that manufactured housing communities may contribute to residential economic diversity. Accordingly, the final rule allows Enterprise manufactured housing community activities to qualify for residential economic diversity extra credit, but only if the Enterprise is able to substantiate the affordability of homes in the manufactured housing community to very-low, low-, or moderate-income households through use of the methodology in § 1282.38(f)(1) or another methodology FHFA has approved.

Consistent with the proposed rule, the final rule excludes Enterprise support for energy or water efficiency improvement activities from qualifying for extra credit, as FHFA continues to view these activities as insufficiently related to residential economic diversity.

Definition of ''High Opportunity Areas''

Section 1282.1 of the final rule defines ''high opportunity area'' primarily to mean an area designated by HUD as a Difficult-to-Develop Area (DDA) during any year covered by a Plan or in the year prior to a Plan's effective date, whose poverty rate is lower than the rate specified by FHFA in the Evaluation Guidance. DDAs are areas where it is difficult to create affordable housing due to high rents relative to area median income, and they are generally considered to be a proxy for higher opportunity areas. HUD is required to identify DDAs by the LIHTC statute and does so annually.[124] The definition in the final rule also allows the Enterprises to utilize certain state or local definitions of high opportunity areas from a geographically-applicable LIHTC Qualified Allocation Plan (QAP).[125]

The proposed rule would have defined ''high opportunity areas'' only as DDAs. The proposed rule specifically requested comment on whether the proposed definition is the most appropriate, whether the definition should use DDAs to define high opportunity areas outside of metropolitan areas, and whether there is a factor-based definition that would be preferable. The proposed rule also asked whether state-defined high opportunity areas (or similar terms) should be incorporated in the definition, and if so, how this could be implemented by the Enterprises.

Several policy advocacy and nonprofit organizations directly supported the proposed definition due to its empirical and straightforward nature. Freddie Mac commented that FHFA should clarify how to address annual changes in the areas HUD identifies as DDAs because the

[124] 26 U.S.C. 42(d)(5)(B)(iii).

[125] LIHTC Qualified Allocation Plans govern the allocation of 9 percent LIHTCs. *See* 26 U.S.C. 42(m)(B).

Enterprises are being asked to plan their Duty to Serve activities for three years at a time. Neither Freddie Mac nor Fannie Mae commented in favor of or in opposition to the proposed definition.

Critics of using DDAs exclusively as a proxy for high opportunity areas noted that because HUD's DDA calculation methodology is used as an allocation mechanism for limited tax credits under the LIHTC program, it has a 20 percent nationwide population cut-off (applied separately to metropolitan and non-metropolitan areas). As a result of this limit, many high opportunity areas are not designated as DDAs. Other commenters noted that four states have no DDAs in 2016. Because of these reasons, multiple nonprofit and governmental organizations recommended use of a modified version of HUD's methodology without the national population cut-off. A policy advocacy organization suggested that FHFA pair HUD's DDA designations with a poverty indicator in order to ensure that areas designated as high opportunity do not have disproportionately high poverty rates. Some nonprofit organizations recommended that FHFA employ an opportunity index developed by an outside party. A larger number of nonprofit and governmental organizations suggested that FHFA defer to or incorporate state or local definitions of high opportunity areas, such as those put forth in an LIHTC QAP. Additionally, some nonprofit organizations stated that FHFA should continue working to develop an ideal definition of a high opportunity area, potentially by opening a separate comment period on definitions related to residential economic diversity.

After considering the comments, FHFA has determined that it should rely on a pre-existing government definition or index to measure high opportunity areas. Neither FHFA nor the Enterprises provide affordable housing subsidies, which can play a more direct role in driving the location of affordable housing than the activities the Enterprises will undertake in support of the Duty to Serve. As a result, FHFA wishes to align its residential economic diversity policy with other federal policy efforts. Additionally, creating an opportunity index would be highly labor intensive. While DDAs have limits as a proxy for high opportunity areas, they are widely understood by the affordable housing community and play a central role in the LIHTC market. While a variety of opportunity indices could in fact be useful, no commenters suggested how FHFA should choose among the many indices that outside parties have created, none of which is federally sanctioned. Further, FHFA believes that the Enterprises could easily operationalize the DDA-based definition and incorporate it into their systems.

However, FHFA agrees that DDAs are not a perfect proxy for high opportunity areas. In addition, promoting residential economic diversity is subject to much experimentation. FHFA is addressing these concerns in the final rule in two ways. First, the final rule requires a maximum poverty level for a HUD-designated DDA to qualify as a high opportunity area. As one commenter suggested, this will eliminate higher-poverty areas that are unlikely to be areas of opportunity. FHFA will establish this poverty rate threshold for each Plan period in the Evaluation Guidance. In setting this poverty rate threshold, FHFA will balance its desire to exclude high-poverty DDAs from its definition of high opportunity areas with its desire to ensure that its definition covers a reasonable segment of the population. To address Freddie Mac's concern about annual changes in the areas HUD designates as DDAs, the final rule allows any area meeting the poverty threshold and designated as a DDA by HUD in the year before the Plan takes effect or during any of the three years of the Plan to qualify as a high opportunity area.

Second, the final rule allows state and local definitions of high opportunity areas in LIHTC QAPs to qualify where they meet certain criteria. State and local definitions of high opportunity areas can be tailored to a locale's unique circumstances and may change over time. Many states in recent years have experimented with new definitions of, and means of encouraging activity in, high opportunity areas in their QAPs. From 2013 to 2015, 19 states added language to their QAPs related to high opportunity areas.[126] For a definition of a high opportunity area in a QAP to qualify as a high opportunity area under the final rule, it will have to be specifically identified by FHFA in the final Evaluation Guidance.

There are considerable operational barriers to allowing the Enterprises to utilize all state and local QAP definitions of high opportunity areas for Duty to Serve purposes. States and localities may attempt to promote development in higher opportunity areas without explicitly defining or using the terminology ''high opportunity areas,'' which means FHFA cannot always determine whether a QAP offers a usable definition for Duty to Serve purposes. States and localities also may encourage activities in high opportunity areas using methods that do not allow FHFA to reach a firm conclusion on whether an area is definitively a high opportunity area or not. At the same time, states and localities employ different indicators for high opportunity areas.

As a result of these challenges, the final rule utilizes DDAs, with a poverty level threshold, as the primary definition of high opportunity areas. However, the rule also permits the Enterprises to use approved state and local definitions of high opportunity areas in geographically-applicable QAPs that meet specific criteria. The specific criteria FHFA will use to allow state and local definitions will be described in the proposed Evaluation Guidance, which will be subject to public input. The final Evaluation Guidance will consider submissions received during the public input period and identify the state and local definitions of high opportunity areas that FHFA will accept for the duration of the Plan period. If states and localities continue to refine their definitions of high opportunity areas and expand the use of tools allowing stakeholders to clearly identify those areas, FHFA envisions utilizing state and local definitions to a greater degree in subsequent Plan periods.

Definition of ''Area of Concentrated Poverty''

The final rule considers activities in areas of concentrated poverty that facilitate financing of mixed-income housing as promoting residential economic diversity. Section 1282.1 of the final rule defines an ''area of concentrated poverty'' as a census tract designated by HUD as a ''Qualified Census Tract'' (QCT) or a ''Racially- or Ethnically-Concentrated Area of Poverty'' (R/ECAP) in the year before the Plan takes effect or during any of the three years of the Plan. The proposed rule would have defined ''area of concentrated poverty'' only as HUD-designated QCTs.

QCTs are generally census tracts where 50 percent of households have incomes below 60 percent of the area median income or that have a poverty rate of 25 percent or more.[127] HUD is required by the LIHTC statute to

[126] These definitions are explored and catalogued in National Housing Trust, ''Preservation and Opportunity Neighborhoods in the Low Income Housing Tax Credit Program'' (2015), *available at http://prezcat.org/related-catalog-content/preservation-and-opportunity-neighborhoods-low-income-housing-tax-credit* (last accessed July 28, 2016).

[127] For the 2016 QCTs, *see* 80 FR 73201 (Nov. 24, 2015).

identify QCTs, and does so annually.[128] R/ECAPs are generally census tracts with (i) a non-white population of 50 percent or more and (ii) a poverty rate of 40 percent or more, or that is three or more times the average tract poverty rate for the metro/micro area, whichever is lower.[129]

The proposed rule specifically requested comment on whether FHFA should consider other or additional definitions of ''area of concentrated poverty,'' such as a definition similar to HUD-designated R/ECAPs. Some nonprofit and governmental organizations explicitly supported FHFA's proposed definition because QCTs cover a wider band of lower-income neighborhoods than R/ECAPs. Some nonprofit organizations favored defining ''areas of concentrated poverty'' as HUD-designated R/ECAPs without elaborating on their rationale. Other nonprofit and governmental organizations recommended that FHFA consider an area to qualify if it is designated as either a QCT or an R/ECAP because this would encompass a larger number of low-income areas than utilizing either designation by itself.

There are considerably more QCTs (13,619 census tracts) than R/ECAPs (4,161 census tracts). Additionally, QCTs and R/ECAPs generally overlap; only 600 R/ECAPs (14 percent) are not also QCTs. These 600 census tracts, however, contain 2.3 million residents.[130] Therefore, using R/ECAPs in addition to QCTs helps to identify additional underserved areas with higher poverty levels that would benefit from Enterprise activities under the Duty to Serve. For these reasons, the final rule includes R/ECAPs in the definition of ''area of concentrated poverty.''

Revitalization in Areas of Concentrated Poverty

In the proposed rulemaking, FHFA considered but did not provide that the Enterprises may receive extra credit when their activities are part of or contribute to revitalization plans in areas of concentrated poverty. FHFA also did not set forth criteria for identifying such plans. The proposed rule specifically requested comment on whether CNI and HUD/USDA-designated Promise Zones would be useful for purposes of denoting areas of concentrated poverty subject to revitalization plans. The proposed rule also asked whether other consistent criteria could be applied for this purpose.

Commenters were divided on this topic. A number of nonprofit organizations supported using CNI, Promise Zones, or other federal designations for purposes of determining whether Enterprise activities are part of or contribute to a revitalization plan in an area of concentrated poverty, while several other nonprofit and governmental organizations opposed it, partially because revitalization plans are more typically led by states or localities. Among those who were supportive, some offered tepid support for utilizing CNI or Promise Zones, noting that there are a limited number of these areas. One commenter suggested that FHFA also allow state and local definitions of revitalization plans to qualify, while another commenter suggested FHFA hold a separate comment period on utilizable definitions.

FHFA continues to find that it cannot adequately identify revitalization plans or implement in the Duty to Serve process the diverse definitions set out for these plans by states and localities. Accordingly, the final rule does not add a revitalization component to residential economic diversity.

Definition of ''Mixed-Income Housing''

Section 1282.1 of the final rule defines ''mixed-income housing'' as a multifamily property or development—which may include or comprise single-family units—that serves very low-, low-, or moderate-income families, where: (i) A minimum percentage of units as specified in the Evaluation Guide are unaffordable to low-income families, or to families at higher income levels as specified therein; and (ii) a minimum percentage of units as specified in the Evaluation Guide are affordable to low-income families, or to families at lower income levels as specified therein. The proposed rule would have defined ''mixed-income housing'' to require that at least 25 percent of the units are affordable only to households with incomes above moderate-income levels.

FHFA specifically requested comment on whether the proposed definition is appropriate, including whether minimum thresholds for the percentage of units affordable to very low-, low, or moderate-income households should be included. A number of nonprofit organizations suggested that the definition should contain a minimum percentage of units that are affordable to very low-, low-, or moderate-income households. Setting a minimum threshold would ensure that the mixed-income housing the Enterprises are encouraged to support serves a wide diversity of income levels. While one nonprofit organization noted that there is inadequate research to empirically guide setting unit and income thresholds for mixed-income housing, a state housing finance agency suggested that FHFA consider the standards set out in the LIHTC program.

A nonprofit organization recommended that FHFA allow developments with a significant share of unrestricted units (available to households of any income) to be eligible for extra credit, regardless of whether the area's current market rent is unaffordable to households at or below moderate-income levels. This commenter argued that generally market rents in areas of concentrated poverty are relatively affordable, at least in the near term.

FHFA agrees that the proposed definition of ''mixed-income housing'' could be strengthened to ensure the Enterprises are encouraged to support sustainable mixed-income housing that serves a diversity of income levels. However, given that an appropriate standard may differ between markets and may change over time, the definition will be spelled out in the Evaluation Guidance, rather than in the final rule. FHFA plans to specify in its proposed Evaluation Guidance that mixed-income housing must contain a minimum share of affordable units that mirrors the requirements set out in the LIHTC program (20 percent of units must be affordable for households with incomes at or below 50 percent of area median income, or 40 percent of units must be affordable to households with incomes at or below 60 percent of area median income).[131] FHFA finds that this well-known metric of affordability is the best standard available at this time.

FHFA also recognizes that, in areas of concentrated poverty, market rents may be relatively affordable, which means developers may face difficultly at least initially in attracting higher-income households to these developments. This could make it difficult to finance properties that meet the requirement for a certain percentage of units that are unaffordable to moderate-income households specified in the proposed rule. However, FHFA still finds that a minimum threshold of units for higher-

[128] 26 U.S.C. 42(d)(5)(B)(ii).

[129] HUD's approach is described in U.S. Department of Housing and Urban Development, ''AFFH Data Documentation,'' (2016), *available at https://www.hudexchange.info/resources/documents/AFFH-Data-Documentation.docx* (last accessed July 28, 2016). Outside of Core-Based Statistical Areas (CBSAs), the racial/ethnic concentration threshold is set at 20 percent.

[130] Analysis based on 2016 DDA and 2013 R/ECAP data from HUD.

[131] 26 U.S.C. 42(g)(1).

income households is important in order to ensure that mixed-income housing is not solely occupied by very low- or low- income households. The threshold of units that must be unaffordable to low-income households, or to households at higher income levels, will also be specified in the Evaluation Guide. At this time, FHFA plans to specify that mixed-income housing must include at least 20 percent of units that are affordable only to households with incomes above low-income levels.

B. Other Activities Identified in the Evaluation Guidance as Eligible for Extra Credit

Under the final rule, FHFA may also designate in the Evaluation Guidance other activities as extra credit-eligible activities. This would not require the Enterprises to undertake any activity designated as eligible for extra credit. Instead, it would provide an incentive for the Enterprises to include those designated activities in their Plans. In determining whether to designate an activity as eligible for extra credit, FHFA will consider whether the activity could be considered more challenging, or whether it serves a part of an underserved market that is relatively less well-served. For example, activities such as serving high-needs rural populations or manufactured housing communities with tenant pad lease protections could foreseeably be designated as eligible for extra credit due to their challenging nature. This approach also responds to commenters, as described above, who encouraged FHFA to modify the proposed evaluation and ratings approach to encourage the Enterprises to undertake more challenging activities.

V. General Requirements for Credit—§ 1282.37

Section 1282.37 of the final rule sets forth general counting requirements for whether and how activities or objectives may receive Duty to Serve credit. With some exceptions, the counting rules and other requirements are similar to those in the proposed rule and FHFA's housing goals regulation. FHFA received few comments on these provisions.

A. No Credit Under Any Evaluation Area—§ 1282.37(b)

Section 1282.37(b) of the final rule identifies specific Enterprise activities that are not eligible to receive Duty to Serve credit under any evaluation area, as discussed below.

Housing Trust Fund and Capital Magnet Fund contributions. Consistent with the proposed rule, and in accordance with the statutory provisions, § 1282.37(b)(1) of the final rule provides that contributions to the Housing Trust Fund [132] and the Capital Magnet Fund,[133] and Enterprise mortgage purchases funded with such grant amounts, are ineligible for Duty to Serve credit. This prohibition is discussed further above in the discussion on Other Federal Affordable Housing Programs.

HOEPA mortgages. As proposed, § 1282.37(b)(2) of the final rule prohibits Duty to Serve credit for HOEPA mortgages.[134] A federal regulator commented that loans for manufactured homes are more likely to be classified as ''high-cost'' loans under HOEPA, and a policy advocacy organization supported excluding HOEPA mortgages from receiving Duty to Serve credit because they do not adequately protect consumers. A manufactured housing trade association suggested that FHFA lacks the legal authority to require consumer protections on manufactured home loans as a condition of eligibility to received Duty to Serve credit. FHFA has determined that it possesses such authority, and that Enterprise support for HOEPA mortgages, whether for manufactured home loans or for mortgages for site-built homes, would not fulfill the purposes of the Duty to Serve.

Subordinate liens on multifamily properties. As proposed, § 1282.37(b)(3) of the final rule prohibits Duty to Serve credit for subordinate liens on multifamily properties, except for subordinate liens originated for energy or water efficiency improvements on multifamily rental properties that meet the requirements in § 1282.34(d)(2). Fannie Mae commented that subordinate loans for capital improvements to expand the useful life or significantly improve the condition or quality of a property and that result in preserving affordability should receive Duty to Serve creditable. Given the regulatory and statutory restrictions on most affordable properties, FHFA had determined that subordinated loans for capital improvements are not an effective tool to preserve affordability at this time. In addition, it is not a standard practice in the industry to allow subordinate loans for preserving affordability, as these could present excessive risk to investors in the subordinate loan.

Under the final rule, subordinate liens for energy or water efficiency improvements on existing multifamily rental properties meeting the requirements in § 1282.34(d)(2) are eligible for Duty to Serve credit. These subordinate liens extend the useful life of the property and also enhance the overall value of the property by reducing operating expenses.

Subordinate liens on single-family properties. As proposed, § 1282.37(b)(4) of the final rule excludes subordinate liens on most single-family properties from receiving Duty to Serve credit, including subordinate liens for energy efficiency improvements on single-family properties. However, in a change from the proposed rule, subordinate liens on shared appreciation loans that meet all of the requirements in § 1282.34(d)(4) are eligible for Duty to Serve credit. As one nonprofit organization commented, these liens are unlike standard second lien mortgages. They are due upon the sale of the property and typically have no interest. Moreover, the borrower does not make monthly payments on these second liens, except where there is a modest interest rate payment that covers the cost of program implementation, asset management, and ongoing monitoring. In effect, these second liens are vehicles for maintaining the subsidy with the property when the property is sold.

Under the final rule, not all shared appreciation loans are eligible for Duty to Serve credit. Those not eligible are proprietary shared appreciation loans, where an investor receives part of the equity in exchange for making the home affordable for a single buyer only. Such loans do not preserve the affordability of the unit for subsequent buyers.

LIHTC equity investments. Section 1282.37(b)(5) of the final rule prohibits Duty to Serve credit for LIHTC equity investments in a property, except where the property is located in a rural area. LIHTC equity investments are discussed above under the rural markets under § 1282.35.

Permanent construction take-out loans and Additional Activities under the affordable housing preservation market. Section 1282.37(b)(6) of the final rule provides that Duty to Serve credit will not be provided for permanent construction take-out loans and Additional Activities under the affordable housing preservation market, except as provided in § 1282.37(c). The exceptions are discussed above under the affordable housing preservation market under § 1282.34.

B. No Credit Under Loan Purchase Evaluation Area—§ 1282.37(d)

Consistent with the proposed rule, § 1282.37(d) of the final rule sets forth

[132] *See* 12 U.S.C. 4565(d)(4).

[133] *See* 12 U.S.C. 4569(h)(7).

[134] *See* 15 U.S.C. 1602(bb).

activities that are not eligible to receive Duty to Serve credit under the loan purchase evaluation area, even if the activity would otherwise receive credit under § 1282.38. These include generally: Mortgage purchases on secondary residences; single-family refinancing mortgages resulting from conversion of balloon notes to fully amortizing notes if the Enterprise already owns the balloon note at the time conversion occurs; purchases of mortgages that previously received Duty to Serve credit within the immediately preceding five years; mortgage purchases where the property or any units therein have not been approved for occupancy; any interests in mortgages that FHFA determines will not be treated as interests in mortgages; and purchases of state and local government housing bonds except as provided in § 1282.39(h).

C. FHFA Review of Activities or Objectives—§ 1282.37(e)

Consistent with the proposed rule, § 1282.37(e) of the final rule provides that FHFA may determine whether and how any activity or objective will receive Duty to Serve credit under an underserved market in a Plan, including treatment of missing data, and FHFA will notify each Enterprise in writing of any determination regarding the treatment of any activity or objective. Section 1282.37(e) also adds a provision that was not included in the proposed rule which requires FHFA to make any such determinations available to the public on FHFA's Web site.

D. Year in Which Activity or Objective Will Receive Credit—§ 1282.37(f)

As proposed, § 1282.37(f) of the final rule provides that an activity or objective eligible for Duty to Serve credit will receive such credit in the year in which it is completed. FHFA may determine that credit is appropriate for an activity or objective in which an Enterprise engages, but does not complete in a particular year, except that activities or objectives under the loan purchase evaluation area will receive credit in the year in which the Enterprise purchased the mortgage.

E. Credit Under One Evaluation Area—§ 1282.37(g)

As proposed, § 1282.37(g) of the final rule provides that an activity or objective eligible for Duty to Serve credit will receive such credit under only one evaluation area in a particular underserved market. The rationale for this provision is discussed above under the Plan objectives under § 1282.32(f).

F. Credit Under Multiple Underserved Markets—§ 1282.37(h)

As proposed, § 1282.37(h) of the final rule provides that an activity or objective, including financing of dwelling units by an Enterprise's mortgage purchase, that is eligible for Duty to Serve credit will receive such credit under each underserved market for which the activity or objective qualifies in that year. For example, if a borrower uses a Section 8 voucher [135] to help buy a manufactured home in the Lower Mississippi Delta, and if an Enterprise subsequently purchases that loan, the purchase would receive Duty to Serve credit under the manufactured housing, affordable housing preservation, and rural markets.

VI. General Requirements for Loan Purchases—§ 1282.38

In order to be eligible to receive Duty to Serve credit for loan purchases, a loan must be on housing affordable to very low-, low-, or moderate income families, regardless of whether the property is owner-occupied or rental. Sections 1282.17, 1282.18, and 1282.19 of part 1282 define ''affordability'' for owner-occupied and rental units. The tables in these sections adjust the maximum percentage of area median income based on family size and the size of the dwelling unit, as measured by the number of bedrooms.

A. Counting Dwelling Units—§ 1282.38(b)

Consistent with the proposed rule, § 1282.38(b) of the final rule provides that performance under the loan purchase evaluation area will be measured by counting dwelling units affordable to very low-, low-, and moderate-income families.

B. Credit for Owner-Occupied Units—§ 1282.38(c)

As proposed, § 1282.38(c) of the final rule provides that mortgage purchases financing owner-occupied single-family properties will be evaluated based on a comparison of the income of the mortgagor(s) to the area median income at the time the mortgage was originated, using the appropriate percentage factor in § 1282.17. If the income of the mortgagor(s) is not available, no Duty to Serve credit will be provided under the loan purchase evaluation area.

C. Credit for Rental Units—Use of Rent—§ 1282.38(d)(1)

As proposed, § 1282.38(d)(1) of the final rule provides that for Enterprise mortgage purchases financing single-family rental units and multifamily rental units, affordability is determined based on rent and whether the rent is affordable to the income groups targeted by the Duty to Serve. A rent is affordable if the rent does not exceed the maximum levels as provided in § 1282.19.

D. Credit for Rental Units—Affordability of Rents Based on Housing Program Requirements—§ 1282.38(d)(2)

Consistent with the proposed rule, § 1282.38(d)(2) of the final rule provides that where a multifamily property is subject to an affordability restriction under a housing program that establishes the maximum permitted income level of a tenant or a prospective tenant or the maximum permitted rent, the affordability of units in the property may be determined based on the maximum permitted income level or maximum permitted rent established under such housing program for those units, subject to certain restrictions set forth in the rule.

E. Missing Data or Information for Rental Units—1282.38(e)(2)

Under § 1282.38(e)(2) of the final rule, when an Enterprise lacks sufficient information on the rents, the Enterprise's performance regarding the rental units may be evaluated using estimated affordability information, except that an Enterprise may not estimate affordability of rental units for purposes of receiving extra credit for residential economic diversity activities. As proposed, the final rule provides that estimated affordability information is calculated by multiplying the number of rental units with missing affordability information in properties securing the mortgages purchased by the Enterprise in each census tract by the percentage of all moderate-income rental dwelling units in the respective tracts, as determined by FHFA.

The housing goals regulation [136] applies a 5 percent limit on the number of rental units with missing rent data for which an Enterprise may estimate affordability of rents. The proposed rule specifically requested comment on whether there are better methods than the proposed methodology to estimate affordability when rent information is

[135] The Housing Opportunity through Modernization Act of 2016 provides that Section 8 vouchers may be used for payment of notes on manufactured homes. *See* Housing Opportunity through Modernization Act of 2016, sec. 112, Public Law 114–201, 130 Stat. 782 (July 29, 2016), *available at https://www.gpo.gov/fdsys/pkg/PLAW-114publ201/pdf/PLAW-114publ201.pdf.* The provision on Section 8 vouchers for manufactured homes has not been implemented as of the time of this rule.

[136] 12 CFR 1282.15(e)(3).

missing, and whether the Duty to Serve rule should cap the number of units with missing data for which an Enterprise could estimate affordability.

No commenters addressed these questions. In FHFA's experience with the housing goals, the Enterprises have not come close to reaching the 5 percent limit. Because the rent rolls determine the viability of a property as an investment, the Enterprises generally obtain this information and use it as part of their underwriting. Accordingly, consistent with the proposed rule, § 1282.38(e)(2) of the final rule does not include a limit on the number of rental units for which an Enterprise may estimate affordability each year.

In a change from the proposed rule, § 1282.38(e)(2) of the final rule does not permit the Enterprises to estimate affordability of rental units when rent data are missing for purposes of receiving extra credit for residential economic diversity activities. Estimating affordability under the methodology discussed above would assume that a multifamily development's affordability mirrors the income characteristics of the tract in which it is located, which is not useful for determining whether the development contributes to residential economic diversity as defined in the final rule.

F. Credit for Blanket Loans on Manufactured Housing Communities—§ 1282.38(f)

Section 1282.38(f) of the final rule sets forth how determinations of affordability of manufactured housing communities will be made. These determinations are discussed above in the manufactured housing market section.

G. Application of Median Income—§ 1282.38(g)

Consistent with the proposed rule, § 1282.38(g) of the final rule includes provisions on determining an area's median income.

H. Newly Available Data—1282.38(h)

As proposed, § 1282.38(h) of the final rule provides that when data is used to determine whether a dwelling unit receives Duty to Serve credit under the loan purchase evaluation area and new data is released after the start of a calendar quarter, the new data need not be used until the start of the following quarter.

VII. Special Requirements for Loan Purchases—§ 1282.39

Section 1282.39 of the final rule provides that the activities identified in this section will be treated as mortgage purchases and are eligible to receive Duty to Serve credit under the loan purchase evaluation area.

A. Credit Enhancements—§ 1282.39(b)

Consistent with the proposed rule, § 1282.39(b) of the final rule identifies the specific circumstances under which dwelling units financed under a credit enhancement entered into by an Enterprise will be treated as mortgage purchases.

B. Risk-Sharing—§ 1282.39(c)

Consistent with the proposed rule, § 1282.39(c) of the final rule provides that mortgages purchased under risk-sharing arrangements between an Enterprise and any federal agency under which the Enterprise is responsible for a substantial amount of the risk will be treated as mortgage purchases. Fannie Mae commented that this provision would have the effect of excluding loans under a number of FHA, USDA, and Veterans Administration programs from receiving Duty to Serve credit.

The Duty to Serve counting rules are structured such that unless a particular loan type is specifically identified as being ineligible to receive Duty to Serve credit, it is eligible to receive credit provided the borrower income and other requirements in the rule are satisfied. Thus, § 1282.39(c) does not exclude from receiving credit Enterprise purchases of Title 1 loans, USDA Section 502 and 538 loans, Section 184 Indian Home Loan Guarantee Program loans, Section 542(b) loans, or other similar types of loans. The only loans that § 1282.39(c) specifically excludes from receiving credit are mortgages purchased under risk-sharing arrangements between an Enterprise and a federal agency where the Enterprise is not responsible for a substantial amount of the risk.

C. Participations—§ 1282.39(d)

As proposed, § 1282.39(d) of the final rule provides that participations purchased by an Enterprise will be treated as mortgage purchases only when the Enterprise's participation in the mortgage is 50 percent of more.

D. Cooperative Housing and Condominiums—§ 1282.39(e)

As proposed, § 1282.39(e) of the final rule provides that the purchase of a mortgage on a cooperative housing unit (share loan) or on a condominium unit will be treated as a mortgage purchase, with affordability determined based on the income of the mortgagor(s). The final rule also provides that the purchase of a blanket mortgage on a cooperative building or on a condominium project will be treated as a mortgage purchase.

E. Seasoned Mortgages—§ 1282.39(f)

Consistent with the proposed rule, § 1282.39(f) of the final rule provides that an Enterprise's purchase of a seasoned mortgage will be treated as a mortgage purchase.

F. Purchase of Refinancing Mortgages—§ 1282.39(g)

As proposed, § 1282.39(g) of the final rule provides that an Enterprise's purchase of a refinancing mortgage will be treated as a mortgage purchase only if the refinancing is an arms-length transaction that is borrower-driven.

G. Mortgage Revenue Bonds—§ 1282.39(h)

Consistent with the proposed rule, § 1282.39(h) of the final rule provides that the purchase or guarantee by an Enterprise of a mortgage revenue bond issued by a state or local housing finance agency will be treated as a purchase of the underlying mortgages only to the extent the Enterprise has sufficient information to determine whether the underlying mortgages or mortgage-backed securities serve the income groups targeted by the duty to serve.

H. Seller Dissolution Option—§ 1282.39(i)

As proposed, § 1282.39(i) of the final rule sets forth the specific circumstances under which mortgages acquired by an Enterprise through transactions involving seller dissolution options will be treated as mortgage purchases.

VIII. Failure To Comply; Housing Plans—§§ 1282.40, 1282.41

The Safety and Soundness Act provides that the Duty to Serve underserved markets is enforceable to the same extent and under the same enforcement provisions as are applicable to the Enterprise housing goals, except as otherwise provided.[137] Accordingly, under § 1282.40 of the final rule, if an Enterprise has not complied with, or there is a substantial probability that an Enterprise will not comply with, the Duty to Serve a particular underserved market in a given year, FHFA will determine whether compliance by the Enterprise with the activities and objectives in its Plan is or was feasible. In determining feasibility, FHFA will consider factors such as market and economic conditions and the financial condition

[137] 12 U.S.C. 4566(a)(4).

of the Enterprise. If FHFA determines that compliance is or was feasible, FHFA will follow the procedures in 12 U.S.C. 4566(b).

A determination of a failure to comply means that an Enterprise has received a rating of Fails under its Plan for a particular underserved market in a given year. A determination of a substantial probability that an Enterprise will fail to comply means that there is a substantial probability that the Enterprise will receive a rating of Fails under its Plan for a particular underserved market in a given year.

Consistent with the proposed rule, § 1282.41 of the final rule includes requirements for an Enterprise to submit to FHFA a housing plan, in the Director's discretion, if the Director determines that the Enterprise did not comply with, or there is a substantial probability that an Enterprise will not comply with, the Duty to Serve a particular underserved market. There were no comments specifically addressing enforcement.

IX. Enterprise Duty To Serve Reporting to FHFA—§ 1282.66

Consistent with the proposed rule, § 1282.66 of the final rule requires the Enterprises to submit to FHFA quarterly reports on the activities and objectives in their Plans for each underserved market. The fourth quarterly report will serve as and be termed the annual report.

As proposed, § 1282.66(a) of the final rule provides that the first and third quarter reports must include detailed year-to-date information on the Enterprise's progress toward meeting the activities and objectives in its Plan only for the loan purchase evaluation area for each underserved market. Section 1282.66(a) of the final rule provides that the first and third quarter reports are due to FHFA within 60 days after the end of the quarter.

As proposed, § 1282.66(b) of the final rule provides that the second quarter report must include detailed year-to-date information on the Enterprise's progress toward meeting all of the activities and objectives in its Plan for each underserved market. Section 1282.66(b) also requires that the second quarter report contain narrative and summary statistical information for the Plan objectives, supported by appropriate transaction-level data (which was discussed in the proposed rule). Section 1282.66(b) provides that the second quarter report is due to FHFA within 60 days after the end of the second quarter. In the proposed rule, FHFA referred to this report as the ''semi-annual'' report. FHFA has changed the name of this report to the ''second quarter'' report in the final rule but has retained the requirements of the ''semi-annual'' report from the proposed rule. FHFA changed the name of this report in order to more closely follow the naming convention for reports under the housing goals, and because the name ''semi-annual report'' may imply that the report is due twice a year, though the final rule states that the report is due only once a year after the second quarter. When discussing comments below that referenced this report, FHFA refers to it as the ''semi-annual'' report for ease of reference because that is the terminology used by the commenters and in the proposed rule.

As proposed, § 1282.66(c) of the final rule provides that the annual report must include information on the Enterprise's performance on all of the activities and objectives in its Plan for each underserved market during the evaluation year. At a minimum, the annual report must include: Narrative and summary statistical information for the Plan objectives over the evaluation year, supported by appropriate transaction-level data (which was discussed in the proposed rule); a description of the Enterprise's market opportunities for purchasing loans during the evaluation year, to the extent data is available; the volume of qualifying loans purchased by the Enterprise during the evaluation year; a comparison of the Enterprise's loan purchases with those in prior years; and a comparison of market opportunities with the size of the relevant markets in the past, to the extent data is available. Market opportunities for purchasing loans could include market or regulatory factors that may affect lenders' decisions to retain loans in portfolio or sell them, the availability and pricing of credit enhancements from third parties, and competition from other secondary market participants. Section 1282.66(c) provides that the annual report is due to FHFA within 75 days after the end of each calendar year.

Section 1282.66(d) of the final rule provides that FHFA will make public information from the first quarter, second quarter, and third quarter reports within a reasonable time after the end of the calendar year for which they apply. FHFA will make public information from the annual report within a reasonable time after its receipt. FHFA will omit any confidential and proprietary information from the information it provides to the public from the Enterprises' reports. During the final year of the three-year period covered by a Plan, FHFA will also make public certain narrative information from each Enterprise's second quarter report for that year, omitting data on loan purchases and any additional confidential or proprietary information, within a reasonable time after receiving the second quarter report. The proposed rule did not specifically address public disclosure of the reports or how any confidential or proprietary data or information in the reports would be treated.

Several policy advocacy organizations supported the proposed reporting requirements, and no commenters specifically opposed the proposed requirements. As further discussed below, two policy advocacy organizations suggested FHFA consider having the Enterprises report on all activities and objectives quarterly and provide that information to the public. The commenters proposed this as one way to allow the public to weigh in on the next cycle's Plans with information on Enterprises' performance in the final year of the current Plan cycle. Several policy advocacy organizations noted that a significant amount of time could elapse between when the Enterprises submit their annual reports to FHFA and when FHFA finalizes its evaluation for the Enterprises' Duty to Serve compliance. Given this timeline in FHFA's proposed reporting requirements, these commenters stated that FHFA should meet with market participants in order to learn from them how the Plans are operating and the challenges the Enterprises may face in accomplishing their objectives.

FHFA has determined that the reports as detailed in § 1282.66 will provide FHFA with information necessary to monitor and evaluate Enterprise compliance with their Plans. FHFA has also determined that the reporting requirements are not likely to create operational concerns for the Enterprises, given their experience with FHFA's reporting requirements for the housing goals.

Although FHFA did not specifically request comment on whether the Enterprises' reports should be made public, both Enterprises and several policy advocacy organizations and nonprofit organizations provided comments on the extent to which the reports should be made public. Fannie Mae requested that FHFA make the annual report public but not the first quarter, semi-annual, and third quarter reports because these reports will contain information on its progress toward meeting the activities and objectives in its Plan and include confidential and proprietary data. Freddie Mac recommended that none of

the reports be publicly disclosed because they would disclose information that would reveal Freddie Mac's progress and that would influence the Enterprises' development of additional initiatives. Freddie Mac recommended that, at the very least, parts of each report should be considered confidential, in order to allow for even competition between the Enterprises and among other market participants.

In contrast, a policy advocacy organization recommended that all of the reports be made public so that the public could review the reports and play a role in holding the Enterprises accountable and in helping develop their subsequent Plans. A nonprofit organization echoed this recommendation without providing a reason, and commented that the public versions should include protections for proprietary information and sensitive content. Another nonprofit organization stated that the annual report should be made public in order to make the Duty to Serve process transparent.

After considering the comments, FHFA is persuaded that public input on certain information in the Enterprises' reports can provide valuable information for FHFA's evaluation process and the development of the subsequent Plans. At the same time, FHFA is mindful that public access to information in the Enterprise's reports should not compromise the Enterprises' progress in meeting their Plan activities and objectives during the evaluation year, especially where the reports contain confidential or proprietary data or information. In considering the Enterprises' concern about revealing their progress under their Plans, FHFA has determined that public release of data under the loan purchase evaluation area during the evaluation year could impair the Enterprises' activity in the underserved market. Accordingly, § 1282.66(d) of the final rule provides that FHFA will make public information derived from the Enterprises' first quarter, second quarter, and third quarter reports, omitting any confidential and proprietary information and data, at a reasonable time after the end of the calendar year for which they apply. This will mitigate the concerns the Enterprises expressed about revealing their progress under their Plans. FHFA will make public information derived from the Enterprises' annual reports, omitting any confidential and proprietary data, within a reasonable time after receiving them.

A policy advocacy organization noted that the Enterprises will submit their proposed new Plans to FHFA in the third year of their current three-year Plans. The commenter pointed out that without public access to information on the Enterprises' performance on their current Plans during the third year, the public would have to review and provide input on the Enterprises' proposed new Plans without complete information on the Enterprises' performance to date. Because information on Enterprise progress on all of their Plan activities and objectives will be included in their semi-annual reports, the commenter recommended that FHFA disclose and invite public input on the semi-annual reports in considering the Enterprises' proposed new Plans. Alternatively, the commenter proposed requiring the Enterprises to report on all of their Plan activities and objectives quarterly, at least in the final year of the three-year Plan, so that FHFA could receive more robust information from the public as it considers the Enterprises' proposed new Plans. Another policy advocacy organization that advocated for all of the reports to be made public echoed this recommendation.

After considering the comments, FHFA has concluded that it would be beneficial for the public to have greater information about Enterprise performance during the third year of the Enterprises' Plans in order to be able to provide more informed input to FHFA on the Enterprises' subsequent proposed Plans. Accordingly, § 1282.66(d) of the final rule provides that FHFA will make public certain narrative information derived from the Enterprises' second quarter reports, omitting loan purchase data as well as any confidential and proprietary data or information, at a reasonable time after receiving the second quarter reports in the third year of the Plans. Although this approach would reveal some information about the Enterprises' progress on their Plans during that evaluation year, FHFA has determined that risk to the Enterprises would be mitigated by omitting data under the loan purchase evaluation area. Providing the public with some information derived from the second quarter reports could facilitate stronger public input that could sharpen the Plans that will cover the next three years.

X. Paperwork Reduction Act

The final rule does not contain any information collection requirement that would require the approval of OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). Therefore, FHFA has not submitted any information to OMB for review.

XI. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires that a regulation that has a significant economic impact on a substantial number of small entities, small businesses, or small organizations must include an initial regulatory flexibility analysis describing the regulation's impact on small entities. Such an analysis need not be undertaken if the agency has certified that the regulation will not have a significant economic impact on a substantial number of small entities. (5 U.S.C. 605(b)). FHFA has considered the impact of this rule under the Regulatory Flexibility Act. The General Counsel of FHFA certifies that this rule will not have a significant economic impact on a substantial number of small entities because the rule applies to the Enterprises, which are not small entities for purposes of the Regulatory Flexibility Act.

List of Subjects in 12 CFR Part 1282

Mortgages, Reporting and recordkeeping requirements.

Authority and Issuance

For the reasons stated in the preamble, under the authority of 12 U.S.C. 4501, 4502, 4511, 4513, 4526, and 4561–4566, FHFA amends part 1282 of subchapter E of 12 CFR chapter XII, as follows:

PART 1282—ENTERPRISE HOUSING GOALS AND MISSION

■ 1. The authority citation for part 1282 continues to read as follows:

Authority: 12 U.S.C. 4501, 4502, 4511, 4513, 4526, 4561–4566.

■ 2. In § 1282.1(b), add the definitions of ''Additional Activity'', ''Agricultural worker'', ''Area of concentrated poverty'', ''Colonia'', ''Community development financial institution'', ''Evaluation Guidance'', ''Federally insured credit union'', ''Federally recognized Indian tribe'', ''High-needs rural population'', ''High-needs rural region'', ''High opportunity area'', ''Indian area'', ''Insured depository institution'', ''Lower Mississippi Delta'', ''Manufactured home'', ''Manufactured housing community'', ''Middle Appalachia'', ''Mixed-income housing'', ''Persistent poverty county'', ''Regulatory Activity'', ''Resident-owned manufactured housing community'', ''Residential economic diversity activity'', ''Rural area'', ''Small financial institution'', ''Small multifamily rental property'', ''Statutory Activity'', and ''Underserved Markets Plan'', in alphabetical order to read as follows:

§ 1282. 1 Definitions.

* * * * *

(b) * * *

Additional Activity, for purposes of subpart C of this part, means an activity in an Enterprise's Underserved Markets Plan that is not a Statutory Activity or Regulatory Activity.

Agricultural worker, for purposes of subpart C of this part, means any person that meets the definition of an agricultural worker under a federal, state, tribal or local program.

* * * * *

Area of concentrated poverty, for purposes of subpart C of this part, means a census tract designated by HUD as a Qualified Census Tract, pursuant to 26 U.S.C. 42(d)(5)(B)(ii), or as a Racially- or Ethnically-Concentrated Area of Poverty, pursuant to 24 CFR 5.152, during any year covered by an Underserved Markets Plan or in the year prior to a Plan's effective date.

* * * * *

Colonia, for purposes of subpart C of this part, means an identifiable community that meets the definition of a colonia under a federal, State, tribal, or local program.

Community development financial institution, for purposes of subpart C of this part, has the meaning in 12 CFR 1263.1.

* * * * *

Evaluation Guidance, for purposes of subpart C of this part, means separate FHFA-prepared guidance that includes the information required under this subpart, as well as additional guidance on the Underserved Markets Plans, how the quantitative and qualitative assessments will be conducted, the role of extra credit for extra-credit eligible activities such as residential economic diversity, how final ratings will be determined, and other matters as may be appropriate.

* * * * *

Federally insured credit union, for purposes of subpart C of this part, has the meaning in 12 U.S.C. 1752(7).

Federally recognized Indian tribe, for purposes of subpart C of this part, has the meaning in 25 CFR 83.1.

* * * * *

High-needs rural population, for purposes of subpart C of this part, means any of the following populations provided the population is located in a rural area:

(i) Members of a Federally recognized Indian tribe located in an Indian area; or

(ii) Agricultural workers.

High-needs rural region, for purposes of subpart C of this part, means any of the following regions provided the region is located in a rural area:

(i) Middle Appalachia;

(ii) The Lower Mississippi Delta;

(iii) A colonia; or

(iv) A tract located in a persistent poverty county and not included in Middle Appalachia, the Lower Mississippi Delta, or a colonia.

High opportunity area, for purposes of subpart C of this part, means:

(i) An area designated by HUD as a ''Difficult Development Area,'' pursuant to 26 U.S.C. 42(d)(5)(B)(iii), during any year covered by an Underserved Markets Plan or in the year prior to an Underserved Markets Plan's effective date, whose poverty rate is lower than the rate specified by FHFA in the Evaluation Guidance; or

(ii) An area designated by a state or local Qualified Allocation Plan as a high opportunity area and which meets a definition FHFA has identified as eligible for duty to serve credit in the Evaluation Guidance.

* * * * *

Indian area, for purposes of subpart C of this part, has the meaning in 24 CFR 1000.10.

Insured depository institution, for purposes of subpart C of this part, means an institution whose deposits are insured under the Federal Deposit Insurance Act (12 U.S.C. 1811 *et seq.*).

* * * * *

Lower Mississippi Delta, for purposes of subpart C of this part, means the Lower Mississippi Delta counties designated by Public Laws 100–460, 106–554, and 107–171, along with any future updates made by Congress.

Manufactured home, for purposes of subpart C of this part, means a manufactured home as defined in section 603(6) of the National Manufactured Housing Construction and Safety Standards Act of 1974, as amended, 42 U.S.C. 5401 *et seq.,* and implementing regulations.

Manufactured housing community, for purposes of subpart C of this part, means a tract of land under unified ownership and developed for the purposes of providing individual rental spaces for the placement of manufactured homes for residential purposes within its boundaries.

* * * * *

Middle Appalachia, for purposes of subpart C of this part, means the ''central'' Appalachian subregion under the Appalachian Regional Commission's subregional classification of Appalachia.

* * * * *

Mixed-income housing, for purposes of subpart C of this part, means a multifamily property or development that may include or comprise single-family units that serves very low-, low-, or moderate-income families where:

(i) A minimum percentage of the units are unaffordable to low-income families, or to families at higher income levels, as specified in the Evaluation Guide; and

(ii) A minimum percentage of the units are affordable to low-income families, or to families at lower income levels, as specified in the Evaluation Guide.

* * * * *

Persistent poverty county, for purposes of subpart C of this part, means a county in a rural area that has had 20 percent or more of its population living in poverty over the past 30 years, as measured by the most recent successive decennial censuses.

* * * * *

Regulatory Activity, for purposes of subpart C of this part, means an activity in an Enterprise's Underserved Markets Plan that is designated as a Regulatory Activity in §§ 1282.33(c), 1282.34(d), or 1282.35(c).

* * * * *

Resident-owned manufactured housing community, for purposes of subpart C of this part, means a manufactured housing community for which the terms and conditions of residency, policies, operations and management are controlled by at least 51 percent of the residents, either directly or through an entity formed under the laws of the state.

Residential economic diversity activity, for purposes of subpart C of this part, means an eligible Enterprise activity, other than an energy or water efficiency improvement activity or other activity that FHFA determines to be ineligible, in connection with mortgages on:

(i) Affordable housing in a high opportunity area; or

(ii) Mixed-income housing in an area of concentrated poverty.

* * * * *

Rural area, for purposes of subpart C of this part, means:

(i) A census tract outside of a metropolitan statistical area as designated by the Office of Management and Budget; or

(ii) A census tract in a metropolitan statistical area as designated by the Office of Management and Budget that is outside of the metropolitan statistical area's Urbanized Areas as designated by the U.S. Department of Agriculture's (USDA) Rural-Urban Commuting Area (RUCA) Code #1, and outside of tracts with a housing density of over 64 housing units per square mile for USDA's RUCA Code #2.

* * * * *

Small financial institution, for purposes of subpart C of this part,

means a financial institution with less than $304 million in assets.

* * * * *

Small multifamily rental property, for purposes of subpart C of this part, means any property of 5 to 50 rental units.

Statutory Activity, for purposes of subpart C of this part, means an Enterprise activity relating to housing projects under the programs set forth in 12 U.S.C. 4565(a)(1)(B) and § 1282.34(c).

Underserved Markets Plan, for purposes of subpart C of this part, means a plan prepared by an Enterprise describing the activities and objectives it will undertake to meet its duty to serve each of the three underserved markets.

* * * * *

■ 3. Add subpart C to read as follows:

Subpart C—Duty to Serve Underserved Markets

Sec.
1282.31 General.
1282.32 Underserved Markets Plan.
1282.33 Manufactured housing market.
1282.34 Affordable housing preservation market.
1282.35 Rural markets.
1282.36 Evaluations, ratings, and Evaluation Guidance.
1282.37 General requirements for credit.
1282.38 General requirements for loan purchases.
1282.39 Special requirements for loan purchases.
1282.40 Failure to comply.
1282.41 Housing plans.

§ 1282.31 General.

(a) This subpart sets forth the Enterprise duty to serve three underserved markets as required by section 1335 of the Safety and Soundness Act (12 U.S.C. 4565). This subpart also establishes standards and procedures for annually evaluating and rating Enterprise compliance with the duty to serve underserved markets.

(b) Nothing in this subpart permits or requires an Enterprise to engage in any activity that would otherwise be inconsistent with its Charter Act or the Safety and Soundness Act.

§ 1282.32 Underserved Markets Plan.

(a) *General.* Each Enterprise must submit to FHFA an Underserved Markets Plan describing the activities and objectives it will undertake to meet its duty to serve each of the three underserved markets. Plan activities and objectives may cover a single year or multiple years.

(b) *Term of Plan.* Each Enterprise's Plan must cover a period of three years.

(c) *Effective date of Plans.* Where an underserved market in a Plan receives a Non-Objection from FHFA by December 1 of the prior year, the effective date for that underserved market in the Plan will be January 1 of the first evaluation year for which the Plan is applicable. Where an underserved market in a Plan does not receive a Non-Objection from FHFA by December 1 of the prior year, the effective date for that underserved market in the Plan will be as determined by FHFA.

(d) *Plan content.*—(1) *Consideration of minimum number of activities.* The Enterprises must consider and address in their Plans a minimum number of Statutory Activities or Regulatory Activities for each underserved market. The minimum number will be determined by FHFA and stated in the Evaluation Guidance as provided for in § 1282.36(d). An Enterprise will select the specific Statutory Activities or Regulatory Activities to address in its Plan under this requirement. For the activities selected by the Enterprise, the Enterprise must address in its Plan either how it will undertake the activities and related objectives, or the reasons why it will not undertake the activities. The statutory programs in § 1282.34(c)(5) and (c)(6) are excluded for this purpose.

(2) *Additional Activities.* An Enterprise may also include in its Plan Additional Activities eligible to serve an underserved market. For the Additional Activities included by the Enterprise, the Enterprise must address in its Plan how it will undertake the activities and related objectives.

(3) *Residential economic diversity activities.* If an Enterprises chooses to undertake a residential economic diversity activity for extra credit under § 1282.36(c)(3), the Enterprise must describe the activity and related objectives in its Plan.

(e) *Objectives.* Each Statutory Activity, Regulatory Activity, and Additional Activity in an Enterprise's Plan must comprise one or more objectives, which are the specific action items that the Enterprises will identify for each activity. Each objective must meet all of the following requirements:

(1) *Strategic.* Directly or indirectly maintain or increase liquidity to an underserved market;

(2) *Measurable.* Provide measurable benchmarks, which may include numerical targets, that enable FHFA to determine whether the Enterprise has achieved the objective;

(3) *Realistic.* Be calibrated so that the Enterprise has a reasonable chance of meeting the objective with appropriate effort;

(4) *Time-bound.* Be subject to a specific timeframe for completion by being tied to Plan calendar year evaluation periods; and

(5) *Tied to analysis of market opportunities.* Be based on assessments and analyses of market opportunities in each underserved market, taking into account safety and soundness considerations.

(f) *Evaluation areas.* Each Plan objective must meet at least one of the evaluation areas set forth in § 1282.36(b). An Enterprise must designate in its Plan the one evaluation area under which each Plan objective will be evaluated.

(g) *Plan procedures.*—(1) *Submission of proposed Plans.*—(i) *First proposed Plan.* An Enterprise's first proposed Plan must be submitted to FHFA within 90 days after FHFA posts the proposed Evaluation Guidance on FHFA's Web site pursuant to § 1282.36(d)(3).

(ii) *Subsequent proposed Plans.* For subsequent proposed Plans after the first Plan, FHFA will provide timelines 300 days before the termination date of the Plan in effect, or a later date if additional time is necessary, for proposed Plan submission, public input periods, and Non-Objection to an underserved market in a Plan. Unless otherwise directed by FHFA, each Enterprise must submit a proposed Plan to FHFA at least 210 days before the termination date of the Enterprise's Plan in effect.

(2) *Posting of proposed Plans.* As soon as practical after an Enterprise submits its proposed Plan to FHFA for review, FHFA will post the proposed Plan on FHFA's Web site, with any confidential and proprietary data and information omitted.

(3) *Public input.*—(i) For the first proposed Plans, the public will have 60 days from the date the proposed Plans are posted on FHFA's Web site to provide input on the proposed Plans.

(ii) The Enterprises' subsequent proposed Plans will be available for public input pursuant to the timeframe and procedures established by FHFA.

(4) *Enterprise review.* Each Enterprise may, in its discretion, make revisions to its proposed Plan based on the public input.

(5) *FHFA review.*—(i) *FHFA review of first proposed Plans.* FHFA will review each Enterprise's first proposed Plan and inform the Enterprise of any FHFA comments on the proposed Plan within 60 days from the end of the public input period on the proposed Plan, or such additional time as may be necessary. The Enterprise must address FHFA's comments, as appropriate, through revisions to its proposed Plan pursuant to the timeframe and procedures established by FHFA.

(ii) *FHFA review of subsequent proposed Plans.* For subsequent proposed Plans after the first proposed Plans, FHFA will establish a timeframe and procedures for FHFA review, comments, and any required Enterprise revisions.

(iii) *Designation of Statutory Activity or Regulatory Activity.* FHFA may, in its discretion, designate in the Evaluation Guidance one Statutory Activity or Regulatory Activity in each underserved market that FHFA will significantly consider in determining whether to provide a Non-Objection to that underserved market in a proposed Plan.

(iv) *FHFA Non-Objections to underserved markets in a proposed Plan.* After FHFA is satisfied that all of its comments on an underserved market in a proposed Plan have been addressed, FHFA will issue a Non-Objection for that underserved market in the Plan.

(6) *Effective date of an underserved market in a Plan.* Where an underserved market in a Plan receives a Non-Objection from FHFA by December 1 of the prior year, the effective date for that underserved market in the Plan will be January 1 of the first evaluation year for which the Plan is applicable. Where an underserved market in a Plan does not receive a Non-Objection from FHFA by December 1 of the prior year, the effective date for that underserved market in the Plan will be as determined by FHFA.

(7) *Posting of an underserved market section in a Plan.* As soon as practicable after FHFA issues a Non-Objection to an underserved market in a Plan, that section of the Plan will be posted on the Enterprise's and FHFA's respective Web sites, with any confidential and proprietary data and information omitted.

(h) *Modification of a Plan.* At any time after implementation of a Plan, an Enterprise may request to modify its Plan during the three-year term, subject to FHFA Non-Objection of the proposed modifications. FHFA may also require an Enterprise to modify its Plan during the three-year term. FHFA and the Enterprise may seek public input on proposed modifications to a Plan if FHFA determines that public input would assist its consideration of the proposed modifications. If a Plan is modified, the modified Plan, with any confidential and proprietary information and data omitted, will be posted on the Enterprise's and FHFA's respective Web sites.

§ 1282.33 Manufactured housing market.

(a) *Duty in general.* Each Enterprise must develop loan products and flexible underwriting guidelines to facilitate a secondary market for eligible mortgages on manufactured homes for very low-, low-, and moderate-income families. Enterprise activities under this section must serve each such income group in the year for which the Enterprise is evaluated and rated.

(b) *Eligible activities.* Enterprise activities eligible to be included in an Underserved Markets Plan for the manufactured housing market are activities that facilitate a secondary market for mortgages on residential properties for very low-, low-, or moderate-income families consisting of manufactured homes titled as real property or personal property; and manufactured housing communities.

(c) *Regulatory Activities.* Enterprise activities related to the following are eligible to receive duty to serve credit under the manufactured housing market:

(1) *Manufactured homes titled as real property.* Mortgages on manufactured homes titled as real property;

(2) *Chattel.* Loans on manufactured homes titled as personal property, including both pilot and ongoing initiatives;

(3) *Manufactured housing communities owned by a governmental entity, nonprofit organization, or residents.* Mortgages on manufactured housing communities that are owned by a governmental unit or instrumentality, a nonprofit organization, or residents; and

(4) *Manufactured housing communities with certain pad lease protections.* Manufactured housing communities with pad leases that have the following pad lease protections at a minimum, or manufactured housing communities that are subject to state or local laws requiring pad lease protections that equal or exceed the following pad lease protections:

(i) One-year renewable lease term unless there is good cause for nonrenewal;

(ii) Thirty-day written notice of rent increases;

(iii) Five-day grace period for rent payments and right to cure defaults on rent payments;

(iv) Tenant has the right to sell the manufactured home without having to first relocate it out of the community;

(v) Tenant has the right to sublease or assign the pad lease for the unexpired term to the new buyer of the tenant's manufactured home without any unreasonable restraint;

(vi) Tenant has the right to post ''For Sale'' signs;

(vii) Tenant has the right to sell the manufactured home in place within a reasonable time period after eviction by the manufactured housing community owner; and

(viii) Tenant has the right to receive at least 60 days advance notice of a planned sale or closure of the manufactured housing community.

(d) *Additional Activities.* An Enterprise may include in its Plan other activities to serve very low-, low-, or moderate-income families in the manufactured housing market consistent with paragraph (b) of this section, subject to FHFA determination of whether the Additional Activity is eligible to receive duty to serve credit.

§ 1282.34 Affordable housing preservation market.

(a) *Duty in general.* Each Enterprise must develop loan products and flexible underwriting guidelines to facilitate a secondary market to preserve housing affordable to very low-, low-, and moderate-income families under eligible housing programs or activities. Enterprise activities under this section must serve each such income group in the year for which the Enterprise is evaluated and rated.

(b) *Eligible activities.* Enterprise activities eligible to be included in an Underserved Markets Plan for the affordable housing preservation market are activities that facilitate a secondary market for mortgages on residential properties for very low-, low-, or moderate-income families consisting of affordable rental housing preservation and affordable homeownership preservation.

(c) *Statutory Activities.* Enterprise activities related to housing projects under the following programs in the Safety and Soundness Act (12 U.S.C. 4565(a)(1)(B)) are eligible to receive duty to serve credit under the affordable housing preservation market:

(1) *Section 8.* The project-based and tenant-based rental assistance housing programs under section 8 of the U.S. Housing Act of 1937, 42 U.S.C. 1437f;

(2) *Section 236.* The rental and cooperative housing program for lower income families under section 236 of the National Housing Act, 12 U.S.C. 1715z–1;

(3) *Section 221(d)(4).* The housing program for moderate-income and displaced families under section 221(d)(4) of the National Housing Act, 12 U.S.C. 1715l;

(4) *Section 202.* The supportive housing program for the elderly under section 202 of the Housing Act of 1959, 12 U.S.C. 1701q;

(5) *Section 811.* The supportive housing program for persons with disabilities under section 811 of the

Cranston-Gonzalez National Affordable Housing Act, 42 U.S.C. 8013;

(6) *McKinney-Vento Homeless Assistance.* Permanent supportive housing projects subsidized under Title IV of the McKinney-Vento Homeless Assistance Act, 42 U.S.C. 11361, *et seq.;*

(7) *Section 515.* The rural rental housing program under section 515 of the Housing Act of 1949, 42 U.S.C. 1485;

(8) *Low-income housing tax credits.* Low-income housing tax credits under section 42 of the Internal Revenue Code of 1986, 26 U.S.C. 42; and

(9) *Other comparable state or local affordable housing programs.* Other comparable affordable housing programs administered by a state or local government that preserve housing affordable to very low-, low-, and moderate-income families. An Enterprise may include in its Plan statutory programs pursuant to this paragraph (c)(9), subject to FHFA determination that the program is comparable to one of the statutory programs in this paragraph (c) in the way it provides subsidy and preserves affordable housing for the income-eligible households.

(d) *Regulatory Activities.* Enterprise activities related to the following are eligible to receive duty to serve credit under the affordable housing preservation market:

(1) *Financing of small multifamily rental properties.* Financing of small multifamily rental properties by a community development financial institution, insured depository institution, or federally insured credit union, where the entity's total assets are $10 billion or less;

(2) *Energy or water efficiency improvements on multifamily rental properties.* Energy or water efficiency improvements on multifamily rental properties provided there are projections made based on credible and generally accepted standards that the improvements financed by the loan will reduce energy or water consumption by the tenant or the property by at least 15 percent, and the energy or water savings generated over an improvement's expected life will exceed the cost of installation;

(3) *Energy or water efficiency improvements on single-family, first lien properties.* Energy or water efficiency improvements on single-family, first-lien properties, provided there are projections made based on credible and generally accepted standards that the improvements financed by the loan will reduce energy or water consumption by the homeowner, the tenant, or the property by at least 15 percent, and the utility savings generated over an improvement's expected life will exceed the cost of installation;

(4) *Shared equity programs for affordable homeownership preservation.*—(i) Affordable homeownership preservation through one of the following shared equity homeownership programs:

(A) Resale restriction programs administered by community land trusts, other nonprofit organizations, or state or local governments or instrumentalities; or

(B) Shared appreciation loan programs administered by community land trusts, other nonprofit organizations, or state or local governments or instrumentalities that may or may not partner with a for-profit institution to invest in, originate, sell, or service shared appreciation loans.

(ii) A program in paragraph (d)(4)(i) must:

(A) Provide homeownership opportunities to very low-, low-, or moderate-income households;

(B) Utilize a ground lease, deed restriction, subordinate loan, or similar legal mechanism that includes provisions stating that the program will keep the home affordable for subsequent very low-, low-, or moderate-income families, the affordability term is at least 30 years after recordation, a resale formula applies that limits the homeowner's proceeds upon resale, and the program administrator or its assignee has a preemptive option to purchase the homeownership unit from the homeowner at resale; and

(C) Support homebuyers and homeowners to promote sustainable homeownership, including reviewing and pre-approving refinances and home equity lines of credit.

(5) *HUD Choice Neighborhoods Initiative.* The HUD Choice Neighborhoods Initiative, as authorized by 42 U.S.C. 1437v;

(6) *HUD Rental Assistance Demonstration program.* The HUD Rental Assistance Demonstration program, as authorized by 42 U.S.C.1437f note; and

(7) *Purchase or rehabilitation of certain distressed properties.* Lending programs for the purchase or rehabilitation by very low-, low-, or moderate-income families, or by nonprofit organizations or local or tribal governments serving such families, of homes eligible for short sale, homes eligible for foreclosure sale, or properties that a lender acquires as a result of foreclosure.

(e) *Additional Activities.* An Enterprise may include in its Plan other activities to serve very low-, low-, or moderate-income families in the affordable housing preservation market consistent with paragraph (b) of this section, subject to FHFA determination of whether the activities are eligible to receive duty to serve credit.

§ 1282.35 Rural markets.

(a) *Duty in general.* Each Enterprise must develop loan products and flexible underwriting guidelines to facilitate a secondary market for eligible mortgages on housing for very low-, low-, and moderate-income families in rural areas. Enterprise activities under this section must serve each such income group in the year for which the Enterprise is evaluated and rated.

(b) *Eligible activities.* Enterprise activities eligible to be included in an Underserved Markets Plan for the rural market are activities that facilitate a secondary market for mortgages on residential properties for very low-, low-, or moderate-income families in rural areas.

(c) *Regulatory Activities.* Enterprise activities related to the following are eligible to receive duty to serve credit under the rural market:

(1) *High-needs rural regions.* Housing in high-needs rural regions;

(2) *High-needs rural populations.* Housing for high-needs rural populations;

(3) *Financing by small financial institutions of rural housing.* Financing by a small financial institution of housing in a rural area; and

(4) *Small multifamily rental properties in rural areas.* Small multifamily rental properties that are located in a rural area.

(d) *Additional Activities.* An Enterprise may include in its Plan other activities to serve very low-, low-, or moderate-income families in rural areas consistent with paragraph (b) of this section, subject to FHFA determination of whether the activities are eligible to receive duty to serve credit.

§ 1282.36 Evaluations, ratings, and Evaluation Guidance.

(a) *Evaluation of compliance.* In determining whether an Enterprise has complied with the duty to serve each underserved market, FHFA will annually evaluate and rate the Enterprise's duty to serve performance based on the Enterprise's implementation of its Underserved Markets Plan during the relevant evaluation year. FHFA's evaluation will be in accordance with separate, FHFA-prepared Evaluation Guidance as provided for in paragraph (d) of this section.

(b) *Evaluation areas.* As provided in § 1282.32(f), an Enterprise must specify

in its Plan the evaluation area under which each Plan objective will be evaluated. FHFA will evaluate an Enterprise's performance of each of its Plan objectives under one of the following four evaluation areas, as designated by the Enterprise in its Plan:

(1) *Outreach.* The extent of the Enterprise's outreach to qualified loan sellers and other market participants in each underserved market;

(2) *Loan product.* The Enterprise's development of loan products, more flexible underwriting guidelines, and other innovative approaches to providing financing in each underserved market;

(3) *Loan purchase.* The volume of loan purchases by the Enterprise in each underserved market relative to the market opportunities available to the Enterprise; and

(4) *Investments and grants.* The amount of the Enterprise's investments and grants in projects that assist in meeting the needs of each underserved market.

(c) *Evaluation process.* At the end of each evaluation year, FHFA will evaluate each Enterprise's performance under its Plan based on quantitative and qualitative assessments of the Enterprise's accomplishment of the objectives for the activities under each underserved market in its Plan. Following the quantitative and qualitative assessments, FHFA may provide extra credit for extra credit-eligible residential economic diversity activities in an underserved market in a Plan, and for other extra credit-eligible activities in an underserved market in a Plan as may be designated by FHFA in the Evaluation Guidance.

(1) *Quantitative assessment.* FHFA will conduct a quantitative assessment which will evaluate the level of an Enterprise's accomplishment of each objective for each activity in an underserved market in its Plan, based on the level of accomplishment needed for the objectives in order to receive a passing rating for compliance with the Duty to Serve an underserved market in a Plan, as established by FHFA in the Evaluation Guidance. At the conclusion of the quantitative assessment for an underserved market in a Plan, FHFA will determine whether an Enterprise has passed or failed the required level of accomplishment.

(2) *Qualitative assessment.* FHFA will conduct a qualitative assessment which will evaluate the Enterprise's accomplishment of each objective for each activity in an underserved market in its Plan, based on the method and criteria established by FHFA in the Evaluation Guidance, such as how skillfully an objective was implemented, the impact of the objective, and such other criteria as FHFA may set forth in the Evaluation Guidance.

(3) *Extra credit-eligible activities.* FHFA may provide extra credit for extra credit-eligible residential economic diversity activities included in an underserved market in a Plan, and for other extra credit-eligible activities included in an underserved market in a Plan, where such other activities are designated by FHFA in the Evaluation Guidance. FHFA will conduct its assessment of an Enterprise's accomplishment of activities that are eligible for extra credit based on the method and criteria established by FHFA in the Evaluation Guidance, such as how skillfully an objective was implemented, the impact of the objective, and such other criteria as FHFA may set forth in the Evaluation Guidance.

(4) *Ratings.*—(i) *Assignment of ratings.* Based on the quantitative, qualitative and extra credit assessments, FHFA will assign a rating of Exceeds, High Satisfactory, Low Satisfactory, Minimally Passing, or Fails to the Enterprise's performance for each underserved market in its Plan. A rating of Exceeds, High Satisfactory, Low Satisfactory, or Minimally Passing will constitute compliance by the Enterprise with the duty to serve that underserved market. A rating of Fails will constitute noncompliance by the Enterprise with the duty to serve that underserved market.

(ii) *Ongoing Assessment of Evaluation and Rating Process.* FHFA will make such determinations as appropriate based on evaluation of the program's parameters and operation, pursuant to the Evaluation Guidance, regarding implementation of the evaluation and rating process.

(d) *Evaluation Guidance.*—(1) *Three-year term.* FHFA will prepare Evaluation Guidance for use by both Enterprises for a three-year term.

(2) *Contents.* The Evaluation Guidance will include the information required under this subpart, as well as additional guidance on Enterprise Plans, how the quantitative and qualitative assessments will be conducted, the role of extra credit, how final ratings will be determined, and other matters as may be appropriate.

(3) *Timelines for Evaluation Guidance.*—(i) *For the first Plan.*—(A) FHFA will provide to the Enterprises the proposed Evaluation Guidance for the first Plan within 30 days after the posting of this subpart on FHFA's Web site. FHFA will post the proposed Evaluation Guidance on FHFA's Web site as soon as practicable after providing it to the Enterprises.

(B) The proposed Evaluation Guidance will be available for public input for a period of 120 days following its posting on FHFA's Web site.

(C) FHFA will provide the Evaluation Guidance to the Enterprises no later than the time FHFA provides comments to the Enterprises on their proposed Plans.

(ii) *For subsequent Plans.* FHFA will provide timelines for the Evaluation Guidance for subsequent Plans after the first Plan, including public input periods, 300 days before the termination date of the Plan in effect, or a later date if additional time is necessary.

(4) *Posting of Evaluation Guidance.* The final Evaluation Guidance will be posted on the Enterprises' and FHFA's respective Web sites as soon as practicable after the Evaluation Guidance is finalized.

(5) *Modification of Evaluation Guidance.* From time to time, FHFA may modify the Evaluation Guidance prior to or during the Evaluation Guidance's three-year term. FHFA may seek public input on proposed modifications to the Evaluation Guidance if FHFA determines that public input would assist its consideration of the proposed modifications. Modified Evaluation Guidance will be effective on January 1 of the year after the modified Evaluation Guidance is posted. FHFA will post the modified Evaluation Guidance on FHFA's Web site as soon as practicable after modified.

§ 1282.37 General requirements for credit.

(a) *General.* FHFA will determine whether an activity included in an Enterprise's Underserved Markets Plan will receive duty to serve credit or extra credit under an underserved market in the Plan. In this determination, FHFA will consider whether the activity facilitates a secondary market for financing mortgages: On manufactured homes for very low-, low-, and moderate-income families; to preserve housing affordable to very low-, low-, and moderate-income families; and on housing for very low-, low-, and moderate-income families in rural areas. If FHFA determines that an activity will receive duty to serve credit or extra credit under an underserved market in the Plan, the activity will receive such credit under the relevant evaluation area for each underserved market it serves.

(b) *No credit under any evaluation area.* Enterprise activities related to the following are not eligible to receive duty to serve credit under any evaluation area under an underserved market, even

if the activity otherwise would receive credit under any other section of this subpart, except as provided in this section:

(1) Contributions to the Housing Trust Fund (12 U.S.C. 4568) and the Capital Magnet Fund (12 U.S.C. 4569), and mortgage purchases funded with such grant amounts;

(2) HOEPA mortgages;

(3) Subordinate liens on multifamily properties, except for subordinate liens originated for energy or water efficiency improvements on multifamily rental properties that meet the requirements in § 1282.34(d)(2);

(4) Subordinate liens on single-family properties, except for shared appreciation loans that satisfy all of the requirements in § 1282.34(d)(4) of this part;

(5) Low-Income Housing Tax Credit equity investments in a property, except where the property is located in a rural area;

(6) Permanent construction take-out loans and Additional Activities under the affordable housing preservation market, except as provided in paragraph (c) of this section; and

(7) Any combination of factors in paragraphs (b)(1) through (b)(6) of this section.

(c) *Credit for certain permanent construction take-out loans and Additional Activities under the affordable housing preservation market.* Enterprise activities related to permanent construction take-out loans and Additional Activities under the affordable housing preservation market are eligible for duty to serve credit, provided the following requirements are met, as applicable:

(1) *Permanent construction take-out loans.*—(i) The permanent construction take-out loans preserve existing subsidies on affordable housing with regulatory periods of required affordability that are at least as restrictive as the longest affordability restriction applicable to the subsidy or subsidies being preserved; or

(ii) The permanent construction take-out loans are for housing developed under state or local inclusionary zoning, real estate tax abatement, or loan programs, where the property owner has agreed to restrict a portion of the units for occupancy by very low-, low-, or moderate-income families, and to restrict the rents that can be charged for those units at affordable rents to those populations, or where the property is developed for a shared equity program that meets the requirements under § 1282.34(d)(4), and where there is a regulatory agreement, recorded use restriction, or deed restriction in place that maintains affordability for the term defined by the state or local program.

(2) *Additional Activities.* Additional Activities that either:

(i) Involve preserving existing subsidy where the term of affordability required for the subsidy is followed, or where there is a deed restriction for affordability for the life of the loan; or

(ii) Involve preserving the affordability of properties in conjunction with state or local inclusionary zoning, real estate tax abatement, or loan programs, where a regulatory agreement, recorded use restriction, or deed restriction maintains affordability of a portion of the property's units for the term defined by the state or local program.

(d) *No credit under loan purchase evaluation area.* The following activities are not eligible to receive duty to serve credit under the loan purchase evaluation area, even if the activity otherwise would receive duty to serve credit under § 1282.38:

(1) Purchases of mortgages to the extent they finance any dwelling units that are secondary residences;

(2) Single-family refinancing mortgages that result from conversion of balloon notes to fully amortizing notes, if the Enterprise already owns or has an interest in the balloon note at the time conversion occurs;

(3) Purchases of mortgages or interests in mortgages that previously received credit under any underserved market within the five years immediately preceding the current performance year;

(4) Purchases of mortgages where the property or any units within the property have not been approved for occupancy;

(5) Any interests in mortgages that FHFA determines will not be treated as interests in mortgages;

(6) Purchases of state and local government housing bonds except as provided in § 1282.39(h); and

(7) Any combination of factors in paragraphs (d)(1) through (d)(6) of this section.

(e) *FHFA review of activities or objectives.* FHFA may determine whether and how any activity or objective will receive duty to serve credit under an underserved market in a Plan, including treatment of missing data. FHFA will notify each Enterprise in writing of any determination regarding the treatment of any activity or objective. FHFA will make any such determinations available to the public on FHFA's Web site.

(f) *The year in which an activity or objective will receive credit.* An activity or objective that FHFA determines will receive duty to serve credit under an underserved market in a Plan will receive such credit in the year in which the activity or objective is completed. FHFA may determine that credit is appropriate for an activity or objective in which an Enterprise engages, but does not complete, in a particular year, except that activities or objectives under the loan purchase evaluation area will receive credit in the year in which the Enterprise purchased the mortgage.

(g) *Credit under one evaluation area.* An activity or objective will receive duty to serve credit under only one evaluation area in a particular underserved market.

(h) *Credit under multiple underserved markets.* An activity or objective, including financing of dwelling units by an Enterprise's mortgage purchase, will receive duty to serve credit under each underserved market for which the activity or objective qualifies in that year.

§ 1282.38 General requirements for loan purchases.

(a) *General.* This section applies to Enterprise mortgage purchases that may receive duty to serve credit under the loan purchase evaluation area for a particular underserved market in a Plan. Only dwelling units securing a mortgage purchased by the Enterprise in that year and not specifically excluded under § 1282.37(b) and (d) may receive credit.

(b) *Counting dwelling units.* Performance under the loan purchase evaluation area will be measured by counting dwelling units affordable to very low-, low-, and moderate-income families.

(c) *Credit for owner-occupied units.*—(1) Mortgage purchases financing owner-occupied single-family properties will be evaluated based on the income of the mortgagor(s) and the area median income at the time the mortgage was originated. To determine whether mortgages may receive duty to serve credit under a particular family income level, *i.e.,* very low-, low-, or moderate-income, the income of the mortgagor(s) is compared to the median income for the area at the time the mortgage was originated, using the appropriate percentage factor provided under § 1282.17.

(2) Mortgage purchases financing owner-occupied single-family properties for which the income of the mortgagor(s) is not available will not receive duty to serve credit under the loan purchase evaluation area.

(d) *Credit for rental units.*—(1) *Use of rent.* For Enterprise mortgage purchases financing single-family rental units and multifamily rental units, affordability is determined based on rent and whether

the rent is affordable to the income groups targeted by the duty to serve. A rent is affordable if the rent does not exceed the maximum levels as provided in § 1282.19.

(2) *Affordability of rents based on housing program requirements.* Where a multifamily property is subject to an affordability restriction under a housing program that establishes the maximum permitted income level for a tenant or a prospective tenant or the maximum permitted rent, the affordability of units in the property may be determined based on the maximum permitted income level or maximum permitted rent established under such housing program for those units. If using income, the maximum income level must be no greater than the maximum income level for each income group targeted by the duty to serve, adjusted for family or unit size as provided in § 1282.17 or § 1282.18, as appropriate. If using rent, the maximum rent level must be no greater than the maximum rent level for each income group targeted by the duty to serve, adjusted for unit size as provided in § 1282.19.

(3) *Unoccupied units.* Anticipated rent for unoccupied units may be the market rent for similar units in the neighborhood as determined by the lender or appraiser for underwriting purposes. A unit in a multifamily property that is unoccupied because it is being used as a model unit or rental office may receive duty to serve credit only if the Enterprise determines that the number of such units is reasonable and minimal considering the size of the multifamily property.

(4) *Timeliness of information.* In evaluating affordability for single-family rental properties, an Enterprise must use tenant income and area median income available at the time the mortgage was originated. For multifamily rental properties, the Enterprise must use tenant income and area median income available at the time the mortgage was acquired.

(e) *Missing data or information for rental units.*—(1) When calculating unit affordability, rental units for which bedroom data are missing will be considered efficiencies.

(2) When an Enterprise lacks sufficient information to determine whether a rental unit in a single-family or multifamily property securing a mortgage purchased by the Enterprise receives duty to serve credit under the loan purchase evaluation area because rental data are not available, the Enterprise's performance with respect to such unit may be evaluated using estimated affordability information, except that an Enterprise may not estimate affordability of rental units for purposes of receiving extra credit for residential economic diversity activities. The estimated affordability information is calculated by multiplying the number of rental units with missing affordability information in properties securing the mortgages purchased by the Enterprise in each census tract by the percentage of all moderate-income rental dwelling units in the respective tracts, as determined by FHFA.

(f) *Affordability of manufactured housing communities.* For an Enterprise purchase of a blanket loan on a manufactured housing community, unless otherwise determined by FHFA, the affordability of the homes in the community shall be determined using one of the methodologies in paragraphs (f)(1) or (f)(2) of this section, as applicable, except that for purposes of determining extra credit for residential economic diversity activities or objectives, the methodology in paragraph (f)(2) of this section may not be used.

(1) *Methodology for government-, nonprofit- or resident-owned manufactured housing communities.* For a manufactured housing community owned by a government unit or instrumentality, a nonprofit organization, or the residents, if laws or regulations governing the affordability of the community, or the community's or ownership entity's founding, chartering, governing, or financing documents, require that a certain number or percentage of the community's homes be affordable consistent with paragraph (d)(1) of this section, then any homes subject to such affordability restriction are treated as affordable.

(2) *Census tract methodology for any type of manufactured housing community.* For any type of manufactured housing community, except for purposes of determining extra credit for residential economic diversity activities or objectives, the affordability of the homes in the community is determined as follows:

(i) If the median income of the census tract in which the manufactured housing community is located is less than or equal to the area median income, then all homes in the community are treated as affordable;

(ii) If the median income of the census tract in which the manufactured housing community is located exceeds the area median income, then the number of homes that are treated as affordable is determined by dividing the area median income by the median income of the census tract in which the community is located and multiplying the resulting ratio by the total number of homes in the community.

(g) *Application of median income.*—(1) To determine an area's median income under §§ 1282.17 through 1282.19 and the definitions in § 1282.1, the area is:

(i) The metropolitan area, if the property which is the subject of the mortgage is in a metropolitan area; and

(ii) In all other areas, the county in which the property is located, except that where the State non-metropolitan median income is higher than the county's median income, the area is the State non-metropolitan area.

(2) When an Enterprise cannot precisely determine whether a mortgage is on dwelling unit(s) located in one area, the Enterprise must determine the median income for the split area in the manner prescribed by the Federal Financial Institutions Examination Council for reporting under the Home Mortgage Disclosure Act (12 U.S.C. 2801 *et seq.*), if the Enterprise can determine that the mortgage is on dwelling unit(s) located in:

(i) A census tract; or

(ii) A census place code.

(h) *Newly available data.* When an Enterprise uses data to determine whether a dwelling unit may receive duty to serve credit under the loan purchase evaluation area and new data is released after the start of a calendar quarter, the Enterprise need not use the new data until the start of the following quarter.

§ 1282.39 Special requirements for loan purchases.

(a) *General.* Subject to FHFA's determination of whether an activity or objective will receive duty to serve credit under a particular underserved market, the activities or objectives identified in this section will be treated as mortgage purchases as described and receive credit under the loan purchase evaluation area. An activity or objective that is covered by more than one paragraph below must satisfy the requirements of each such paragraph.

(b) *Credit enhancements.*—(1) Dwelling units financed under a credit enhancement entered into by an Enterprise will be treated as mortgage purchases only when:

(i) The Enterprise provides a specific contractual obligation to ensure timely payment of amounts due under a mortgage or mortgages financed by the issuance of housing bonds (such bonds may be issued by any entity, including a State or local housing finance agency); and

(ii) The Enterprise assumes a credit risk in the transaction substantially

equivalent to the risk that would have been assumed by the Enterprise if it had securitized the mortgages financed by such bonds.

(2) When an Enterprise provides a specific contractual obligation to ensure timely payment of amounts due under any mortgage originally insured by a public purpose mortgage insurance entity or fund, the Enterprise may, on a case-by-case basis, seek approval from the Director for such transactions to receive credit under the loan purchase evaluation area for a particular underserved market.

(c) *Risk-sharing.* Mortgages purchased under risk-sharing arrangements between an Enterprise and any federal agency under which the Enterprise is responsible for a substantial amount of the risk will be treated as mortgage purchases.

(d) *Participations.* Participations purchased by an Enterprise will be treated as mortgage purchases only when the Enterprise's participation in the mortgage is 50 percent or more.

(e) *Cooperative housing and condominiums.*—(1) The purchase of a mortgage on a cooperative housing unit (''a share loan'') or a mortgage on a condominium unit will be treated as a mortgage purchase. Such a purchase will receive duty to serve credit in the same manner as a mortgage purchase of single-family owner-occupied units, *i.e.,* affordability is based on the income of the mortgagor(s).

(2) The purchase of a blanket mortgage on a cooperative building or a mortgage on a condominium project will be treated as a mortgage purchase. The purchase of a blanket mortgage on a cooperative building will receive duty to serve credit in the same manner as a mortgage purchase of a multifamily rental property, except that affordability must be determined based solely on the comparable market rents used in underwriting the blanket loan. If the underwriting rents are not available, the loan will not be treated as a mortgage purchase. The purchase of a mortgage on a condominium project will receive duty to serve credit in the same manner as a mortgage purchase of a multifamily rental property.

(3) Where an Enterprise purchases both a blanket mortgage on a cooperative building and share loans for units in the same building, both the mortgage on the cooperative building and the share loans will be treated as mortgage purchases. Where an Enterprise purchases both a mortgage on a condominium project and mortgages on individual dwelling units in the same project, both the mortgage on the condominium project and the mortgages on individual dwelling units will be treated as mortgage purchases.

(f) *Seasoned mortgages.* An Enterprise's purchase of a seasoned mortgage will be treated as a mortgage purchase.

(g) *Purchase of refinancing mortgages.* The purchase of a refinancing mortgage by an Enterprise will be treated as a mortgage purchase only if the refinancing is an arms-length transaction that is borrower-driven.

(h) *Mortgage revenue bonds.* The purchase or guarantee by an Enterprise of a mortgage revenue bond issued by a state or local housing finance agency will be treated as a purchase of the underlying mortgages only to the extent the Enterprise has sufficient information to determine whether the underlying mortgages or mortgage-backed securities serve the income groups targeted by the duty to serve.

(i) *Seller dissolution option.*—(1) Mortgages acquired through transactions involving seller dissolution options will be treated as mortgage purchases only when:

(i) The terms of the transaction provide for a lockout period that prohibits the exercise of the dissolution option for at least one year from the date on which the transaction was entered into by the Enterprise and the seller of the mortgages; and

(ii) The transaction is not dissolved during the one-year minimum lockout period.

(2) FHFA may grant an exception to the one-year minimum lockout period described in paragraphs (i)(1)(i) and (i)(1)(ii) of this section, in response to a written request from an Enterprise, if FHFA determines that the transaction furthers the purposes of the Enterprise's Charter Act and the Safety and Soundness Act.

(3) For purposes of paragraph (i) of this section, ''seller dissolution option'' means an option for a seller of mortgages to the Enterprises to dissolve or otherwise cancel a mortgage purchase agreement or loan sale.

§ 1282.40 Failure to comply.

If the Director determines that an Enterprise has not complied with, or there is a substantial probability that an Enterprise will not comply with, the duty to serve a particular underserved market in a given year and the Director determines that such compliance is or was feasible, the Director will follow the procedures in 12 U.S.C. 4566(b).

§ 1282.41 Housing plans.

(a) *General.* If the Director determines that an Enterprise did not comply with, or there is a substantial probability that an Enterprise will not comply with, the duty to serve a particular underserved market in a given year, the Director may require the Enterprise to submit a housing plan for approval by the Director.

(b) *Nature of housing plan.* If the Director requires a housing plan, the housing plan must:

(1) Be feasible;

(2) Be sufficiently specific to enable the Director to monitor compliance periodically;

(3) Describe the specific actions that the Enterprise will take:

(i) To comply with the duty to serve a particular underserved market for the next calendar year; or

(ii) To make such improvements and changes in its operations as are reasonable in the remainder of the year, if the Director determines that there is a substantial probability that the Enterprise will fail to comply with the duty to serve a particular underserved market in such year; and

(4) Address any additional matters relevant to the housing plan as required, in writing, by the Director.

(c) *Deadline for submission.* The Enterprise must submit the housing plan to the Director within 45 days after issuance of a notice requiring the Enterprise to submit a housing plan. The Director may extend the deadline for submission of a housing plan, in writing and for a time certain, to the extent the Director determines an extension is necessary.

(d) *Review of housing plans.* The Director will review and approve or disapprove housing plans in accordance with 12 U.S.C. 4566(c)(4) and (c)(5).

(e) *Resubmission.* If the Director disapproves an initial housing plan submitted by an Enterprise, the Enterprise must submit an amended housing plan acceptable to the Director not later than 15 days after the Director's disapproval of the initial housing plan. The Director may extend the deadline if the Director determines that an extension is in the public interest. If the amended housing plan is not acceptable to the Director, the Director may afford the Enterprise 15 days to submit a new housing plan.

■ 4. Add § 1282.66 to subpart D to read as follows:

§ 1282.66 Enterprise reports on duty to serve.

(a) *First and third quarter reports.* Each Enterprise must submit to FHFA a first and third quarter report on its activities and objectives under each underserved market in its Underserved Markets Plan for the loan purchase evaluation area. The report must

include detailed year-to-date information on the Enterprise's progress towards meeting the activities and objectives in its Plan. The Enterprise must submit the first and third quarter reports to FHFA within 60 days of the end of the respective quarter.

(b) *Second quarter report.* Each Enterprise must submit to FHFA a second quarter report on all of the activities and objectives under each underserved market in its Underserved Markets Plan. The report must include detailed year-to-date information on the Enterprise's progress towards meeting the activities and objectives under each underserved market in its Plan, and contain narrative and summary statistical information for the Plan objectives, supported by appropriate transaction level detail. The Enterprise must submit the second quarter report to FHFA within 60 days of the end of the second quarter.

(c) *Annual report.* To comply with the requirements in sections 309(n) of the Fannie Mae Charter Act and 307(f) of the Freddie Mac Act and for purposes of FHFA's Annual Housing Report to Congress, each Enterprise must submit to FHFA an annual report on all of the activities and objectives under each underserved market in its Underserved Markets Plan no later than 75 days after the end of each calendar year. For each underserved market, the Enterprise's annual report must include, at a minimum: A description of the Enterprise's market opportunities for loan purchases during the evaluation year to the extent data is available; the volume of qualifying loans purchased by the Enterprise during the evaluation year; a comparison of the Enterprise's loan purchases with its loan purchases in prior years; a comparison of market opportunities with the size of the relevant markets in the past, to the extent data is available; and narrative and summary statistical information for the Plan objectives, supported by appropriate transaction level data.

(d) *Public disclosure of information from reports.* FHFA will make public certain information from the first, second, and third quarter reports at a reasonable time after the end of the calendar year for which they apply, with any confidential and proprietary information and data omitted. FHFA will make public certain information from the annual reports at a reasonable time after receiving them from the Enterprises, with any confidential and proprietary information and data omitted. In the third year of the Underserved Markets Plans, FHFA will make public certain narrative information from the year's second quarter report, excluding data under the loan purchase evaluation area and any confidential and proprietary information and data, at a reasonable time after receiving it within the calendar year.

Dated: December 12, 2016.

Melvin L. Watt,

Director, Federal Housing Finance Agency.

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Part IV

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 223

Endangered and Threatened Wildlife and Plants; Proposed Threatened Listing Determination for the Oceanic Whitetip Shark Under the Endangered Species Act (ESA); Proposed Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 223

[Docket No. 151110999–6999–02]

RIN 0648–XE314

Endangered and Threatened Wildlife and Plants; Proposed Threatened Listing Determination for the Oceanic Whitetip Shark Under the Endangered Species Act (ESA)

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS has completed a comprehensive status review under the Endangered Species Act (ESA) for the oceanic whitetip shark (*Carcharhinus longimanus*) in response to a petition from Defenders of Wildlife to list the species. Based on the best scientific and commercial information available, including the status review report (Young *et al.,* 2016), and after taking into account efforts being made to protect the species, we have determined that the oceanic whitetip shark warrants listing as a threatened species. We conclude that the oceanic whitetip shark is likely to become endangered throughout all or a significant portion of its range within the foreseeable future. Any protective regulations determined to be necessary and advisable for the conservation of the species under ESA section 4(d) would be proposed in a subsequent **Federal Register** announcement. Should the proposed listing be finalized, we would also designate critical habitat for the species, to the maximum extent prudent and determinable. We solicit information to assist in this listing determination, the development of proposed protective regulations, and the designation of critical habitat in the event this proposed listing determination is finalized.

DATES: Comments on this proposed rule must be received by March 29, 2017. Public hearing requests must be requested by February 13, 2017.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2015–0152, by either of the following methods:

- *Electronic Submissions:* Submit all electronic comments via the Federal eRulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2015-0152,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Chelsey Young, NMFS Office of Protected Resources (F/PR3), 1315 East West Highway, Silver Spring, MD 20910, USA. Attention: Oceanic whitetip proposed rule.

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).

You can find the petition, status review report, **Federal Register** notices, and the list of references electronically on our Web site at *http://www.nmfs.noaa.gov/pr/species/fish/oceanic-whitetip-shark.html.* You may also receive a copy by submitting a request to the Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910, Attention: Oceanic whitetip proposed rule.

FOR FURTHER INFORMATION CONTACT: Chelsey Young, NMFS, Office of Protected Resources, (301) 427–8403.

SUPPLEMENTARY INFORMATION:

Background

On September 21, 2015, we received a petition from Defenders of Wildlife to list the oceanic whitetip shark (*Carcharhinus longimanus*) as threatened or endangered under the ESA throughout its entire range, or, as an alternative, to list two distinct population segments (DPSs) of the oceanic whitetip shark, as described in the petition, as threatened or endangered, and to designate critical habitat. We found that the petitioned action may be warranted for the species; on January 12, 2016, we published a positive 90-day finding for the oceanic whitetip shark (81 FR 1376), announcing that the petition presented substantial scientific or commercial information indicating the petitioned action of listing the species may be warranted range wide, and explaining the basis for those findings. We also announced the initiation of a status review of the species, as required by section 4(b)(3)(a) of the ESA, and requested information to inform the agency's decision on whether the species warranted listing as endangered or threatened under the ESA.

Listing Species Under the Endangered Species Act

We are responsible for determining whether species are threatened or endangered under the ESA (16 U.S.C. 1531 *et seq.*). To make this determination, we first consider whether a group of organisms constitutes a ''species'' under section 3 of the ESA, then whether the status of the species qualifies it for listing as either threatened or endangered. Section 3 of the ESA defines species to include ''any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.'' On February 7, 1996, NMFS and the U.S. Fish and Wildlife Service (USFWS; together, the Services) adopted a policy describing what constitutes a DPS of a taxonomic species (61 FR 4722). The joint DPS policy identified two elements that must be considered when identifying a DPS: (1) The discreteness of the population segment in relation to the remainder of the species (or subspecies) to which it belongs; and (2) the significance of the population segment to the remainder of the species (or subspecies) to which it belongs.

Section 3 of the ESA defines an endangered species as ''any species which is in danger of extinction throughout all or a significant portion of its range'' and a threatened species as one ''which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' Thus, in the context of the ESA, the Services interpret an ''endangered species'' to be one that is presently at risk of extinction. A ''threatened species,'' on the other hand, is not currently at risk of extinction, but is likely to become so in the foreseeable future. In other words, a key statutory difference between a threatened and endangered species is the timing of when a species may be in danger of extinction, either now (endangered) or in the foreseeable future (threatened). The statute also requires us to determine whether any species is endangered or threatened as a result of any of the following five factors: The present or threatened destruction, modification, or curtailment of its habitat or range; overutilization for commercial, recreational, scientific, or educational purposes; disease or

predation; the inadequacy of existing regulatory mechanisms; or other natural or manmade factors affecting its continued existence (ESA, section 4(a)(1)(A)–(E)). Section 4(b)(1)(A) of the ESA requires us to make listing determinations based solely on the best scientific and commercial data available after conducting a review of the status of the species and after taking into account efforts being made by any State or foreign nation or political subdivision thereof to protect the species. In evaluating the efficacy of existing protective efforts, we rely on the Services' joint *Policy on Evaluation of Conservation Efforts When Making Listing Decisions* (''PECE''; 68 FR 15100; March 28, 2003) for any conservation efforts that have not been implemented, or have been implemented but have not yet demonstrated effectiveness.

Status Review

We convened a team of agency scientists to conduct the status review for the oceanic whitetip shark and prepare a report. The status review report of the oceanic whitetip shark (Young *et al.,* 2016) compiles the best available information on the status of the species as required by the ESA and assesses the current and future extinction risk for the species, focusing primarily on threats related to the five statutory factors set forth above. We appointed a biologist in the Office of Protected Resources Endangered Species Conservation Division to undertake a scientific review of the life history and ecology, distribution, abundance, and threats to the oceanic whitetip shark. Next, we convened a team of biologists and shark experts (hereinafter referred to as the Extinction Risk Analysis (ERA) team) to conduct an extinction risk analysis for the species, using the information in the scientific review. The ERA team was comprised of a natural resource management specialist from NMFS Office of Protected Resources, a fishery management specialist from NMFS' Highly Migratory Species (HMS) Management Division, and four research fishery biologists from NMFS' Southeast, Northeast, Southwest, and Pacific Island Fisheries Science Centers. The ERA team had group expertise in shark biology and ecology, population dynamics, highly migratory species management, and stock assessment science. The status review report presents the ERA team's professional judgment of the extinction risk facing the oceanic whitetip shark but makes no recommendation as to the listing status of the species. The status review report is available electronically at *http://www.nmfs.noaa.gov/pr/species/fish/oceanic-whitetip-shark.html.*

The status review report was subjected to independent peer review as required by the Office of Management and Budget Final Information Quality Bulletin for Peer Review (M–05–03; December 16, 2004). The status review report was peer reviewed by five independent specialists selected from the academic and scientific community, with expertise in shark biology, conservation and management, and specific knowledge of oceanic whitetip sharks. The peer reviewers were asked to evaluate the adequacy, appropriateness, and application of data used in the status review as well as the findings made in the ''Assessment of Extinction Risk'' section of the report. All peer reviewer comments were addressed prior to finalizing the status review report.

We subsequently reviewed the status review report, its cited references, and peer review comments, and believe the status review report, upon which this proposed rule is based, provides the best available scientific and commercial information on the oceanic whitetip shark. Much of the information discussed below on oceanic whitetip shark biology, distribution, abundance, threats, and extinction risk is attributable to the status review report. However, we have independently applied the statutory provisions of the ESA, including evaluation of the factors set forth in section 4(a)(1)(A)–(E), our regulations regarding listing determinations, and our DPS policy in making the 12-month finding determination.

Life History, Biology, and Status of the Petitioned Species

Taxonomy and Species Description

The oceanic whitetip shark belongs to the family Carcharhinidae and is classified as a requiem shark (Order Carcharhiniformes). The oceanic whitetip belongs to the genus *Carcharhinus,* which includes other pelagic species of sharks, such as the silky shark (*Carcharhinus falciformis*) and dusky shark (*C. obscuras*), and is the only truly oceanic (*i.e.,* pelagic) shark of its genus (Bonfil *et al.,* 2008). The oceanic whitetip shark has a stocky build with a large rounded first dorsal fin and very long and wide paddle-like pectoral fins. The first dorsal fin is very wide with a rounded tip, originating just in front of the rear tips of the pectoral fins. The second dorsal fin originates over or slightly in front of the base of the anal fin. The species also exhibits a distinct color pattern of mottled white tips on its front dorsal, caudal, and pectoral fins with black tips on its anal fin and on the ventral surfaces of its pelvic fins. The head has a short and bluntly rounded nose and small circular eyes with nictitating membranes. The upper jaw contains broad, triangular serrated teeth, while the teeth in the lower jaw are more pointed and are only serrated near the tip. The body is grayish bronze to brown in color, but varies depending upon geographic location. The underside is whitish with a yellow tinge on some individuals (Compagno 1984).

Current Distribution

The oceanic whitetip shark is distributed worldwide in epipelagic tropical and subtropical waters between 30° North latitude and 35° South latitude (Baum *et al.,* 2006). In the western Atlantic, oceanic whitetips occur from Maine to Argentina, including the Caribbean and Gulf of Mexico. In the central and eastern Atlantic, the species occurs from Madeira, Portugal south to the Gulf of Guinea, and possibly in the Mediterranean Sea. In the western Indian Ocean, the species occurs in waters of South Africa, Madagascar, Mozambique, Mauritius, Seychelles, India, and within the Red Sea. Oceanic whitetips also occur throughout the Western and Central Pacific Ocean, including China, Taiwan, the Philippines, New Caledonia, Australia (southern Australian coast), Hawaiian Islands south to Samoa Islands, Tahiti and Tuamotu Archipelago and west to the Galapagos Islands. Finally, in the eastern Pacific, the species occurs from southern California to Peru, including the Gulf of California and Clipperton Island (Compagno 1984).

Habitat Use and Movement

The oceanic whitetip shark is a highly migratory species of shark that is usually found offshore in the open ocean, on the outer continental shelf, or around oceanic islands in deep water, occurring from the surface to at least 152 meters (m) depth. Although the oceanic whitetip can be found in decreasing numbers out to latitudes of 30° N and 35° S, with abundance decreasing with greater proximity to continental shelves, it has a clear preference for open ocean waters between 10° S and 10° N (Backus *et al.,* 1956; Strasburg 1958; Compagno 1984; Bonfil *et al.,* 2008). The species can be found in waters between 15 °C and 28 °C, but it exhibits a strong preference for the surface mixed layer in water with temperatures above 20 °C, and is considered a surface-dwelling shark. It

is however, capable of tolerating colder waters down to 7.75 °C for short periods as exhibited by brief, deep dives into the mesopelagic zone below the thermocline (>200 m), presumably for foraging (Howey-Jordan *et al.,* 2013; Howey *et al.,* 2016). However, exposures to these cold temperatures are not sustained (Musyl *et al.,* 2011; Tolotti *et al.,* 2015a) and there is some evidence to suggest the species tends to withdraw from waters below 15 °C (*e.g.,* the Gulf of Mexico in winter; Compagno 1984).

Little is known about the movement or possible migration paths of the oceanic whitetip shark. Although the species is considered highly migratory and capable of making long distance movements, tagging data provides evidence that this species also exhibits a high degree of philopatry (*i.e.,* site fidelity) in some locations. To date, there have been three tagging studies conducted on oceanic whitetip sharks in the Atlantic. Mark recapture data (number tagged = 645 and recaptures = 8) from the NMFS Cooperative Shark Tagging Program between 1962 and 2015 provide supporting evidence that the range of movement of oceanic whitetip sharks is large, with potential for transatlantic movements (Kohler *et al.,* 1998; NMFS, unpublished data). Maximum time at liberty was 3.3 years and the maximum distance traveled was 1,225 nautical miles (nmi0 (2,270 kilometers (km0). These data indicate movements from the northeastern Gulf of Mexico to the Atlantic Coast of Florida, from the Mid-Atlantic Bight to southern Cuba, from the Lesser Antilles west into the central Caribbean Sea, from east to west along the equatorial Atlantic, and from off southern Brazil in a northeasterly direction. In the Bahamas, oceanic whitetips tagged at Cat Island stayed within 500 km of the tagging site for ~30 days before dispersing across 16,422 km^2 of the western North Atlantic. Maximum individual displacement from the tagging site ranged from 290–1,940 km after times at liberty from 30–245 days, with individuals moving to several different destinations (*e.g.,* the northern Lesser Antilles, the northern Bahamas, and north of the Windward Passage). Many sharks returned to the Bahamas after ~150 days and estimated residency times within the Bahamas Exclusive Economic Zone (EEZ), were generally high (mean=68.2 percent of time; Howey-Jordan *et al.,* 2013). Oceanic whitetip sharks showed similar movement patterns and site fidelity in a tagging study conducted in Brazil. Although individuals tended to travel long distances before returning to the tagging area, tagging and pop-up sites were relatively close to each other. In fact, five out of eight sharks ended their tracks relatively close to their starting points, even after traveling several thousand kilometers (Tolotti *et al.,* 2015a).

In the Indo-Pacific, two tagging studies of oceanic whitetip shark have been conducted: one in the central Pacific and one in the western Indian Ocean. In the central Pacific, oceanic whitetip sharks showed a complex movement pattern generally restricted to tropical waters north of the North Equatorial Countercurrent near the tagging location. Maximum time at liberty was 243 days, but the largest linear movement was 2,314 nmi (4,285 km) in 95 days (Musyl *et al.,* 2011). Similar to previously discussed studies, long distance movements were also observed in the Indian Ocean, with one tag that remained attached for 100 days. This individual displayed extensive horizontal movement covering a distance of approximately 6,500 km during the monitored period, moving from the Mozambique Channel up the African east coast of Somalia and then heading back down towards the Seychelles (Filmalter *et al.,* 2012). Overall, the available tagging data demonstrates that oceanic whitetip sharks are capable of traveling great distances in the pelagic environment, but also show a high degree of site fidelity in some locations.

Diet and Feeding

Oceanic whitetip sharks are high trophic-level predators in open ocean ecosystems feeding mainly on teleosts and cephalopods (Backus *et al.,* 1956; Bonfil *et al.,* 2008), but studies have also reported that they consume sea birds, marine mammals, other sharks and rays, molluscs, crustaceans, and even garbage (Compagno 1984; Cortés 1999). Backus *et al.,* (1956) recorded various fish species in the stomachs of oceanic whitetip sharks, including blackfin tuna, barracuda, and white marlin. Based on the species' diet, the oceanic whitetip has a high trophic level, with a score of 4.2 out of a maximum 5.0 (Cortés 1999). The available evidence also suggests that oceanic whitetip sharks are opportunistic feeders. In the Bahamas, large pelagic teleosts (*e.g.,* billfish, tunas, and dolphin fish) are abundant and oceanic whitetips are anecdotally reported to feed heavily on recreationally caught teleosts in this region. In a recent study of an oceanic whitetip shark aggregation at Cat Island, Bahamas, SIA-based Bayesian mixing model estimates of short-term (near Cat Island) diets showed more large pelagic teleosts (72 percent) than in long-term diets (47 percent), showing a spatiotemporal difference in oceanic whitetip feeding habits. Thus, the availability of large teleost prey and supplemental feeding from recreational sport fishermen may be possible mechanisms underpinning site-fidelity and aggregation of oceanic whitetips at this location (Madigan *et al.,* 2015).

Size and Growth

Historically, the maximum length effectively measured for the oceanic whitetip was 350 cm total length (TL; Bigelow and Schroder 1948 cited in Lessa *et al.,* 1999), with ''gigantic individuals'' perhaps reaching 395 cm TL (Compagno 1984), though Compagno's length seems to have never been measured (Lessa *et al.,* 1999). In contemporary times, Lessa *et al.* (1999) recorded a maximum size of 250 cm TL in the Southwest Atlantic, and estimated a theoretical maximum size of 325 cm TL (Lessa *et al.,* 1999), but the most common sizes are below 300 cm TL (Compagno 1984). The oceanic whitetip has an estimated maximum age of 17 years, with confirmed maximum ages of 12 and 13 years in the North Pacific and South Atlantic, respectively (Seki *et al.,* 1998; Lessa *et al.,* 1999). However, other information from the South Atlantic suggests the species likely lives up to ~20 years old based on observed vertebral ring counts (Rodrigues *et al.,* 2015). Growth rates (growth coefficient, K) have been estimated similarly for both sexes and range from 0.075—0.099 in the Southwest Atlantic to 0.0852–0.103 in the North Pacific (Seki *et al.,* 1998; Lessa *et al.,* 1999; Joung *et al.,* 2016). Using life history parameters from the Southwest Atlantic, Cortés *et al.* (2010; 2012) estimated productivity of the oceanic whitetip shark, determined as intrinsic rate of population increase (r), to be 0.094–0.121 per year (median). Overall, the best available data indicate that the oceanic whitetip shark is a long-lived species (at least 20 years) and can be characterized as having relatively low productivity (based on the Food and Agriculture Organization of the United Nations (FAO) productivity indices for exploited fish species, where $r < 0.14$ is considered low productivity), making them generally vulnerable to depletion and potentially slow to recover from overexploitation.

Reproduction

Similar to other Carcharhinid species, the oceanic whitetip shark is viviparous (*i.e.,* the species produces live young) with placental embryonic development. The reproductive cycle is thought to be

biennial, giving birth on alternate years, after a lengthy 10–12 month gestation period. The number of pups in a litter ranges from 1 to 14 (mean = 6), and a positive correlation between female size and number of pups per litter has been observed, with larger sharks producing more offspring (Compagno 1984; Seki *et al.,* 1998; Bonfil *et al.,* 2008; IOTC 2015a). Age and length of maturity estimates are slightly different depending on geographic location. For example, in the Southwest Atlantic, age and length of maturity in oceanic whitetips was estimated to be 6–7 years and 180–190 cm TL, respectively, for both sexes (Lessa *et al.,* 1999). In the North Pacific, there are two different estimates for age and length of maturity. Seki *et al.,* (1998) estimated that females reach sexual maturity at approximately 168–196 cm TL, and males at 175–189 cm TL, which corresponds to ages of 4 and 5 years, respectively (Seki *et al.,* 1998). However, more recently Joung *et al.* (2016) determined a later age of maturity in the North Pacific, with females reaching maturity at 190 cm TL (approximately 8.5–8.8 years) and males reaching maturity at 172 cm TL (approximately 6.8–8.9 years old). In the Indian Ocean, both males and females mature at around 190–200 cm TL (IOTC 2014). Size at birth also varies slightly between geographic locations, ranging from 55 to 75 cm TL in the North Pacific, around 65–75 cm TL in the northwestern Atlantic, and 60–65 cm TL off South Africa, with reproductive seasons thought to occur from late spring to summer (Bonfil *et al.,* 2008; Compagno 1984).

Tropical Pacific records of pregnant females and newborns are concentrated between 20° N and the equator, from 170° E to 140° W. In the Atlantic, young oceanic whitetip sharks have been found well offshore along the southeastern coast of the United States, suggesting that there may be a nursery in oceanic waters over this continental shelf (Compagno 1984; Bonfil *et al.,* 2008). In the southwestern Atlantic, the prevalence of immature sharks, both female and male, in fisheries catch data suggests that this area may serve as potential nursery habitat for the oceanic whitetip shark (Coelho *et al.,* 2009; Tambourgi *et al.,* 2013; Tolotti *et al.,* 2013; Frédou *et al.,* 2015). Juveniles seem to be concentrated in equatorial latitudes, while specimens in other maturational stages are more widespread (Tambourgi *et al.,* 2013). Pregnant females are often found close to shore, particularly around the Caribbean Islands. One pregnant female was found washed ashore near Auckland, New Zealand. These points suggest that females may come close to shore to pup (Clarke *et al.,* 2015b). In the southwestern Indian Ocean, oceanic whitetip sharks appear to mate and give birth in the early summer. The locations of the nursery grounds are not well known but they are thought to be in oceanic areas.

Population Structure and Genetics

To date, only two studies have been conducted on the genetics and population structure of the oceanic whitetip shark, which suggest there may be some genetic differentiation between various populations of the species. The first study (Camargo *et al.,* 2016) compared the mitochondrial control region (mtCR) in 215 individuals from the Indian Ocean and eastern and western Atlantic Ocean. While results showed significant genetic differentiation (based on haplotype frequencies) between the eastern and western Atlantic Ocean ($\Phi ST = 0.1039$, $P < 0.001$; Camargo *et al.,* 2016), pairwise comparisons among populations within the regions revealed a complex pattern. Though some eastern Atlantic populations were significantly differentiated from western Atlantic populations ($FST = 0.09 - 0.27$, $P < 0.01$), others were not ($FST = 0.02 - 0.03$, $P > 0.01$), even after excluding populations with sample sizes of less than 10 individuals (Camargo *et al.,* 2016). Additionally, the sample size from the Indian Ocean ($N = 9$) may be inadequate to detect statistically significant genetic structure between this and other regions (Camargo *et al.,* 2016). Furthermore, since this study only used mitochondrial markers, male mediated gene flow is not reflected.

In the second study, Ruck (2016) compared the mitochondrial control region, a protein-coding mitochondrial region, and nine nuclear microsatellite loci in 171 individuals sampled from the western Atlantic, Indian, and Pacific Oceans. Using three population-level pairwise metrics (PhiST, FST, and Jost's D), Ruck (2016) did not detect fine-scale matrilineal structure within ocean basins, but mitochondrial and nuclear analyses indicated weak but significant differentiation between western Atlantic and Indo-Pacific Ocean populations ($\Phi ST = 0.076$, $P = 0.0002$; $FST = 0.017$, $P < 0.05$ after correction for False Discovery Rate). Therefore, Ruck (2016) suggests that oceanic whitetip sharks consist of a minimum of two contemporary, distinct genetic populations comprising sharks from the western Atlantic and the Indo-Pacific (this study did not have any samples from the eastern Atlantic). However, although significant inter-basin population structure was evident, it was associated with deep phylogeographic mixing of mitochondrial haplotypes and evidence of contemporary migration between the western Atlantic and Indo-Pacific Oceans (Ruck 2016).

As noted previously, although Ruck (2016) did not initially detect fine-scale matrilineal structure within ocean basins, after comparing and analyzing the genetic samples of the two studies together (*i.e.,* samples from Camargo *et al.,* 2016 and samples from Ruck 2016), Ruck (Unpublished data) detected significant maternal population structure within the western Atlantic that provides evidence of three matrilineal lineages in the western Atlantic. However, the data showing population structure within the Atlantic relies solely on mitochondrial DNA and does not reflect male mediated gene flow. Thus, while the current (albeit unpublished) data supports three maternal populations within the Atlantic, this data is preliminary and information regarding male mediated gene flow would provide an improved understanding of the fine-scale genetic structuring of oceanic whitetip in the Atlantic.

The best available information indicates that the oceanic whitetip shark has relatively low genetic diversity. Compared to eight other circumtropical elasmobranch species, including the basking shark (*Cetorhinus maximus*), smooth hammerhead (*Sphyrna zygaena*), great hammerhead (*Sphyrna mokarran*), tiger shark (*Galeocerdo cuvier*), blacktip reef shark (*Carcharhinus limbatus*), sandbar shark (*Carcharhinus plumbeus*), silky shark (*Carcharhinus falciformis*), and the whale shark (*Rhincodon typus*), the oceanic whitetip shark ranks the fourth lowest in global mtCR genetic diversity (0.33 percent ± 0.19 percent; Ruck 2016), with diversity similar to the smooth hammerhead (0.32 percent ± 0.18 percent (Testerman 2014) and greater than basking sharks (Hoelzel *et al.,* 2006). The mtCR genetic diversity of the oceanic whitetip is about half that of the closely related silky shark (0.61 percent ±0.32 percent; (Clarke *et al.,* 2015a)) and about a third that of the whale shark (1.1 percent ± 0.6 percent; (Castro *et al.,* 2007). Ruck (2016) noted that the relatively low mtDNA genetic diversity (concatenated mtCR–ND4 nucleotide diversity $\pi = 0.32$ percent ±0.17 percent) compared to other circumtropical elasmobranch species raises potential concern for the future genetic health of this species. Camargo *et al.,* (2016) also observed low levels of

genetic variability for the species throughout the study area, and noted that these low genetic variability rates may represent a risk to the adaptive potential of the species leading to a weaker ability to respond to environmental changes (Camargo *et al.* 2016).

Current Status

Oceanic whitetip sharks can be found worldwide, with no present indication of a range contraction. Although generally not targeted, they are frequently caught as bycatch in many global fisheries, including pelagic longline (PLL) fisheries targeting tuna and swordfish, purse seine, gillnet, and artisanal fisheries. Oceanic whitetip sharks are also a preferred species for their large, morphologically distinct fins, as they obtain a high price in the Asian fin market, and thus they are valuable as incidental catch for the international shark fin trade.

In 2006, the International Union for Conservation of Nature (IUCN) classified the oceanic whitetip shark as Vulnerable globally based on an assessment by Baum *et al.,* (2006) and its own criteria (A2ad+3d+4ad), and placed the species on its ''Red List.'' Under criteria A2ad, 3d and 4ad, a species may be classified as Vulnerable when its ''observed, estimated, inferred or suspected'' population size is reduced by 30 percent or more over the last 10 years, the next 10 years, or any 10-year time period, or over a 3-generation period, whichever is the longer, where the reduction or its causes may not have ceased or may not be understood or may not be reversible, based on a direct observation and actual or potential levels of exploitation. The IUCN's justification for the categorization is based on the species' declining populations. The IUCN notes that the species' regional trends, slow life history characteristics (hence low capacity to recover from moderate levels of exploitation), and high levels of largely unmanaged and unreported mortality in target and bycatch fisheries, give cause to suspect that the population has decreased by over 30 percent and meets the criteria to be categorized as Vulnerable globally. As a note, the IUCN classification for the oceanic whitetip shark alone does not provide the rationale for a listing recommendation under the ESA, but the classification and the sources of information that the classification is based upon are evaluated in light of the standards on extinction risk and impacts or threats to the species.

Distinct Population Segments

As described above, the ESA's definition of ''species'' includes ''any subspecies of fish or wildlife or plants, and any distinct population segment (DPS) of any species of vertebrate fish or wildlife which interbreeds when mature.'' As stated in the joint DPS policy, Congress expressed its expectation that the Services would exercise authority with regard to DPSs sparingly and only when the biological evidence indicates such action is warranted. NMFS determined at the 90-day finding stage that the petition to list the global species of oceanic whitetip shark was warranted. As such, we conducted the extinction risk analysis on the global oceanic whitetip shark population.

Assessment of Extinction Risk

The ESA (section 3) defines an endangered species as ''any species which is in danger of extinction throughout all or a significant portion of its range.'' A threatened species is defined as ''any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' Neither we nor the USFWS have developed formal policy guidance about how to interpret the definitions of threatened and endangered with respect to what it means to be ''in danger of extinction.'' We consider the best available information and apply professional judgment in evaluating the level of risk faced by a species in deciding whether the species is threatened or endangered. We evaluate both demographic risks, such as low abundance and productivity, and threats to the species, including those related to the factors specified in ESA section 4(a)(1)(A)–(E).

Methods

As we described previously, we convened an ERA team to evaluate extinction risk to the species. This section discusses the methods used to evaluate threats and the overall extinction risk to the oceanic whitetip shark. For purposes of the risk assessment, an ERA team comprised of fishery biologists and shark experts was convened to review the best available information on the species and evaluate the overall risk of extinction facing the oceanic whitetip shark, now and in the foreseeable future. The term ''foreseeable future'' was defined as the timeframe over which threats could be reliably predicted to impact the biological status of the species. After considering the life history of the oceanic whitetip shark, availability of data, and types of threats, the ERA team decided that the foreseeable future should be defined as approximately 3 generation times for the oceanic whitetip shark, or approximately 30 years. A generation time is defined as the time it takes, on average, for a sexually mature female oceanic whitetip shark to be replaced by offspring with the same spawning capacity. This timeframe (3 generation times) takes into account the time necessary to provide for the conservation and recovery of the species. As a late-maturing species, with slow growth rate and relatively low productivity, it would likely take more than a generation time for any conservative management action to be realized and reflected in population abundance indices. In addition, the foreseeable future timeframe is also a function of the reliability of available data regarding the identified threats and extends only as far as the data allow for making reasonable predictions about the species' response to those threats. Since the main threats to the species were identified as fisheries and the inadequacy of existing regulatory measures that manage these fisheries, the ERA team felt that they had the background knowledge in fisheries management and expertise to confidently predict the impact of these threats on the biological status of the species within this timeframe.

The ability to measure or document risk factors to a marine species is often limited, where quantitative estimates of abundance and life history information are often lacking altogether. Therefore, in assessing extinction risk of a data limited species, it is important to include both qualitative and quantitative information. In assessing extinction risk to the oceanic whitetip shark, the ERA team considered the demographic viability factors developed by McElhany *et al.,* (2000) and the risk matrix approach developed by Wainwright and Kope (1999) to organize and summarize extinction risk considerations. The approach of considering demographic risk factors to help frame the consideration of extinction risk has been used in many of our status reviews (see *http://www.nmfs.noaa.gov/pr/species* for links to these reviews). In this approach, the collective condition of individual populations is considered at the species level according to four demographic viability factors: Abundance, growth rate/productivity, spatial structure/connectivity, and diversity. These viability factors reflect concepts that are

well-founded in conservation biology and that individually and collectively provide strong indicators of extinction risk.

Using these concepts, the ERA team evaluated demographic risks by assigning a risk score to each of the four demographic risk factors. The scoring for these demographic risk criteria correspond to the following values: 0—unknown risk, 1—low risk, 2—moderate risk, and 3—high risk. Detailed definitions of the risk scores can be found in the status review report.

The ERA team also performed a threats assessment for the oceanic whitetip shark by evaluating the effect that the threat was currently having on the extinction risk of the species. The levels included ''unknown,'' ''low,'' ''moderate,'' and ''high.'' The scores were then tallied and summarized for each threat. It should be emphasized that this exercise was simply a tool to help the ERA team members organize the information and assist in their thought processes for determining the overall risk of extinction for the oceanic whitetip shark.

Guided by the results from the demographic risk analysis and the threats assessment, the ERA team members were asked to use their informed professional judgment to make an overall extinction risk determination for the oceanic whitetip shark. For this analysis, the ERA team considered three levels of extinction risk: 1—low risk, 2—moderate risk, and 3—high risk, which are all temporally connected. Detailed definitions of these risk levels are as follows: 1 = Low risk: A species or DPS is at low risk of extinction if it is not at a moderate or high level of extinction risk (see ''Moderate risk'' and ''High risk'' below). A species or DPS may be at a low risk of extinction if it is not facing threats that result in declining trends in abundance, productivity, spatial structure, or diversity. A species or DPS at low risk of extinction is likely to show stable or increasing trends in abundance and productivity with connected, diverse populations; 2 = Moderate risk: A species or DPS is at moderate risk of extinction if it is on a trajectory that puts it at a high level of extinction risk in the foreseeable future (see description of ''High risk''). A species or DPS may be at moderate risk of extinction due to projected threats or declining trends in abundance, productivity, spatial structure, or diversity. The appropriate time horizon for evaluating whether a species or DPS is more likely than not to be at high risk in the foreseeable future depends on various case- and species-specific factors; 3 = High risk: A species or DPS with a high risk of extinction is at or near a level of abundance, productivity, spatial structure, and/or diversity that places its continued persistence in question. The demographics of a species or DPS at such a high level of risk may be highly uncertain and strongly influenced by stochastic or depensatory processes. Similarly, a species or DPS may be at high risk of extinction if it faces clear and present threats (*e.g.,* confinement to a small geographic area; imminent destruction, modification, or curtailment of its habitat; or disease epidemic) that are likely to create present and substantial demographic risks. The ERA team adopted the ''likelihood point'' (FEMAT) method for ranking the overall risk of extinction to allow individuals to express uncertainty. For this approach, each team member distributed 10 ''likelihood points'' among the extinction risk levels. This approach has been used in previous NMFS status reviews (*e.g.,* Pacific salmon, Southern Resident killer whale, Puget Sound rockfish, Pacific herring, and black abalone) to structure the team's thinking and express levels of uncertainty when assigning risk categories. Although this process helps to integrate and summarize a large amount of diverse information, there is no simple way to translate the risk matrix scores directly into a determination of overall extinction risk. Other descriptive statistics, such as mean, variance, and standard deviation, were not calculated, as the ERA team felt these metrics would add artificial precision to the results. The scores were then tallied and summarized.

Finally, the ERA team did not make recommendations as to whether the species should be listed as threatened or endangered. Rather, the ERA team drew scientific conclusions about the overall risk of extinction faced by the oceanic whitetip shark under present conditions and in the foreseeable future based on an evaluation of the species' demographic risks and assessment of threats.

Evaluation of Demographic Risks

Abundance

While a global population size estimate or trend for the oceanic whitetip shark is currently unavailable, numerous sources of information, including the results of a recent stock assessment and several other abundance indices (*e.g.,* trends in occurrence and composition in fisheries catch data, catch-per-unit-effort (CPUE), and biological indicators) were available to infer and assess current regional abundance trends of the species. Given the available data, and the fact that the available assessments were not conducted prior to the advent of industrial fishing (and thus not from virgin biomass), the exact magnitude of the declines and current abundance of the global population are unknown. However, based on the best available scientific and commercial data, the ERA team concluded, and we agree, that while the oceanic whitetip shark was historically one of the most abundant and ubiquitous shark species in tropical seas around the world, numerous lines of evidence suggest the species has not only undergone significant historical declines throughout its range, but likely continues to experience abundance declines of varying magnitude globally.

Across the Pacific Ocean, several lines of evidence indicate significant and ongoing population declines of the oceanic whitetip shark. In the eastern Pacific Ocean (EPO), the oceanic whitetip shark was historically the third most abundant shark species after blue sharks (*Prionace glauca*) and silky sharks (*C. falciformis*). The oceanic whitetip comprised approximately 20 percent of the total shark catch in the tropical tuna purse seine fishery from 2000–2001 (Roman-Verdesoto and Orozco-Zoller 2005) and averaged 9 percent of the total shark catch from 1993–2009 (with silky sharks comprising 84 percent, the hammerhead complex comprising 5 percent, and other sharks comprising 2 percent; Hall and Román 2013). However, if only the more recent period from 2005–2009 is considered, then the proportion of silky sharks is 93 percent, followed by the scalloped hammerhead shark (1.6 percent), and the smooth hammerhead shark (1.5 percent). The changes are the result of a rapid decline in oceanic whitetip sharks (Hall and Román 2013). Data for the oceanic whitetip shark in the EPO is available from the Inter-American Tropical Tuna Commission (IATTC), the Regional Fishery Management Organization (RFMO) responsible for the conservation and management of tuna and tuna-like species in the IATTC Convention Area. The IATTC Convention Area is defined as waters of the EPO within the area bounded by the west coast of the Americas and by 50° N. latitude, 150° W. longitude, and 50° S. latitude.

Nominal catch data from the IATTC shows that purse seine sets on floating objects, unassociated sets and dolphin sets all show decreasing trends of oceanic whitetip shark since 1994 (IATTC 2007). In particular, presence of oceanic whitetip sharks on sets with floating objects, which are responsible

for 90 percent of the shark catches in the EPO purse seine fishery, has declined significantly (Hall and Román 2013). Based on nominal catches per set as well as the frequency of occurrence of oceanic whitetip sharks in floating object sets, the species has practically disappeared from the fishing grounds, with a seemingly north to south progression. Similar trends are also seen in dolphin and school sets. These declines in nominal CPUE or the frequency of occurrence translates to a decline of 80–95 percent from the population levels in the late 1990s (Hall and Román 2013). Although there are various potential reasons for such reductions, including changes in fishing areas or methods, higher utilization rates, or some combination of factors, the increasing rarity of this species in EPO purse seine sets likely tracks closely with their relative abundance (Hall and Román 2016).

Similar levels of decline have also been observed across the Western and Central Pacific Ocean. Like the eastern Pacific, the oceanic whitetip shark was once one of the most abundant pelagic shark species throughout the tropical waters of the region. For example, tuna longline survey data from the 1950s indicate oceanic whitetip sharks comprised 28 percent of the total shark catch of fisheries south of 10° N. (Strasburg 1958). Likewise, Japanese research longline records during 1967–1968 indicate that oceanic whitetip sharks were among the most common shark species taken by tuna vessels in tropical seas of the Western and Central Pacific, and comprised 22.5 percent and 23.5 percent of the total shark catch west and east of the International Date Line, respectively (Taniuchi 1990). However, numerous sources of information indicate significant and ongoing abundance declines of oceanic whitetip sharks in this region. For example, a recent stock assessment conducted in the Western and Central Pacific, based on observer data from the Secretariat of the Pacific Community (SPC), estimated an 86 percent decline in spawning biomass from 1995 to 2009, with total biomass reduced to just 6.6 percent of the theoretical equilibrium virgin biomass (*i.e.,* a total decline of 93.4 percent; Rice and Harley 2012). Based on the results from the oceanic whitetip stock assessment, the median estimate of oceanic whitetip biomass in the Western Central Pacific as of 2010 was 7,295 tons (Rice and Harley 2012), which would be equivalent to a population of roughly 200,000 individuals (FAO 2012). An updated assessment analyzing various abundance indices, including standardized CPUE, concluded that the oceanic whitetip shark continues to decline throughout the tropical waters of the Western and Central Pacific (Rice *et al.,* 2015), indicating a severely depleted population of oceanic whitetip shark across the region with observations of the species becoming increasingly rare. Similar results were found in analyses of CPUE data from the Hawaii-based PLL fishery, where oceanic whitetip shark showed a decline in relative abundance on the order of ≥90 percent from 1995–2010 (Clarke *et al.,* 2012; Brodziak *et al.,* 2013). It must be recognized that the closeness of the agreement between the trends in observer data from Hawaii and the observer data from the SPC for the entire Western and Central Pacific Ocean may be partly due to the use of datasets that partially overlap for years prior to 2005. Still, even after 2005, the trends show similar results suggesting that the patterns are representative of regional trends in oceanic whitetip abundance. A preliminary update of the Brodziak *et al.* (2013) study with 4 additional years of data (2011–2014) indicates a potential relative stability in the population size at a post-decline depressed state (Young *et al.,* 2016). Nonetheless, the ERA team concluded, and we agree, that the levels of significant and ongoing population decline observed in these studies indicate that these declines are not just local or regional, but rather a Pacific-wide phenomenon, with no significant indication that these trends have reversed.

In the Northwest Atlantic, the oceanic whitetip shark was described historically as widespread, abundant, and the most common pelagic shark in the warm parts of the North Atlantic (Backus *et al.,* 1956). Several studies have been conducted to determine trends in abundance of various shark species, including the oceanic whitetip shark. Baum *et al.,* (2003) analyzed logbook data for the U.S. PLL fleets targeting swordfish and tunas, and reported a 70 percent decline in relative abundance for the oceanic whitetip shark from 1992 to 2000. Similarly, Baum and Myers (2004) compared longline CPUE from research surveys from 1954–1957 to observed commercial longline sets from 1995–1999, and determined that the oceanic whitetip had declined by more than 150-fold, or 99.3 percent (95 percent; Confidence Interval (CI): 98.3–99.8 percent) in the Gulf of Mexico during that time. However, the methods and results of Baum *et al.* (2003) and Baum and Myers (2004) were challenged on the basis of whether correct inferences were made regarding the magnitude of shark population declines in the Atlantic (see discussions in Burgess *et al.,* (2005b) and Burgess *et al.,* (2005a)). Of particular relevance to the oceanic whitetip, Burgess *et al.,* (2005b) noted that the change from steel to monofilament leaders between the 1950s and 1990s could have reduced the catchability of all large sharks, and the increase in the average depth of sets during the same period could have reduced the catchability of the surface-dwelling oceanic whitetip (FAO 2012). Later, Driggers *et al.,* (2011) conducted a study on the effects of different leader materials on the CPUE of oceanic sharks and determined that with equivalent methods but using a wire leader, the catch rates of Baum and Myers (2004) for the recent period would have been 0.55 rather than 0.02 (as estimated by Baum and Myers (2004) using nylon leaders). Comparing the recent 0.55 value with the Baum *et al.* (2003) value of 4.62 for the 1950s gave an estimated extent of decline of 88 percent (FAO 2012). In a re-analysis of the same logbook dataset analyzed by Baum *et al.* (2003) for the Northwest Atlantic using a similar methodology, Cortés *et al.,* (2007) reported a 57 percent decline from 1992–2005. The decline was largely driven by a 37 percent decline from 1992 to 1993 and a subsequent decline of 53 percent from 1997 to 2000, after which the time series remained stable (2000–2005). However, an analysis of the observer dataset from the same fishery resulted in a less pronounced decline than that of the logbook analysis, with a 9 percent decline in abundance from the same period of 1992–2005. Finally, the ERA team conducted an updated analysis (1992–2015) using the same observer data analyzed by Cortés *et al.* (2007). Similar to previous analyses, there was high variability in the initial years of the time series, but overall, the analysis conducted by the ERA team showed ~4 percent decline over the time series, with the overall trend indicative that the population may have stabilized (Young *et al.* 2016). Although observer data are generally regarded as more reliable than logbook data for non-target shark species (Walsh *et al.,* 2002), it should be noted that the sample size of oceanic whitetip shark in the observer data was substantially smaller than for other species, and thus the trends estimated should be regarded with caution. Additionally, although misreporting and species misidentification are likely to be much more prevalent in logbooks,

which can obscure abundance trends, misidentification is not considered an issue for the oceanic whitetip, whereas it is more problematic for other species such as night shark and other *Carcharhinus* species. It should also be noted that fishing pressure on the oceanic whitetip shark began decades prior to the time series covered in these studies (with the exception of the Baum and Myers (2004) study), thus the percentage declines discussed here do not represent percentage declines from historical virgin biomass. Therefore, given all of the caveats and limitations of the studies and analyses discussed above, it is likely that the oceanic whitetip shark population in the Northwest Atlantic and Gulf of Mexico experienced significant historical declines; however, relative abundance of oceanic whitetip shark may have stabilized in the Northwest Atlantic since 2000 and in the Gulf of Mexico/Caribbean since the late 1990s at a significantly diminished abundance (Cortés *et al.* 2007; Young *et al.* 2016).

In other areas of the oceanic whitetip shark range, robust and reliable quantitative abundance data are limited or lacking altogether. In the South Atlantic, the oceanic whitetip has been characterized as one of the most abundant species of pelagic shark in the southwestern and equatorial region. For example, the oceanic whitetip was the third most commonly caught shark out of 33 shark species caught year-round in the prominent Brazilian Santos longline fishery, and one of 7 species that comprised >5 percent of total shark catches from 1971–1995 (Amorim 1998). In Itajai, southern Brazil, oceanic whitetip sharks were considered ''abundant'' and ''frequent'' in the surface longline and gillnet fleets, respectively, from 1994–1999 (Mazzoleni and Schwingel 1999). Likewise, in equatorial waters off the northeastern coast of Brazil, the oceanic whitetip shark was historically reported as the second most abundant elasmobranch species, outnumbered only by the blue shark (*P. glauca*), in research surveys conducted within the EEZ of Brazil, and comprised 29 percent of the total elasmobranch catch in the 1990s (Lessa *et al.,* 1999). From 1992–2002, oceanic whitetip CPUE in this area averaged 2.18 individuals/1,000 hooks (Domingo *et al.,* 2007); more recently, however, the average CPUE recorded in this same area from 2004–2010 of 0.1–0.3 individuals/1,000 hooks (Frédou *et al.,* 2015) is much lower. Additionally, none of the other areas within this region exhibit CPUE rates comparable to the rates seen in the 1990s. Further, demographic analyses from the largest oceanic whitetip shark catching country in the South Atlantic (*i.e.,* Brazil) indicate abundance declines similar to the Northwest Atlantic of 50–79 percent in recent decades (Santana *et al.,* 2004; ICMBio 2014) and coincide with significant declines in catches of oceanic whitetip shark reported by Brazil to the International Commission for the Conservation of Atlantic Tunas (ICCAT). As a result of these declining trends, the oceanic whitetip shark was designated as a ''species threatened by overexploitation'' in 2004 by Brazil's Ministério do Meio Ambiente (Ministry of Environment), and listed under Annex II of Brazil's Normative Ruling No. 5 of May 21, 2004 that recognizes endangered species and species threatened by overexploitation, including aquatic invertebrates and fish. In 2014, Brazil finalized its national assessment regarding the extinction risk of Brazilian fauna, and listed the oceanic whitetip shark as Vulnerable under Brazil's ''Lista Nacional Oficial de Espécies da Fauna Ameaçadas de Extinção—Peixes e Invertebrados Aquáticos'' (National Official List of Endangered Species of Fauna—Fish and Aquatic Invertebrate; ICMBio 2014).

Elsewhere across the South Atlantic, the oceanic whitetip shark appears to be relatively rare, with low patchy abundance. For example, in 6 years of observer data from the Uruguayan longline fleet (1998–2003), catches of oceanic whitetip shark were described as ''occasional'' with CPUE rates of only 0.006 individuals/1,000 hooks (Domingo 2004). However, during this study, the Uruguayan longline fleet operated between latitudes 26° and 37° S. and within sea surface temperatures ranging between 16° and 23 °C, which are largely lower than the temperature preferences of the species. Domingo (2004) noted that it is unknown whether the species has always occurred in low numbers in this region of the South Atlantic, or whether the population has been affected significantly by fishing effort. More recently, Domingo *et al.* (2007) found similar results, with the highest CPUE recorded not exceeding 0.491 individuals/1,000 hooks. In total, only 63 oceanic whitetips were caught on 2,279,169 hooks and 63 percent were juveniles. All catches occurred in sets with sea surface temperatures ≥22.5 °C (Domingo *et al.,* 2007). Again, this data does not indicate whether a decline in the population has occurred, rather, it clearly reflects the low abundance of the species in this area (Domingo *et al.,* 2007). The low abundance of oceanic whitetip in this area may be the result of the species' tendency to remain in warmer, tropical waters farther north. Alternatively, it could be a result of historical fishing pressure in the region.

Finally, in a study that synthesized information on shark catch rates (based on 871,177 sharks caught on 86,492 longline sets) for the major species caught by multiple fleets in the South Atlantic between 1979 and 2011, catch rates of most species (with the exception of *P. glauca* and *A. superciliosus*), including oceanic whitetip, declined by more than 85 percent (Barreto *et al.,* 2015). However, it should be noted that there are some caveats and limitations to this study, including high and overlapping confidence intervals, raising the possibility that the trends may be noise rather than truly tracking abundance. Nonetheless, while robust abundance data is lacking in the South Atlantic, the best available information, including demographic analyses and fisheries data across the region from 1979–2011, indicate the oceanic whitetip shark has potentially experienced a significant population decline ranging from 50–85 percent (Santana *et al.* 2004; ICMBio 2014; Barreto *et al.* 2015). Overall, the ERA team concluded, and we agree, that the oceanic whitetip population in the South Atlantic has likely experienced historical declines similar to levels seen in the Northwest Atlantic, and this population decline is likely ongoing, although we acknowledge some uncertainty regarding the available data from this region.

Abundance information from the Indian Ocean is relatively deficient and unreliable. Nonetheless, historical research data shows overall declines in both CPUE and mean weight of oceanic whitetip sharks (Romanov *et al.,* 2008), and anecdotal reports suggest that oceanic whitetips have become rare throughout much of the Indian Ocean over the past 20 years (IOTC 2015a). The Indian Ocean Tuna Commission (IOTC) also reports that despite limited data, oceanic whitetip shark abundance has likely declined significantly over recent decades. Furthermore, a few quantitative studies provide some additional information indicative of declining trends of oceanic whitetip in the Indian Ocean. For example, data from an exploratory fishing survey for large pelagic species conducted off the eastern seaboard of the Maldives from 1987–1988 reported that oceanic whitetips represented 29 percent of the sharks caught by longline and 10 percent of the sharks caught by gillnet in all fishing zones (Anderson and Waheed 1990). During this survey, the

average CPUE for all sharks was 48.7 sharks/1,000 hooks. Applying the percentage of oceanic whitetips in the catch to the total CPUE, it is estimated that the CPUE of oceanic whitetip in this period was about 1.41 individuals/100 hooks (FAO 2012). More recently, Anderson *et al.* (2011) estimated that the average CPUE of oceanic whitetip in the shark longline fishery was only 0.20 individuals per fishing vessel (or approximately 0.14 sharks/100 hooks), and estimated the species contributed only 3.5 percent of the shark landings. This would represent a 90 percent decline in abundance between 1987–1988 and 2000–2004. Such a level of decline would be consistent with the decrease in the proportion of oceanic whitetip in the catch (from 29 percent of longline shark catch in 1987–1988 to just 3.5 percent of landings in 2000–2004) and also with anecdotal information reporting a marked decrease in sightings of oceanic whitetip sharks off northern and central Maldives (Anderson *et al.,* 2011; FAO 2012). The IOTC Working Party on Ecosystems and Bycatch (WPEB) noted the following on the aforementioned studies: ''Data collected on shark abundance represents a consistent time series for the periods 1987–1988 and 2000–2004, collected with similar longline gear, and that the data was showing a declining trend in oceanic whitetip shark abundance, which is a potential indicator of overall stock depletion.'' The WPEB further noted that it could be related to localized effects, although this was deemed unlikely as oceanic whitetip sharks are wide-ranging and abundance trends from long-term research conducted by the former Soviet Union between the 1960s and 1980s indicate a similar decline of oceanic whitetip sharks, and that ''sightings of this species in Maldives and Réunion islands is now quite uncommon'' (IOTC 2011).

Similarly, surveys of the tuna longline fishery in India indicate a likely decline of oceanic whitetip shark abundance. In Andaman and Nicobar waters, where catches of sharks are prominent and contribute 35.15 percent of the catch by number and 51.46 percent by weight, John and Varghese (2009) reported that the oceanic whitetip shark comprised 4.6 percent of the total shark catch from 1984–2006. However, in more recent surveys, Varghese *et al.,* (2015) report that oceanic whitetip shark comprised only 0.23 percent of the total shark catch from 2004–2010 in this area, which is significantly lower than what John and Varghese (2009) reported previously. Off the West Coast of India in the eastern Arabian Sea, the percentage of oceanic whitetip sharks in the overall shark catch also declined slightly from 0.6 percent to 0.45 percent. Overall, Varghese *et al.* (2015) shows that the index of relative abundance of sharks was considerably lower than that found in earlier studies, indicating a decline in abundance over the years. While the lack of standardized CPUE trend information for oceanic whitetip in these studies makes it difficult to evaluate the potential changes in abundance for this species in this region, based on the best available information, it is likely that the oceanic whitetip has experienced some level of population decline in this region. Additionally, it is important to note that India has objected to IOTC Resolution 13–06, which prohibits the retention of oceanic whitetip sharks (since 2013) in IOTC managed fisheries, and thus this Resolution is not binding on India. Therefore, oceanic whitetip sharks may still be retained in Indian fisheries.

Other studies on the abundance trends of oceanic whitetip shark in the Indian Ocean, including analyses of standardized CPUE indices from Japanese and Spanish longline fisheries, also indicate potential population declines, although trends are conflicting. Two studies estimate standardized CPUE for oceanic whitetip shark in the Japanese longline fleet operating in the Indian Ocean (Semba and Yokawa 2011; Yokawa and Semba 2012). In the first 2011 study, CPUE reached its peak in 2003 and then showed a gradually decreasing trend thereafter. Prior to 2003, large fluctuations in oceanic whitetip CPUE are attributed to changes in reporting requirements rather than the actual trend of the stock, as those years represent the introduction phase of a new recording system. The data showed low values in 2000 and 2001 (attributed to extremely low catches), and a gradual decreasing trend from 2003 to 2009. The authors interpreted a 40 percent decline in CPUE as an indication of a decrease in abundance of the population (FAO 2012; Semba and Yokawa 2011). Yokawa and Semba (2012) updated the data to 2011 using a modified data filtering method, which produced a rather similar and somewhat flattened trend.

Standardized CPUE of the Spanish longline fishery from 1998 to 2011 showed large historical fluctuations and a general decreasing trend of oceanic whitetip shark from 1998–2007, followed by an increase thereafter in the last 4 years of the time series. Overall, the magnitude of decline in this study was estimated to be about 25–30 percent (Ramos-Cartelle *et al.,* 2012); however, it should be noted that due to the high variability of the standardized catch rates between consecutive years and limited availability of specimens in some years, this index could be representative of a particular period rather than a plausible indicator of the stock abundance at large (Ramos-Cartelle *et al.,* 2012). Specifically, the data yielded support for the relatively low prevalence described for this species in the commercial fishery of surface longline fleets targeting swordfish in waters with temperatures generally lower than those selected by this species as its preferred habitat (García-Cortés *et al.,* 2012; Ramos-Cartelle *et al.,* 2012).

Finally, a study that incorporated data from the tropical French and Soviet Union purse seine fisheries analyzed the interaction between oceanic whitetip sharks and the tropical purse seine fisheries in terms of occurrence per set (not taking into account the number of individuals caught per set) from the mid-1980s to 2014. Results showed a marked change in the proportion of fish aggregating device (FAD) sets with oceanic whitetips present, fluctuating around 20 percent in the mid-1980s and 1990s, and then dropping to less than 10 percent from 2005 onwards. Taking into account that the number of FADs has greatly increased since the 1990s (Dagorn *et al.,* 2013; Maufroy *et al.,* 2015; Tolotti *et al.,* 2015b), the change in the proportion of FADs with oceanic whitetip sharks by more than 50 percent could indicate an important population decline (Tolotti *et al.,* 2015b). Alternatively, the decline of oceanic whitetip shark occurrence per FAD could be the result of a sharp increase of FAD densities combined with a small and stable population size. In this scenario, the proportion of oceanic whitetips/FAD would simply decrease because there aren't enough sharks to aggregate around that many FADs. However, although the analyzed data does not provide a straightforward interpretation (as both hypotheses seem plausible), given the declines indicated in other studies throughout the Indian Ocean, it seems more plausible that the marked decline observed in Tolotti *et al.* (2015b) is indicative of a declining abundance trend rather than a small, stable population.

Despite the varying magnitudes of reported declines of oceanic whitetip shark in the Indian Ocean, the ERA team agreed that given the significantly high fishing pressure and catches of oceanic whitetip shark in the Indian Ocean (which are likely severely underreported), combined with the

species' high at-vessel mortality rates in longlines in this area and the species' low-moderate productivity (see the *Overutilization for Commercial, Recreational, Scientific, or Educational Purposes* section below for more details), it is likely that the species will continue to experience population declines in this region into the foreseeable future.

Overall, in areas where oceanic whitetip shark data are available, trends from throughout the species' global range show large historical declines in abundance (*e.g.,* Eastern Pacific, Western and Central Pacific, Atlantic and Indian Oceans). Recent evidence suggests that most populations are still experiencing various levels of decline due to continued fishing pressure and associated mortality. Further, the potential stabilization of the abundance trends at depleted levels seen in observer data from the Northwest Atlantic and Hawaiian PLL fisheries represents a small contingent of the global population. Thus, the best available scientific and commercial data available suggest that the global population of oceanic whitetip continues to experience various levels of decline throughout the majority of its range.

Growth Rate/Productivity

The ERA team expressed some concern regarding the effect of the oceanic whitetip shark's growth rate and productivity on its risk of extinction. Sharks, in general, have lower reproductive and growth rates compared to bony fishes. The ERA team noted that this species has some life history parameters that are typically advantageous, and some that are likely detrimental to the species' resilience to excessive levels of exploitation. For example, in comparison to other shark species, the oceanic whitetip is relatively productive, with an intrinsic rate of population increase (r) of 0.094–0.121 per year (Cortés 2010; 2012). The oceanic whitetip also ranked among the highest in productivity when compared with other pelagic shark species in terms of its pup production, rebound potential, potential for population increase, and for its stochastic growth rate (Chapple and Botsford 2013). Although the oceanic whitetip shark has a relatively high productivity rate compared to other sharks, it is still considered low for a fish species (r <0.14). Additionally, the species has a fairly late age of maturity (~6–9 years for females depending on the location), has a lengthy gestation period of 9–12 months, and only produces an average of 5–6 pups every two years. Thus, while this species may generally be able to withstand low to moderate levels of exploitation, given the high level of fishing mortality this species has experienced and continues to experience throughout the majority of its range, its life history characteristics may only provide the species with a limited ability to compensate. Therefore, based on the best available information, these life history characteristics likely pose a risk to this species in combination with threats that reduce its abundance, such as overutilization.

Spatial Structure/Connectivity

The oceanic whitetip shark is a relatively widespread species that may be comprised of distinct stocks in the Pacific, Indian, and Atlantic oceans. The population structure and exchange between these stocks is unknown; however, based on genetic information, telemetry data, and temperature preferences it is unlikely that there is much exchange between populations in the Atlantic and Indo-Pacific Oceans. However, recent genetic data suggests potentially significant population structure within the Atlantic, which may be underpinned by the fact that this species exhibits a high degree of philopatry in some locations (*i.e.,* the species returns to the same site for purposes of breeding or feeding, etc.). While the population structure observed in the Atlantic, despite no physical or oceanographic barrier, could result in localized depletions in areas where fishing pressure is high (*e.g.,* Brazil), habitat characteristics that are important to this species are unknown. The species is highly mobile, and there is little known about specific migration routes. It is also unknown if there are source-sink dynamics at work that may affect population growth or species' decline. There is no information on critical source populations to suggest spatial structure and/or loss of connectivity are presently posing demographic risks to the species. Thus, based on the best available information, there is insufficient information to support the conclusion that spatial structure and connectivity currently pose a significant demographic risk to this species.

Diversity

As noted previously in the *Population Structure and Genetics* section, recent research suggests the oceanic whitetip shark has low genetic diversity (0.33 percent ± 0.19 percent; Ruck 2016), which is about half that of the closely related silky shark (0.61 percent ± 0.32 percent; Clarke *et al.,* (2015a)). The ERA team noted that the relatively low mtDNA genetic diversity of the oceanic whitetip raises potential concern for the future genetic health of this species, particularly in concert with steep global declines in abundance. Based on the fact that exploitation of the oceanic whitetip shark began with the onset of industrial fishing in the 1950s, only 5–7 generations of oceanic whitetip have passed since the beginning of this exploitation. Thus, the low genetic diversity of oceanic whitetip shark likely reflects historic levels, and the significant global declines are not yet reflected genetically (Ruck 2016). The ERA team noted that this may be a cause for concern in the foreseeable future, since a species with already relatively low genetic diversity undergoing significant levels of exploitation may increase the species' risk in terms of reduced fitness and evolutionary adaptability to a rapidly changing oceanic environment as well as potential extirpations. The ERA team also noted that low genetic diversity does not necessarily equate to a risk of extinction in and of itself for all species; but, in combination with low levels of abundance and continued exploitation, low genetic diversity may pose a viable risk to the species in the foreseeable future.

Summary of Factors Affecting the Oceanic Whitetip Shark

As described above, section 4(a)(1) of the ESA and NMFS' implementing regulations (50 CFR 424.11(c)) state that we must determine whether a species is endangered or threatened because of any one or a combination of the following factors: The present or threatened destruction, modification, or curtailment of its habitat or range; overutilization for commercial, recreational, scientific, or educational purposes; disease or predation; the inadequacy of existing regulatory mechanisms; or other natural or manmade factors affecting its continued existence. The ERA team evaluated whether and the extent to which each of the foregoing factors contributed to the overall extinction risk of the global oceanic whitetip shark population. We summarize information regarding each of these threats below according to the factors specified in section 4(a)(1) of the ESA. Available information does not indicate that destruction, modification or curtailment of the species' habitat or range, disease or predation, or other natural or manmade factors are operative threats on this species; therefore, we do not discuss those further here. See Young *et al.* (2016) for

additional discussion of all ESA section 4(a)(1) threat categories.

Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Threats to the oceanic whitetip shark related to overutilization stem from mortality in commercial fisheries, largely driven by demand of the international shark fin trade, bycatch-related mortality, as well as illegal, unreported, and unregulated (IUU) fishing. The oceanic whitetip shark is generally not a targeted species, but because of its tendency to remain in the surface mixed layer of the water column (0–152 m depth) and in tropical latitudes where fishing pressure is often most concentrated for target species such as tuna, the species is frequently encountered and suffers high mortality rates in numerous fisheries throughout its global range. The oceanic whitetip shark is also considered a preferred species for the international fin trade because its large, morphologically distinct fins obtain a high value in the Asian fin market. The high value and demand for oceanic whitetip fins incentivizes the retention and subsequent finning of oceanic whitetip sharks when caught, and thus represents the main economic driver for retention and mortality of this species in commercial fisheries throughout its global range. In fact, growth in demand from the fin trade during the 1990s coincided with a pattern of soaring catches of oceanic whitetip sharks in numerous fisheries across the globe. Catches generally peaked from 1995 to 2000 and were followed by precipitous declines over the next 10 years due to severe overfishing (Hazin *et al.,* 2007; Lawson 2011; Clarke *et al.,* 2012; Hasarangi *et al.,* 2012; Brodziak *et al.,* 2013; Hall and Román 2013). The oceanic whitetip is regularly caught incidentally with PLLs, purse seines, handlines, troll and occasionally pelagic and even bottom trawls (Compagno 1984). In addition to mortality as a result of retention and finning in commercial fisheries, oceanic whitetip sharks experience varying levels of bycatch-related fishing mortality, including at-vessel and post-release mortality. Finally, recent reports of illegal trafficking of oceanic whitetip shark fins suggest the species may be heavily impacted by IUU fishing activities. Therefore, the ERA team assessed the following factors that may have contributed or continue to contribute to the historical and ongoing overutilization of the oceanic whitetip shark: Retention and finning in commercial fisheries for purposes of the international fin trade, incidental bycatch in commercial fisheries (including impacts of at-vessel and post-release mortality), and IUU fishing activities.

In the EPO, the oceanic whitetip shark is caught on a variety of gear, including longline and purse seine gear targeting tunas and swordfish. They are also believed to be taken in artisanal fisheries in many countries around the EPO (IATTC 2007). To date, the IATTC has not conducted a stock assessment for the oceanic whitetip shark. However, species-specific catch estimates based on observer data from the purse seine fishery are available from the IATTC observer database. As noted previously in the *Demographic Risk Assessment—Abundance section,* the oceanic whitetip was the second most abundant shark in the catches behind the silky shark, and comprised approximately 9 percent of the total shark catch from 1993–2009 (Hall and Román 2013). In floating object sets, which are responsible for 90 percent of oceanic whitetip shark catches, capture probability of the species has decreased over time from a high of 30 percent capture rate per set between 1994 and 1998, to less than 5 percent from 2004 to 2008 (Morgan 2014). Estimated catches of oceanic whitetip sharks in all purse seine sets peaked with approximately 9,709 individuals caught in 1999; however, within 10 years catches dropped dramatically to an estimated 379 oceanic whitetip sharks caught in 2005. Estimated catches of oceanic whitetip shark continue to decline in the EPO tropical tuna purse seine fishery, with only 120 individuals caught in 2015. This drastic decline in oceanic whitetip catches is in stark contrast to catches of the closely related silky shark, which have remained relatively constant over the same time period. Further, size trends in this fishery show that small oceanic whitetip sharks <90 cm, which comprised 21.4 percent of the oceanic whitetips captured in 1993, have been virtually eliminated (Hall and Román 2013), indicating the possibility of recruitment failure in the population. During this same time period, there was an increase in both the total catch of tunas by purse seiners that employ drifting FADs and the number of FADs deployed (Eddy *et al.,* 2016; Hall and Román 2016). Over the past decade, the total number of FADs deployed per year has continued to increase steadily, from about 4,000 in 2005 to almost 15,000 in 2015 (Hall and Román 2016). The total number of sets deployed has also continued increasing, with 2015 being the highest record observed. Thus, given the continued increase in fishing effort and expansion of the tropical tuna purse seine fleet in the Eastern Pacific, fishing pressure and associated mortality of oceanic whitetip sharks are expected to continue.

Oceanic whitetip sharks are also sometimes a significant component of the bycatch in EPO longline fisheries, and are thought to be taken by local artisanal fisheries as well. While observer data is not available from these fisheries, some limited information is available from the various countries that fish in these waters. For example, the oceanic whitetip shark was identified as one of several principal species taken by Mexican fisheries targeting pelagic sharks (Sosa-Nishizaki *et al.,* 2008). Farther south, the oceanic whitetip shark has also been recorded in the catches of the Ecuadorian artisanal fishery. In an analysis of landings from the five principal ports of the Ecuadorian artisanal fishery from 2008–2012, 37.2 mt of oceanic whitetip shark were recorded out of a total 43,492.6 mt of shark catches (Martinez-Ortiz *et al.,* 2015). Although limited, this information confirms that in addition to significant fishing pressure by the tropical tuna purse seine fishery, oceanic whitetip sharks are taken in longline and artisanal fisheries in unknown quantities. Based on the foregoing information, the ERA team concluded, and we agree, that overutilization of the oceanic whitetip shark is ongoing in this region, with no indication that these pressures will cease in the foreseeable future.

In the Western and Central Pacific Ocean (WCPO), the oceanic whitetip shark commonly interacts with both longline and purse seine fisheries throughout the region, with at least 20 member nations of the Western and Central Pacific Fisheries Commission (WCPFC; the RFMO responsible for the conservation and management of tuna and tuna-like species in the region) recording the species in their fisheries. As noted previously, the oceanic whitetip historically comprised between 20–28 percent of the total shark catch in some industrial longline fisheries during the 1950s and 1960s (Strasburg 1958; Taniuchi 1990). In this region, where sharks represent 25 percent of the longline fishery catch (Molony 2007), more recent observer data show that the oceanic whitetip shark represented only 6.3 percent of the total shark catch from 1991–2011(with blue shark comprising the large majority at ~80.5 percent; Lawson 2011). In the purse seine fishery, the oceanic whitetip was once the second most common species of shark caught as bycatch in the WCPO,

and comprised approximately 4.2 percent of the total shark catch from 1994–2011 (Lawson 2011). In addition to being caught indirectly as bycatch, observer records indicate that some targeting of oceanic whitetip shark has occurred historically in the waters near Papua New Guinea, and, given the high value of oceanic whitetip fins and low level of observer coverage in the region, it is likely that targeting has occurred in other areas as well (Rice and Harley 2012). Based on nominal and standardized catch rates for longline and purse seine fisheries, records of oceanic whitetip sharks in both fisheries have become increasingly rare over time, with catches of the species significantly declining since the late 1990s (Lawson 2011; Clarke *et al.,* 2011a). For example, estimated catches of oceanic whitetip shark in the WCPO longline fishery suggest that catches peaked in 1998 at ~249,000 individuals and declined to only ~53,000 individuals in 2009 (Lawson 2011). It should be noted that catches by the fleets of Indonesia and the Philippines were not included because neither observer nor effort data were available for these fleets. Over the same time period (from 1995 to 2009) rates of fishing mortality consistently increased, driven mainly by the increased effort in the longline fleet, and remained substantially above the maximum sustainable yield (MSY) (*i.e.,* the point at which there would be an equilibrium) for the species (Rice *et al.,* 2015). The previously discussed stock assessment report (Rice *et al.,* 2015) attributed the greatest impact on the species to bycatch from the longline fishery, and lesser impacts from target longline activities and purse-seining (Rice and Harley 2012). In fact, Rice *et al.* (2015) determined that fishing mortality on oceanic whitetip sharks in the WCPO has increased to levels 6.5 times what is sustainable, thus concluding that overfishing is still occurring.

As a result of continued and increasing fishing pressure in the WCPO, size trends for oceanic whitetip have also declined, which is indicative of overutilization of the species. For example, declining median size trends were observed in all regions and sexes in both longline and purse seine fisheries until samples became too scarce for analysis. These size trends were significant for females in the longline fishery (Regions 3 and 4; See Figure 1 in Clarke *et al.,* 2011a for the regional map), and for the purse seine fishery (Region 3). Regions 3 and 4 (*i.e.,* the equatorial region of the WCPO) represent the species' core habitat areas, and contain 98 percent of the operational-level reported purse seine sets and the majority of longline fishing effort (Clarke *et al.,* 2011a; Rice *et al.,* 2015). The decline in median size of female oceanic whitetip sharks is particularly concerning due to the potential correlation between maternal length and litter size, which has been documented in the Atlantic and Indian Oceans (Lessa *et al.* 1999, Bonfil *et al.* 2008). While Rice *et al.* (2015) more recently report that trends in oceanic whitetip median length are now stable, the majority of sharks observed are immature. In fact, 100 percent of oceanic whitetips sampled in the purse seine fishery have been immature since 2000 (Clarke *et al.,* 2012).

In the U.S. Pacific, the oceanic whitetip shark is a common bycatch species in the Hawaii-based PLL fishery. This fishery began around 1917, and underwent considerable expansion in the late 1980s to become the largest fishery in the state (Boggs and Ito 1993). This fishery currently targets tunas and billfish and is managed under the auspices of the Western Pacific Fishery Management Council (WPFMC). From 1995–2006, oceanic whitetip sharks comprised approximately 3 percent of the total shark catch (Brodziak *et al.,* 2013). Based on observer data from the Pacific Islands Regional Observer Program (PIROP), oceanic whitetip shark mean annual nominal CPUE decreased significantly from 0.428 sharks/1,000 hooks in 1995 to 0.036 sharks/1,000 hooks in 2010. This reflected a significant decrease in nominal CPUE on longline sets with positive catch from 1.690 sharks/1,000 hooks to 0.773 sharks/1,000 hooks, and a significant increase in longline sets with zero catches from 74.7 percent in 1995 to 95.3 percent in 2010. As discussed previously in the *Evaluation of Demographic Risks—Abundance* section, oceanic whitetip CPUE declined by more than 90 percent in the Hawaii-based PLL fishery since 1995 (Walsh and Clarke 2011; Brodziak *et al.,* 2013). Brodziak *et al.* (2013) concluded that relative abundance of oceanic whitetip declined within a few years of the expansion of the longline fishery, which suggests these fisheries are contributing to the commercial overutilization of oceanic whitetip within this portion of its range. It should be noted that while the Hawaii-based PLL fishery currently catches oceanic whitetip shark as bycatch, the majority of individuals are now released alive in this fishery and the number of individuals kept has been on a declining trend. For example, according to the U.S. National Bycatch Report First Edition Update 2 (see *www.st.nmfs.noaa.gov/observer-home/first-edition-update-2*) the shallow-set fishery released alive an estimated 91–96 percent of all oceanic whitetip sharks caught from 2011 to 2013. During the same time period, the deep-set fishery released alive an estimated 78–82 percent of all oceanic whitetip sharks caught. However, it is unknown how many of these sharks survived after being released. Nonetheless, this particular fishery may be less of a threat to the oceanic whitetip shark in the foreseeable future. However, across the WCPO as a whole, given the ongoing impacts to the species from significant fishing pressure (with the majority of effort concentrated in the species' core tropical habitat area), including significant declines in CPUE, biomass, and size indices, and combined with the species' relatively low-moderate productivity, it is likely that overutilization has been and continues to be an ongoing threat contributing to the extinction risk of the oceanic whitetip shark across the region.

The oceanic whitetip shark was also once described as the most common pelagic shark throughout the warm-temperate and tropical waters in the Atlantic and beyond the continental shelf in the Gulf of Mexico (Mather and Day 1954; Strasburg 1958). Oceanic whitetip sharks are taken in the Atlantic Ocean by longlines, purse seine nets, gillnets, trawls, and handlines; however, the large majority of the catch from 1990–2014 reported to ICCAT was caught by longline gear (Young *et al.,* 2016). Oceanic whitetip sharks have exhibited a range of at-vessel mortality rates in longline gear in the Atlantic Ocean between 11–34 percent (Beerkircher *et al.,* 2002; Coelho *et al.,* 2012; Fernandez-Carvalho *et al.,* 2015) and have been ranked as the 5th most vulnerable pelagic shark in an Ecological Risk Assessment that assessed 11 species of pelagic elasmobranchs (Cortes *et al.,* 2010). In total, approximately 2,430 mt of oceanic whitetip catches were reported to ICCAT from 1990–2014; however, this is likely a severe underestimation of the total amount of oceanic whitetip sharks taken from the Atlantic. For example, Clarke (2008) calculated trade-based estimates that indicate between 80,000–210,000 oceanic whitetip sharks were sourced from the Atlantic Ocean in 2003 alone to supply the Hong Kong fin market, which translates to approximately 3,000–8,000 mt.

In the Northwest Atlantic, the oceanic whitetip is caught incidentally as bycatch by a number of fisheries,

including (but not limited to) the U.S. Atlantic PLL fishery, the Cuban ''sport'' fishery (''sport'' = private artisanal and commercial), and the Colombian oceanic industrial longline fishery operating in the Caribbean (E-CoP16Prop.42, 2013). In the United States, oceanic whitetip sharks are caught as bycatch in PLL fisheries targeting tuna and swordfish in this region, with an estimated 8,526 individuals recorded as captured in U.S. fisheries logbooks from 1992 to 2000 (Baum *et al.,* 2003) and a total of 912 individuals recorded by observers in the NMFS Pelagic Observer Program from 1992–2015. Relative to target species, oceanic whitetip sharks are caught infrequently and only incidentally on PLL vessels fishing for tuna and tuna-like species. Landings and dead discards of sharks by U.S. PLL fishers in the Atlantic are monitored every year and reported to ICCAT. Overall, very few oceanic whitetip sharks were landed by the commercial fishery, except for two peaks of about 1,250 and 1,800 fish in 1983 and 1998, respectively, but otherwise total catches never exceeded 450 fish (NMFS 2009). Commercial landings of oceanic whitetip sharks in the U.S. Atlantic have been variable, but averaged approximately 1,077.4 lb (488.7 kg; 0.4887 mt) per year from 2003–2013. Although oceanic whitetip sharks have been prohibited on U.S. Atlantic commercial fishing vessels with pelagic longline gear onboard since 2011, they can still be caught as bycatch, caught with other gears, and are occasionally landed. However, since the ICCAT retention prohibition was implemented in 2011, estimated commercial landings of oceanic whitetip declined from 1.1 mt in 2011 to only 0.03 mt in 2013 (NMFS 2012; 2014). As discussed previously, the oceanic whitetip population size has likely declined significantly in this region due to historical exploitation of the species since the onset of industrial fishing (refer back to the *Demographic Risk Assessment—Abundance* section); however, results of the ERA team's analysis show that the oceanic whitetip shark population in this region has potentially stabilized since the 1990s/early 2000s (Young *et al.,* 2016). The potential stabilization of oceanic whitetip sharks occurred concomitantly with the first Federal Fishery Management Plan for Sharks in the Northwest Atlantic Ocean and Gulf of Mexico, which directly manages oceanic whitetip shark under the pelagic shark group, and includes regulations on trip limits and quotas. This indicates the potential efficacy of these management measures for reducing the threat of overutilization of the oceanic whitetip shark population in this region; therefore, under current management measures, including the implementation of ICCAT Recommendation 10–07 (see *Factor D—Inadequacy of Existing Regulatory Mechanisms* for more details), the threat of overutilization is not likely as significant in this area relative to other portions of the species' range.

In Cuba, some evidence suggests a historical decline of oceanic whitetip shark may have occurred, although this is uncertain. In the 1960s, the oceanic whitetip shark was characterized as the most abundant species off the northwestern coast of Cuba, but since 1985, a substantial decline was observed in some species, including the oceanic whitetip. Variations in fishing effort and changes in the fishery make it difficult to assess the present condition of the resource, but since 1981 there has been a tendency towards decline (Claro *et al.,* 2001). Recent monitoring studies of a prominent fishing base in Cojimar, Cuba recorded the oceanic whitetip shark comprising only 2–5 percent of the shark landings from 2008–2011 (Cuba Department of Fisheries 2016). In contrast, Valdés *et al.,* (2016) show a steady pattern of abundance for the oceanic whitetip shark in Cuban fishery landings along the northwestern coast from 2010 to 2016. However, sharks caught in Cuban fisheries are never discarded, but rather utilized for either human consumption or bait. Cuba is not a member of ICCAT, and thus ICCAT Recommendation 10–07 on the retention prohibition of oceanic whitetip sharks is not applicable in Cuban waters. Further, evidence suggests there is a prevalence of small, immature individuals in Cuban catches, which suggests the possibility of an important nursery area for this species in the region. However, because these animals are small and of less value to the fishermen, they are typically using the juvenile *C. longimanus* as bait while at sea, a practice which is likely in conflict with sustainable fisheries management and conservation objectives (Valedz *et al.,* 2016) and may be contributing to overutilization of the species.

Farther south, it is likely that overutilization is an ongoing threat in the South Atlantic. Although fishing effort has been high and began intensifying in the southern Atlantic Ocean after the 1990s (Camhi *et al.,* 2008), there is limited information on the catch rates or trends of oceanic whitetip sharks in this region. Oceanic whitetip sharks are taken as bycatch in numerous fisheries operating in the South Atlantic, including Brazilian, Uruguayan, Taiwanese, Japanese, Venezuelan, Spanish and Portuguese longline fisheries; however, the largest oceanic whitetip catching country in this region is Brazil. As noted in the *Evaluation of Demographic Risks—Abundance* section of this proposed rule, oceanic whitetips were historically reported as the second-most abundant shark in research surveys from northeastern Brazil between 1992 and 1997 (FAO 2012), with a high CPUE rate of 2.18 individuals per 1,000 hooks (Domingo *et al.,* 2007). More recently, however, average CPUE in this same area has seemingly declined. It also appears that the percentage of mature sharks has declined in recent years compared to surveys conducted in the 1990s. For example, the frequency of mature sharks ≥180 cm was higher in the 1990s than in years 2005–2009. It should be noted that the data from 2005–2009 represents a much larger area of the southwestern and equatorial Atlantic and has a much larger sample size (n = 1218; Tolotti *et al.,* 2013) than the results from the surveys conducted in the 1990s (n = 258; Lessa *et al.,* 1999). However, the two study areas do overlap and provide some indication that the size composition of oceanic whitetip sharks in the southwestern Atlantic may be shifting downwards. Catches of oceanic whitetip in the Brazilian tuna longline fishery have also shown a substantial decline, decreasing from ~640t in 2000 to only 80t in 2005 (Hazin *et al.,* 2007). According to the ICCAT nominal catch database, catches of oceanic whitetip shark by Brazilian vessels continued to decline, with 0 mt reported from 2009–2012 and only 12 mt from 2013–2014. Although robust standardized CPUE data are not available for the species, making it difficult to evaluate whether the decline in catches resulted from decreased abundance or from changes in catchability, related, for instance, to targeting strategies (Hazin *et al.,* 2007), a recent tagging study indicates that the preferred horizontal and vertical habitat of oceanic whitetip shark, including potential nursery areas, is heavily impacted by the industrial longline fishery. Telemetry data provides evidence that the equatorial region off Northeast Brazil is an area where the oceanic whitetip shark shows a high degree of philopatry (*i.e.,* site fidelity). This same area also happens to be where the highest level of fishing effort is concentrated. For example, from 1999–2011, despite a wide distribution

of fishing sets, the area with the highest effort concentration by the Brazilian longline fleet was bound by the 5° N. and the 15° S. parallels and by the 040° W. and 035° W. meridians (*i.e.,* the equatorial region of Northeast Brazil). Thus, the majority of fishing effort by the Brazilian fleet directly overlaps the preferred habitat area of oceanic whitetip sharks (Tolotti *et al.,* 2015a). Further, many studies show a substantially high percentage of juveniles in the catches from this region (Coelho *et al.,* 2009; Tambourgi *et al.,* 2013; Tolotti *et al.,* 2013; Frédou *et al.,* 2015), which suggests the presence of nursery habitat. For example, Tambourgi *et al.* (2013) found that 80.5 percent of females were immature and 72.4 percent of males were immature in the Brazilian pelagic longline fishery between December 2003 and December 2010. Thus, it is likely that the intensive fishing pressure of oceanic whitetip across its preferred vertical and horizontal habitat, including nursery areas in Brazilian waters, is negatively impacting oceanic whitetip sharks at all life stages, and contributing to the overutilization of the species. In addition to information from Brazil, a recent study that synthesized information on shark catch rates for the major shark species caught by multiple fleets in the South Atlantic from 1979 and 2011 (*e.g.,* Belize, Bolivia, Brazil, Canada, Spain, Guyana, Honduras, Iceland, Japan, Saint Kitts and Nevis, Korea, Morocco, Panama, Portugal, Taiwan, United Kingdom, Uruguay, United States, Saint Vincent and the Grenadines, and Vanuatu) concluded that declines of many shark species, including the oceanic whitetip, coincided with significant fishing effort expansion, a lack of regulatory measures to deal with shark bycatch, finning and directed fishing for sharks by some fleets (Barreto *et al.,* 2015). Based on the foregoing information, the ERA team concluded, and we agree, that overutilization in the South Atlantic Ocean is likely a threat contributing to the oceanic whitetip's risk of extinction in the foreseeable future.

Overutilization is also likely a threat to oceanic whitetip sharks in the Indian Ocean. The oceanic whitetip is reported as bycatch in all three major fisheries operating in the Indian Ocean; the species is considered ''frequent'' in both longline and purse seine fisheries, and ''very frequent'' in the gillnet fishery (Murua *et al.,* 2013b), with gillnet fisheries reporting the highest nominal catches of sharks in 2014, and making up nearly 40 percent of total catches (Ardill *et al.,* 2011; IOTC 2015a). Although information from this region is limited and catch data are severely underreported, the IOTC (the RFMO that manages tuna and tuna-like species in the Indian Ocean and adjacent waters) reports that catches of oceanic whitetip shark are ranked as ''High,'' meaning the accumulated catches from 1950–2010 make up 5 percent or more of the total catches of sharks recorded (Herrera and Pierre 2011). In fact, a recent study estimated that the oceanic whitetip shark comprises 11 percent of the total estimated shark catch in the Indian Ocean (Murua *et al.,* 2013a). It is also ranked as the 5th most vulnerable shark species caught in longline fisheries in the region (out of 16 species assessed) and the most vulnerable shark species caught in purse seine gear due to its high susceptibility (Murua *et al.,* 2012; IOTC 2015a). Oceanic whitetip sharks also exhibit relatively higher at-vessel mortality rates in longlines in this region compared to other regions (*i.e.,* 58 percent; IOTC 2015a) and likely have high mortality rates in purse seine and gillnet fisheries as well.

The main fleets catching oceanic whitetip in the Indian Ocean in recent years (2011–2014) include: Indonesia, Sri Lanka, I.R. Iran, EU (Spain), China, Madagascar, and Seychelles. The reporting of catches of oceanic whitetip sharks shows an unusual trend in 2013 and 2014, with 5,000+ mt reported to the IOTC. These trends are dominated by the Sri Lankan combination longline-gillnet fisheries, and an addition of proportionately very large catches by India (IOTC 2015b). Prior to the unusual trend in 2013 and 2014, the trend in oceanic whitetip catch shows a substantial increase throughout the 1990s, which likely corresponds with the rise in the shark fin trade (Clarke *et al.,* 2007), a peak at 3,050 mt in 1999, followed by a sharp and continued decline in the 2000s. Although the IOTC database is constrained by a number of limitations, information from some fleets catching oceanic whitetip shark indicate declines in catches as well. For example, from 1996–2004, landings of oceanic whitetip in Sri Lanka peaked at approximately 3,000 mt in 1999 and show a declining trend thereafter (Hasarangi *et al.,* 2012) to less than 300 mt in 2014. It is only in the last two years (2013 and 2014) that annual shark production has seen a significant decline in Sri Lanka due to regulatory measures (Jayathilaka and Maldeniya 2015). Most recently, Sri Lanka reported only 88 mt of oceanic whitetip shark catches to IOTC in 2015. Thus, the decline in oceanic whitetip catches in Sri Lanka occurred prior to the implementation of any regulatory measures, and may therefore be indicative of a population decline in Sri Lankan waters as a result of overutilization. Similarly, the substantial decline of oceanic whitetip sharks in the Maldives, from comprising 29 percent of the longline shark catch in the 1980s to only 3.5 percent of landings from 2000–2004 (refer back to the *Demographic Assessment—Abundance* section of this proposed rule), is likely the result of overutilization of the species. In fact, Anderson *et al.* (2011) determined that the shark stocks that supported the shark fishery were sequentially overfished, with the decline in pelagic shark catches the result of high (and likely unsustainable) levels of fishing by overseas fisheries.

The IOTC's Working Group on Ecosystems and Bycatch stated that at current catch levels (*i.e.,* average of 347 mt prior to 2013), the Indian Ocean stock of oceanic whitetip was at considerable risk. Given the previous discussion regarding likely abundance declines in this region, combined with the high level of fishing pressure on oceanic whitetip sharks in the Indian Ocean and the species' low-moderate productivity, it is therefore likely that the substantially high catches of oceanic whitetip sharks in the Indian Ocean (5,000+ mt estimated for 2013 and 2014) are in excess of what is sustainable and are likely contributing to overutilization of the species in the Indian Ocean.

Finally, the ERA team determined that demand from the international shark fin trade is the main economic force driving the retention and subsequent finning of oceanic whitetip sharks taken as bycatch in commercial fisheries worldwide, as they are considered a preferred species for their fins, command high prices in the international market (U.S. $45–85/kg; E-CoP16Prop.42 (2013)) and make up part of the ''first choice'' category in the China, Hong Kong Special Administrative Region (SAR) fin market (Vannuccini 1999). From 2000 to 2011, China, Hong Kong SAR maintained its position as the world's largest trader of shark fins, controlling the majority of global trade. In order to determine the species composition of the shark fin trade, Clarke *et al.,* (2006a) analyzed 1999–2001 Hong Kong trade auction data in conjunction with species-specific fin weights and genetic information to estimate the annual number of globally traded shark fins. Using this approach, the authors discovered that oceanic whitetip sharks are sold under their own category ''*Liu Qiu*'' and represent approximately 1.8 percent of the Hong Kong shark fin

market (Clarke *et al.,* 2006a). This level of oceanic whitetip shark fins in the trade translates to an estimated median of 700,000 oceanic whitetip sharks (range: 200,000–1,200,000 individuals), with an equivalent median biomass of around 21,000 mt (range 9,000–48,000 mt), traded annually (Clarke *et al.,* 2006b). The lack of estimates of the global population makes it difficult to put these trade-based estimates into perspective. However, given the minimum estimate of ~9,000 mt traded annually is in excess of the total biomass estimated for oceanic whitetip for the entire Western and Central Pacific Ocean in 2010 (*i.e.,* 7,295 mt), the effect of the removals (for the shark fin trade) on the ability of the overall population to sustain this level of exploitation is likely substantial.

In more recent years, genetic testing conducted in various fish markets provides additional confirmation of the ongoing utilization of oceanic whitetip shark in the shark fin trade. For example, a genetic sampling study conducted on shark fins collected from several fish markets throughout Indonesia determined that oceanic whitetip shark fins were present and comprised approximately 1.72 percent of the fins tested (Sembiring *et al.,* 2015). In a genetic barcoding study of shark fins from markets in Taiwan, the oceanic whitetip was 1 of 20 species identified and comprised 0.38 percent of average landings from 2001–2010 (Liu *et al.,* 2013). In another genetic barcoding study of fins at the Deira fish market in Dubai, United Arab Emirates (with sharks originating from Oman), oceanic whitetip shark comprised 0.45 percent of fins tested (Jabado *et al.,* 2015). Although it is uncertain whether these studies are representative of the entire market within each respective country, results of these genetic tests confirm the continued presence of oceanic whitetip shark fins in various markets throughout its range.

Recent studies indicate that due to a waning interest in fins as well as increased regulations to curb shark finning, the shark fin market is declining. In fact, the trade in shark fins through China, Hong Kong SAR, which has served as an indicator of the global trade for many years, fell by 22 percent in 2012. Additionally, current indications are that the shark fin trade through Hong Kong SAR and China will continue to contract (Dent and Clarke 2015). The pattern of trade decline closely matches the pattern in chondrichthyan capture production and thus suggests a strong link between the quantity harvested and the quantity traded. However, a government-led backlash against conspicuous consumption in China, combined with global conservation momentum, appears to have had some impact on traded volumes as well (Eriksson and Clarke 2015). Despite the potential improvements in the trade, it is clear that the shark fin trade has asserted and continues to assert significant pressure on oceanic whitetip sharks. Given that oceanic whitetip fins are among the most prized in the international shark fin trade and obtain a high value per kg, combined with recent evidence of oceanic whitetip fins in several prominent markets, the incentive to take oceanic whitetip sharks for their fins remains high and is an ongoing threat contributing to the overutilization of the species. This is further evidenced by recent incidents of illegal trafficking of oceanic whitetip fins, which indicate that oceanic whitetip sharks are still sought after for their fins and continue to experience pressure from demands of the fin trade (see *Inadequacy of Existing Regulatory Mechanisms* section below for more details). In addition, a surge in the trade of shark meat has occurred in recent years. This could be the result of a number of factors, but taking the shark fin and shark meat aggregate trends together indicate that shark fin supplies are limited by the existing levels of chondrichthyan capture production, but shark meat is underutilized by international markets (Dent and Clarke 2015). This suggests that historically underutilized chondrichthyan species will be increasingly utilized for their meat. The ERA team considered whether the recent shift in demand away from shark fins to shark meat would have any considerable impact on the oceanic whitetip shark. Although there are markets for low-value shark meat such as oceanic whitetip, the retention bans for the species in all relevant RFMOs will likely dampen this threat. Thus, the ERA team did not think this increase in demand for shark meat would create a significant new threat to the species.

Overall, based on the best available information, the ERA team concluded, and we agree, that overutilization is the single most important threat contributing to the extinction risk of the oceanic whitetip shark. Due to the paucity of available data from some regions, the ERA team acknowledged that there are some uncertainties in assessing the contribution of the threat of overutilization to the extinction risk of the oceanic whitetip shark throughout its range. As results from the Cortés *et al.* (2012) and Murua *et al.* (2012) Ecological Risk Assessments demonstrated, the threat of overutilization of oceanic whitetip sharks may be exacerbated by the species' low-moderate productivity combined with the species' tendency to remain in the surface mixed layer of the water column (*i.e.,* 0–152 m) and within warm, tropical waters where the majority of fishing effort is often most concentrated. The severity of the threat of overutilization is dependent upon other risks and threats to the species, such as its abundance (as a demographic risk) as well as its level of protection from fishing mortality throughout its range. Given the above analysis and best available information, as well as evidence that the species' current trends in abundance place its future persistence in question due to overutilization, we find that overutilization for commercial purposes is a threat that places the species on a trajectory towards being in danger of extinction in the foreseeable future throughout all or a significant portion of its range.

Inadequacy of Existing Regulatory Mechanisms

The ERA team evaluated existing regulatory mechanisms to determine whether they may be inadequate to address threats to the oceanic whitetip shark. Existing regulatory mechanisms assessed include federal, state, and international regulations for commercial fisheries, as well as the international trade in shark products. Below is a description and evaluation of current and relevant domestic and international management measures that may affect the oceanic whitetip shark. More information on these management measures can be found in the status review report (Young *et al.,* 2016) and other recent status reviews of other shark species (Miller *et al.,* 2013; 2014). The following section will first discuss U.S. domestic regulatory measures applicable to the oceanic whitetip shark, followed by international regulations that may affect sharks in general, as well as the oceanic whitetip shark in particular.

U.S. Domestic Regulatory Mechanisms

In the U.S. Pacific, highly migratory species (HMS) fishery management is the responsibility of adjacent states and three regional management councils that were established by the Magnuson-Stevens Fishery Conservation and Management Act: The Pacific Fishery Management Council (PFMC), the North Pacific Fishery Management Council, and the Western Pacific Fishery Management Council (WPFMC). The PFMC manages highly migratory species

off the coasts of Washington, Oregon, and California; however, the oceanic whitetip shark is not one of the species they actively manage, as its distribution favors more tropical waters. The PFMC is, however, actively engaged in international fishery management organizations that manage fish stocks that migrate through the PFMC's area of jurisdiction. In 2011, NMFS published a final rule (76 FR 68332) issuing regulations to implement decisions of the IATTC, including the Resolution Prohibiting the Retention of Oceanic Whitetip Sharks (C–11–10), which is described in more detail below in the International Regulatory Mechanisms section of this proposed rule. According to the final rule mentioned previously, U.S. fisheries that target highly migratory species rarely retain, transship, land, or sell this species in the IATTC Convention Area.

The WPFMC has jurisdiction over the EEZs of Hawaii, Territories of American Samoa and Guam, Commonwealth of the Northern Mariana Islands, and the Pacific Remote Island Areas, as well as the domestic fisheries that occur on the adjacent high seas. The WPFMC developed the Pelagics Fishery Ecosystem Plan (FEP; formerly the Fishery Management Plan for the Pelagic Fisheries of the Western Pacific Region) in 1986 and NMFS, on behalf of the U.S. Secretary of Commerce, approved the Plan in 1987. Under the FEP, the oceanic whitetip shark is designated as a Pelagic Management Unit Species and is subject to regulations. These regulations are intended to minimize impacts to targeted stocks as well as protected species. Fishery data are also analyzed in annual reports and used to amend the FEP as necessary. In Hawaii and American Samoa, oceanic whitetip sharks are predominantly caught in longline fisheries that operate under extensive regulatory measures, including gear, permit, logbook, vessel monitoring system, and protected species workshop requirements. In 2015, NMFS published a final rule to implement decisions of the WCPFC to prohibit the retention of oceanic whitetip sharks in fisheries operating within the WCPFC's area of competence (or Convention Area), which comprises the majority of the Western and Central Pacific Ocean. The regulations were published in the **Federal Register** on February 19, 2015 (80 FR 8807) and include prohibitions on the retention of the oceanic whitetip shark, as well as requirements to release any oceanic whitetip caught. These regulations are applicable to all U.S. fishing vessels used for commercial fishing for HMS in the Convention Area (PIRO 2015). As noted previously in the *Overutilization for Commercial, Recreational, Scientific, or Educational Purposes* section of this proposed rule, oceanic whitetip sharks are still caught as bycatch in this fishery, but the majority of individuals are now released alive. Though post-release survival rates are unknown, it is likely these regulations are helping to reduce overall mortality of the species to some degree.

In the Northwest Atlantic, the U.S. Atlantic HMS Management Division within NMFS develops regulations for Atlantic HMS fisheries, and primarily coordinates the management of Atlantic HMS fisheries in Federal waters (domestic) and the high seas (international), while individual states establish regulations for HMS in state waters. The NMFS Atlantic HMS Management Division currently manages 42 species of sharks (excluding spiny dogfish) under the Consolidated Atlantic HMS FMP (NMFS 2006). The management of these sharks is divided into five species groups: Large coastal sharks, small coastal sharks, pelagic sharks, smoothhound sharks, and prohibited sharks. Oceanic whitetip sharks are managed under the pelagic sharks group. One way that the HMS Management Division controls and monitors commercial harvest is by requiring U.S. commercial Atlantic HMS fishermen who fish for or sell sharks to have a Federal Atlantic Directed or Incidental shark limited access permit. These permits are administered under a limited access program, and NMFS is no longer issuing new shark permits. As of October 2015, 224 U.S. fishermen are permitted to target sharks managed by the HMS Management Division in the Atlantic Ocean and Gulf of Mexico, and an additional 275 fishermen are permitted to land sharks incidentally (NMFS 2015). Under a directed shark permit, there is no directed numeric retention limit for pelagic sharks, subject to quota limitations. An incidental permit allows fishers to keep up to a total of 16 pelagic or small coastal sharks (all species combined) per vessel per trip. Current authorized gear types for oceanic whitetip sharks include: Bottom longline, gillnet, rod and reel, handline, or bandit gear. There are no restrictions on the types of hooks that may be used to catch oceanic whitetip sharks, and there is no commercial minimum size limit. The annual quota for pelagic sharks (other than blue sharks or porbeagle sharks) is currently 488 mt dressed weight. NMFS monitors the different shark quota complexes annually and will close the fishing season for each fishery after 80 percent of the respective quota has been landed or is projected to be landed. Atlantic sharks and shark fins from federally permitted vessels may be sold only to federally permitted dealers. Logbook reporting is required for selected fishers with a federal commercial shark permit. In addition, fishers may be selected to carry an observer onboard, and some fishers are subject to vessel and electronic monitoring systems depending on the gear used and where they fish. In terms of processing sharks landed, the head may be removed and the shark may be gutted and bled, but the shark cannot be filleted or cut into pieces while onboard the vessel and all fins, including the tail, must remain naturally attached to the carcass through offloading.

In 2011, NMFS published final regulations to implement decisions of ICCAT (*i.e.,* Recommendation 10–07 for the conservation of oceanic whitetip sharks), which prohibits retention of oceanic whitetip sharks in the PLL fishery and on recreational (HMS Angling and Charter headboat permit holders) vessels that possess tuna, swordfish, or billfish (76 FR 53652). The implementation of regulations to comply with ICCAT Recommendation 10–07 for the conservation of oceanic whitetip sharks is likely the most influential regulatory mechanism in terms of reducing mortality of oceanic whitetip sharks in the U.S. Atlantic. It should be noted that oceanic whitetip sharks are still occasionally caught as bycatch and landed in this region despite its prohibited status in ICCAT associated fisheries (NMFS 2012; 2014), as retention is permitted in other authorized gears other than pelagic longlines (*e.g.,* gillnets, bottom longlines); however, these numbers have decreased. Prior to the implementation of the retention prohibition on oceanic whitetip, an analysis of the 2005–2009 HMS logbook data indicated that, on average, a total of 50 oceanic whitetip sharks were kept per year, with an additional 147 oceanic whitetip sharks caught per year and subsequently discarded (133 released alive and 14 discarded dead). Thus, without the prohibition, approximately 197 oceanic whitetip sharks could be caught and 64 oceanic whitetip sharks (32 percent) could die from being discarded dead or retained each year (NMFS 2011). Since the prohibition was implemented in 2011, estimated commercial landings of oceanic whitetip declined from only 1.1 mt in

2011 to only 0.03 mt (dressed weight) in 2013 (NMFS 2012; 2014). In fact, from 2013–2014, NMFS reported a total of 81 oceanic whitetip interactions, with 83 percent (67 individuals) released alive and 17 percent (14 individuals) discarded dead (NMFS 2014; 2015). While the retention ban for oceanic whitetip does not prevent incidental catch or subsequent at-vessel and post-release mortality, it likely provides minor ecological benefits to oceanic whitetip sharks via a reduction in overall fishing mortality in the Atlantic PLL fishery (NMFS 2011).

In addition to general commercial fishing regulations for management of highly migratory species, the United States has implemented a couple of significant laws for the conservation and management of sharks: the Shark Finning Prohibition Act and the Shark Conservation Act. The Shark Finning Prohibition Act was enacted in December 2000 and implemented by final rule on February 11, 2002 (67 FR 6194), and prohibited any person under U.S. jurisdiction from: (i) Engaging in the finning of sharks; (ii) possessing shark fins aboard a fishing vessel without the corresponding carcass; and (iii) landing shark fins without the corresponding carcass. It also implemented a five percent fin to carcass ratio, creating a rebuttable presumption that fins landed from a fishing vessel or found on board a fishing vessel were taken, held, or landed in violation of the Act if the total weight of fins landed or found on board the vessel exceeded five percent of the total weight of carcasses landed or found on board the vessel. The Shark Conservation Act was signed into law on January 4, 2011, and implemented by final rule on June 29, 2016 (81 FR 42285), and, with a limited exception for smooth dogfish (*Mustelus canis*), prohibits any person from removing shark fins at sea, or possessing, transferring, or landing shark fins unless they are naturally attached to the corresponding carcass.

As expected, U.S. exports of dried shark fins dropped significantly after the passage of the Shark Finning Prohibition Act. In 2011, with the passage of the U.S. Shark Conservation Act, exports of dried shark fins dropped again, by 58 percent, to 15 mt, the second lowest export amount since 2001. This is in contrast to the price per kg of shark fin, which was at its highest price of ~$100/kg, and suggests that existing regulations have likely been effective at discouraging fishing for sharks solely for the purpose of the fin trade. Thus, although the international shark fin trade is likely a driving force behind the overutilization of many global shark species, including the oceanic whitetip, the U.S. participation in this trade appears to be diminishing. In 2012, the value of fins also decreased, suggesting that the worldwide demand for fins may be on a decline. For example, a decrease in U.S. fin prices coincided with the implementation of fin bans in various U.S. states in 2012 and 2013, and U.S. shark fin exports have continued on a declining trend (Miller *et al.,* 2013). However, it should be noted that the continued decline is also likely a result of the waning global demand for shark fins altogether. Similarly, many U.S. states, especially on the West Coast, and U.S. Flag Pacific Island Territories have also passed fin bans and trade regulations, subsequently decreasing the United States' contribution to the fin trade. For example, after the State of Hawaii prohibited finning in its waters and required shark fins to be landed with their corresponding carcasses in the state in 2000, the shark fin exports from the United States into Hong Kong declined significantly in 2001 (54 percent decrease, from 374 to 171 t) as Hawaii could therefore no longer be used as a fin trading center for the international fisheries operating and finning in the Central Pacific (Clarke *et al.,* 2007). With regard to oceanic whitetip sharks, the finning regulations introduced in 2001 in the U.S. Hawaii-based longline fishery have acted to reduce mortality on oceanic whitetip and other large shark species (Walsh *et al.,* 2009). Prior to the ban, from 1995–2000, the fins were taken from a large proportion of captured oceanic whitetip with the remaining carcass being discarded (72.3 percent in deep sets and 52.7 percent from shallow sets), as was the case with other large sharks (Walsh *et al.,* 2009). From 2004–2006, following the implementation of the new regulations, almost all sharks were released, although some were dead on release. Overall, minimum mortality estimates declined substantially as a result of the finning regulations, from 81.9 percent to 25.6 percent in deep sets and from 61.3 percent to 9.1 percent in shallow sets (Walsh *et al.,* 2009). However, aside from this example, there is little information on the level of compliance with the various fisheries management measures for sharks, including oceanic whitetip, with compliance likely variable among other countries and regions.

Overall, regulations to control for overutilization of oceanic whitetip sharks in U.S. waters, including fisheries management plans with quotas and trip limits, species-specific retention prohibitions in PLL gear, and finning regulations are not in and of themselves inadequate such that they are contributing to the global extinction risk of the species. In fact, it is likely that the stable CPUE trend observed for the oceanic whitetip shark in the Northwest Atlantic is largely a result of the implementation of management measures for pelagic sharks under the U.S. HMS FMP. However, because oceanic whitetip sharks are highly migratory and frequently move beyond U.S. jurisdiction, these regulatory mechanisms are limited on the global stage in that they only provide protections to oceanic whitetip sharks while in U.S. waters. While this does not make them inadequate in terms of their purpose of protecting oceanic whitetip sharks while in U.S. waters, finning and retention bans are likely inadequate in other parts of the world to prevent further population declines of oceanic whitetip as a result of overutilization (as discussed in detail below). Therefore, given the significant abundance declines observed for the species as a result of overutilization, and the fact that regulatory mechanisms are largely inadequate elsewhere across the species' range, it is unlikely that U.S. regulatory mechanisms alone are enough to mitigate for threats contributing to the species' global extinction risk.

International Regulatory Mechanisms

Regarding international regulatory mechanisms, the ERA team expressed significant concern regarding existing regulations to control bycatch-related mortality, finning of oceanic whitetip sharks for the international shark fin trade, and illegal fishing and trafficking activities. The ERA team recognized that the number of international regulatory mechanisms for sharks in general, and the oceanic whitetip shark in particular, have been on the rise in recent years. For example, the oceanic whitetip shark was listed under Appendix II of the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) in 2014. CITES is an international agreement between governments, with the aim of ensuring that international trade in specimens of wild animals and plants does not threaten their survival. International trade in specimens of Appendix-II species may be authorized by the granting of an export permit or re-export certificate. No import permit is necessary for these species under CITES (although a permit is needed in some countries that have taken stricter measures than CITES requires).

However, recent data from Hong Kong's Agriculture Fisheries Conservation Department (AFCD) suggests that these measures are not adequately implemented or enforced by all CITES Parties with respect to the oceanic whitetip shark. Specifically, since the oceanic whitetip shark was listed under CITES Appendix II in 2014, approximately 1,263 kg (2,784 lbs) of oceanic whitetip fins have been confiscated upon entry into Hong Kong because the country of origin did not include the required CITES permits and paperwork. Since 2014, confiscated oceanic whitetip fin shipments included 940.46 kg from Colombia, 10.96 kg from the Seychelles, and 272.49 kg from the United Arab Emirates (AFCD, Unpublished data).

In addition to trade regulations, finning bans have been implemented by a number of countries, including the European Union (EU), as well as by nine RFMOs. These finning bans range from requiring fins remain attached to the body, to allowing fishers to remove shark fins provided that the weight of the fins does not exceed 5 percent of the total weight of shark carcasses landed or found onboard. In fact, all of the relevant RFMOS prohibit fins onboard that weigh more than 5 percent of the weight of sharks to curb the practice of shark finning (*i.e.,* the fins-to-carcass ratio). Although the fins-to-carcass weight ratios have the potential to reduce the practice of finning, these regulations do not prohibit the fishing of sharks and a number of issues associated with reliance on the 5 percent fins-to-carcass weight ratio requirement have been identified, including: the percentage of fins-to-carcass weight varies widely among species, fin types used in calculation, the type of carcass weight used (whole or dressed) and fin cutting techniques; under the fins-to-carcass weight ratio measure, sharks that are not landed with fins attached to the body make it difficult to match fins to a carcass (Lack and Sant 2009). There are also issues with using the ratios for dried vs. fresh fins, which can change the ratio substantially. Further, despite their existence, laws and regulations are rapidly changing and are not always effectively enforced by countries and RFMOs (Biery and Pauly 2012).

Numerous RFMOs and countries have also implemented various regulations regarding shark fishing in general, which are described in detail in the Status Review Report (Young *et al.,* 2016). A number of countries have enacted complete shark fishing bans (*i.e.,* bans on retention and possession of sharks and shark products), with the Bahamas, Marshall Islands, Honduras, Sabah (Malaysia), and Tokelau (an island territory of New Zealand) adding to the list in 2011, the Cook Islands in 2012, and the Federated States of Micronesia in 2015. These ''shark sanctuaries'' (*i.e.,* locations where harvesting sharks is prohibited) can also be found in the Eastern Tropical Pacific Seascape (which encompasses around two million km^2 and includes the Galapagos, Cocos, and Malpelo Islands), in waters off the Maldives, Mauritania, Palau, French Polynesia, New Caledonia and Raja Ampat, Indonesia. However, it should be noted that sharks can still be caught as bycatch in these areas and enforcement is likely difficult; thus, their efficacy for reducing bycatch-related mortality of sharks is uncertain.

In addition to international regulatory mechanisms for the conservation of sharks in general via shark finning and fishing bans, a number of species-specific measures have been implemented for the conservation of oceanic whitetip sharks in particular. Specifically, the oceanic whitetip is the only shark species that has a no-retention measure in every tuna RFMO, which underscores the species' conservation status. However, the ERA team noted that international regulations specific to oceanic whitetip sharks are likely inadequate to mitigate threats that will result in further population declines throughout the species' global range. Notably, these measures likely have varying rates of implementation and enforcement and they do not prevent oceanic whitetip sharks from being caught in the first place, nor the subsequent at-vessel and post-release mortality that may result from being captured. Additionally, evidence suggests illegal trafficking and exportation activities of oceanic whitetip sharks are ongoing.

In 2011, the IATTC adopted Resolution C–11–10 for the conservation of oceanic whitetip sharks, which provides that IATTC Members and Cooperating non-Members shall prohibit retaining onboard, transshipping, landing, storing, selling, or offering for sale any part or whole carcass of oceanic whitetip sharks in the IATTC Convention Area. However, this measure is not likely adequate to prevent capture and a substantial amount of mortality in the main fishery that catches oceanic whitetip sharks in this region (*i.e.,* the tropical tuna purse seine fishery). Though published mortality rates of the oceanic whitetip shark in purse seine fisheries are not available, it is likely the species experiences high mortality rates similar to congener *C. falciformis* during and after interactions with purse seine fisheries (*i.e.,* ~85 percent in Western and Central Pacific and Indian Ocean tropical purse seine fisheries; Poisson *et al.,* (2014); Hutchinson *et al.,* (2015)). Given that oceanic whitetip sharks are captured in a net where they are unable to swim, and they are also subjected to the weight of whatever tonnage is on top of them, the sharks likely experience high levels of stress that can lead to mortality even if they are released alive. In addition, rough handling techniques utilized after sharks are brought onboard can also increase mortality. Thus, the ERA team concluded, and we agree, that the retention prohibition enacted for oceanic whitetip sharks in the eastern Pacific, particularly for the tropical tuna purse seine fishery, is not likely effective in reducing the threat of overutilization in this region.

In the Western and Central Pacific, the WCPFC also has regulatory measures for the conservation of sharks in general, as well as specific measures for the conservation of oceanic whitetip sharks. Likely the most influential management measure for the conservation of oceanic whitetip sharks in the Western and Central Pacific is Conservation Management Measure (CMM) 2011–04, which prohibits WCPFC vessels from retaining onboard, transshipping, storing on a fishing vessel, or landing any oceanic whitetip shark, in whole or in part, in the fisheries covered by the Convention. However, observations from the longline fishery have shown that CMM 2011–04 for the retention prohibition of oceanic whitetip is not being strictly followed (or not yet fully implemented), with non-negligible proportions of oceanic whitetips still being retained or finned. In fact, both in number and proportionally more oceanic whitetip sharks were retained in 2013 (the first year of the CMM) than 2012 in the longline fishery (Rice *et al.,* 2015). In addition, observations from the Western and Central tropical tuna purse seine fishery suggest similar issues discussed previously for the eastern Pacific purse seine fishery: Even if live release is strictly practiced in purse seine fisheries, the number of sharks surviving is expected to be low.

In addition to finning controls and species-specific retention bans, the WCPFC has also adopted some conservation measures related to fisheries gear to reduce bycatch of oceanic whitetip sharks in the first place. For example, CMM 2014–05, which became effective in July 2015, requires each national fleet to either ban wire leaders or ban shark lines, both of which have potential to reduce shark

bycatch. However, while it is predicted that oceanic whitetip shark mortality may be reduced by up to 40 percent if both measures are used, this CMM allows flag-states to choose which fishing technique they exclude. Using Monte Carlo simulations, Harley and Pilling (2016) determined the following: if flag-states choose to exclude the technique least used by their vessels, the median predicted reduction in fishing-related mortality is only 10 percent for the oceanic whitetip shark. If flag-states exclude the technique most used by their vessels, this would reduce the fishing mortality rate by 30 percent. This compares to a reduction of 40 percent if choice was removed and both techniques are prohibited. Therefore, given the high levels of fishing mortality experienced by this species, it is unlikely that the options under CMM (2014–05) of either banning shark lines or wire traces will result in sufficient reductions in fishing mortality (Harley *et al.,* 2015). Thus, based on the foregoing information, the ERA team concluded, and we agree, that despite the increasing species-specific management measures in this region, given the severely depleted state of the oceanic whitetip population and the significant levels of fishing mortality the species experiences in this region, less-than-full implementation will erode the benefits of any mitigation measures.

In the Atlantic Ocean, ICCAT is the main regulatory body for the conservation and management of tuna and tuna-like species. In 2010, ICCAT developed Recommendation 10–07, which specifically prohibits the retention, transshipping, landing, storing, selling, or offering for sale any part or whole carcass of oceanic whitetip sharks in any fishery; however, like other previously described retention bans, the retention ban implemented by ICCAT does not necessarily prevent all fisheries-associated mortality. Although oceanic whitetip sharks have a relatively higher at-vessel survivorship rate than other pelagic sharks in the Atlantic, some will still likely die as a result of being caught. As previously discussed in the *Overutilization for Commercial, Recreational, Scientific, or Educational Purposes* section of this proposed rule, Brazil is one of the top 26 shark-catching countries in the world and the largest oceanic whitetip catching country in the Atlantic Ocean, comprising 89 percent of the total oceanic whitetip catch reported to ICCAT from 1992–2014. Thus, the following text focuses on existing regulatory mechanisms and their efficacy for reducing fishing pressure on oceanic whitetip sharks in Brazil. Since the implementation of ICCAT Recommendation 10–07, Brazil reported 12 mt of oceanic whitetip from 2013–2014, which indicates the species is still being caught and continues to experience fisheries-related mortality in this portion of its range. In addition to ICCAT regulations, sharks in Brazil must be landed with corresponding fins and a 5 percent fin to carcass weight ratio is required. In addition, all carcasses and fins must be unloaded and weighed and the weights reported to authorities. Pelagic gillnets and trawls are prohibited in waters less than 3 nm (5.6 km) from the coast; however, given that the oceanic whitetip is a pelagic species, a gillnet ban within 3 nm of the coast is not likely going to be beneficial to the species. Further, it is generally recognized that these regulations are poorly enforced (Chiaramonte and Vooren 2007). In December 2014, the Brazilian Government's Chico Mendes Institute for Biodiversity Conservation approved the National Plan of Action for the Conservation of Elasmobranchs of Brazil (No 125). However, this plan will not be fully implemented until 2019, and it focuses on a list of 12 priority species that does not include the oceanic whitetip shark. As noted previously, the oceanic whitetip shark was designated as a ''species threatened by overexploitation'' in 2004 by Brazil's Ministry of Environment, and listed under Annex II of Brazil's Normative Ruling No. 5 of May 21, 2004. In 2014, Brazil finalized its national assessment regarding the extinction risk of Brazilian fauna, and listed the oceanic whitetip shark as ''Vulnerable'' under Brazil's National Official List of Endangered Species of Fauna—Fish and Aquatic Invertebrate (ICMBio 2014). Species listed as ''Vulnerable'' enjoy full protection, including, among other measures, the prohibition of capture, transport, storage, custody, handling, processing and marketing. The capture, transport, storage, and handling of specimens of the species shall only be allowed for research purposes or for the conservation of the species, with the permission of the Instituto Chico Mendes. However, whether these regulations are adequately implemented and enforced is unclear. In fact, there is strong opposition from the fishing industry and some ordinances guaranteeing protection to endangered species in the country have recently been canceled (Di Dario *et al.,* 2014). Additionally, systematic data collection from fleets fishing over Brazilian jurisdiction ended in 2012, and onboard observer programs have been cancelled, which renders any further monitoring of South Atlantic shark populations difficult or impossible (Barreto *et al.,* 2015). Given the foregoing information, it appears that existing regulatory mechanisms in Brazil may not be adequate to effectively manage the significant threat of fishing pressure and associated mortality on oceanic whitetip sharks in this region.

The ERA team also identified several issues with regulations in the Indian Ocean. The IOTC, the main regulatory body for managing tuna and tuna-like species, has management measures in place for sharks in general, and also specifically for the oceanic whitetip shark. In 2013, the IOTC passed Resolution 13–06 that prohibits the retention, transshipment, landing, or storing of any part or whole carcass of oceanic whitetip sharks. However, unlike similar regulations implemented by other RFMOs, the IOTC retention prohibition of oceanic whitetip shark exempts ''artisanal fisheries operating exclusively in their respective EEZ for the purpose of local consumption.'' However, the definition of artisanal vessels in the IOTC encompasses a wide array of boats with vastly different characteristics. They range from the pirogue that fishes close to shore for subsistence with no motor, no deck and no holding facilities, to a longliner, gillnetter or purse seiner of less than 24 m with an inboard motor, deck, communications, fish holding facilities, and in some cases chilling or freezing capabilities. This latter vessel could potentially conduct fishing operations offshore, including outside its EEZ (Moreno and Herrera 2013). For example, in 2014 and 2015 the Islamic Republic of Iran and Sri Lanka reported 239 mt of oceanic whitetip sharks caught by gillnets that fall under the definition of ''artisanal fisheries.'' Additionally, while some no-retention measures ban the ''selling or offering for sale'' of any products from the specified shark species, the IOTC oceanic whitetip shark measure does not (Clarke 2013). Further, this measure is not binding on India, which is one of the main oceanic whitetip shark catching countries identified by the IOTC in the Indian Ocean. Finally, IOTC Resolution 13–06 was passed as an interim pilot measure; therefore, it is highly uncertain as to whether this measure will be ongoing into the foreseeable future. As a result, it appears that the retention ban of oceanic whitetip in the Indian Ocean is limited in scope relative to other RFMO no-retention measures, and only

partially protective depending on whether the measure is adequately implemented and enforced. For example, in Indonesia, which is the largest shark fishing nation in the world, oceanic whitetip sharks are protected in order to comply with IOTC Resolution 13–06. However, evidence suggests that this Resolution may not be strictly adhered to. For instance, in a genetic barcoding study of shark fin samples throughout traditional fish markets in Indonesia from mid-2012 to mid-2014, oceanic whitetip shark was identified as present (Sembiring *et al.,* 2015) despite being prohibited in 2013. In addition, authorities confiscated around 3,000 oceanic whitetip shark fins from sharks caught in waters near Java Island as recent as October 2015 (South China Morning Post 2015). Thus, while it generally appears that the IOTC has increased its number of management measures for sharks, including the oceanic whitetip, these regulations are likely inadequate to prevent further population declines of the oceanic whitetip shark in this region as a result of overutilization.

It is clear that many countries and RFMOs have implemented shark finning bans or have prohibited the sale or trade of shark fins or products, and have even prohibited the retention of oceanic whitetip sharks in their respective fisheries, with declining trends in finning and catches of oceanic whitetip sharks evident in some locations as a result of these regulations (*e.g.,* Fiji, Australia and the United States; see Young *et al.,* 2016 for more details). It also evident that the international trade in shark fins may be gradually slowing. In fact, as described previously, the trade in shark fins through China, Hong Kong SAR, which has served as an indicator of the global trade for many years, fell by 22 percent in 2012. Additionally, current indications are that the shark fin trade through Hong Kong SAR and China will continue to contract (Dent & Clarke 2015). However, although the overall situation regarding the shark fin trade appears to be improving due to current regulations (*e.g.,* increasing number of finning bans) and trends (*e.g.,* waning demand for shark fins), and it may not be as severe a threat to some species of sharks compared to others, evidence suggests that oceanic whitetip fins are considered to be preferred or ''first choice'' in the Hong Kong market (Vannuccini 1999; E-CoP16Prop.42 2013) and the high demand for oceanic whitetip fins is ongoing. This is evidenced by recent genetic studies that confirm the presence of oceanic whitetip shark fins in several markets throughout its range, as well as several recent incidents of illegal finning and trafficking of oceanic whitetip fins despite national and international regulations. For example, in February 2013, oceanic whitetip fins were found in a large seizure of fins from a Taiwanese vessel illegally fishing in the Marshall Islands. In 2014, illegal oceanic whitetip shark fins were discovered in a random sample inspection of three 40 kg sacks slated for export from Costa Rica to Hong Kong (Tico Times 2014). Additionally, and as previously noted, Indonesian authorities seized 3,000 shark fins belonging to oceanic whitetip sharks that were reportedly caught in waters around Java Island in October 2015. The fins, which were about to be flown to Hong Kong, were seized at the international airport that serves the capital Jakarta. This haul was worth an estimated U.S. $72,000 in Indonesia, but would reportedly fetch several times that amount in Hong Kong (South China Morning Post 2015). Therefore, it is clear that the oceanic whitetip shark is subject to illegal fishing and trafficking, particularly for its valuable fins. Given the recent downturn in the shark fin trade (Dent & Clarke, 2015; Eriksson & Clarke 2015), the threat of this IUU fishing for the sole purpose of shark fins may not be as significant into the future. However, based on the best available information on the species' declining population trends throughout its range, as well as current utilization levels, the present mortality rates associated with illegal fishing and its impacts on oceanic whitetip shark populations may be contributing to the overutilization of the species. Therefore, based on the foregoing information, the ERA team concluded that despite national and international regulations to protect the oceanic whitetip, illegal finning and exportation activities are ongoing. As such, and based on the best available information, existing regulatory mechanisms to control for overutilization by the shark fin trade are likely inadequate to significantly reduce this threat to the oceanic whitetip shark at this time.

Overall, and based on the above review of regulatory measures (in addition to the regulations described in Young *et al.,* 2016), the ERA team concluded, and we agree, that existing regulatory mechanisms to control for overutilization are largely inadequate to significantly reduce this global threat to the oceanic whitetip shark at this time. The ERA team acknowledged that in some locations, regulatory measures may be effective for reducing the threat of overutilization to some degree. For example, as noted in the U.S. Domestic Regulatory Mechanisms section, in the U.S. Northwest Atlantic and Pacific Island States and Territories oceanic whitetip sharks are managed under comprehensive management plans and regulations with trip limits, quotas, logbook and protected species requirements, and other various fishing restrictions. In the Northwest Atlantic, oceanic whitetip sharks are managed under the pelagic species complex of the Atlantic HMS FMP, with commercial quotas imposed that restrict the overall level of oceanic whitetip sharks taken in this part of its range. Pelagic longline gear is heavily managed and strictly monitored. The use of pelagic longline gear (targeting swordfish, tuna and/or shark) also requires specific permits, with all required permits administered under a limited access program. Presently, no new permits are being issued; thus, persons wishing to enter the fishery may only obtain these permits by transferring the permit from a permit holder who is leaving the fishery, and transferees are currently subject to vessel upgrading restrictions. These national regulations, as detailed in the 2006 Consolidated HMS FMP and described in this Status Review Report, combined with ICCAT's Recommendation 10–07 on the retention prohibition of oceanic whitetip shark, have likely led to the recent stabilization of the Northwest Atlantic population. In Hawaii, finning and no-retention regulations have resulted in a significant decline in the number of oceanic whitetip sharks finned and an increase in the number of sharks released alive. Thus, these U.S. conservation and management measures in and of themselves are not inadequate such that they contribute to the extinction risk of the oceanic whitetip shark by increasing demographic risks (*e.g.,* further abundance declines) or the threat of overutilization (*e.g.,* unsustainable catch rates) currently and in the foreseeable future. However, the oceanic whitetip shark is highly migratory and often moves beyond U.S. jurisdiction. For example, in just one tagging study conducted in the Northwest Atlantic, five tagged oceanic whitetip sharks made transboundary movements, spending time in waters managed by different countries (United States, Cuba, and several of the windward Caribbean islands) or the high seas that are managed by international bodies (Howey-Jordan et al. 2013). Additionally, the ERA team emphasized that regulatory mechanisms

to control for overutilization of the species are largely inadequate throughout the rest of the species' global range. Therefore, based on the best available information, and given the significant global abundance declines of the oceanic whitetip shark as a result of overutilization, the inadequacy of existing regulatory mechanisms is likely a threat contributing to the species' risk of extinction throughout its range.

Overall Risk Summary

Guided by the results and discussions from the demographic risk analysis and threats assessment, the ERA team members used their informed professional judgment to make an overall extinction risk determination for the oceanic whitetip shark now and in the foreseeable future. The ERA team concluded, and we agree, that the oceanic whitetip shark currently has a ''moderate'' risk of extinction globally. The ERA team was fairly confident in determining the overall level of extinction risk of the oceanic whitetip shark, placing more than half of their likelihood points in the ''moderate risk'' category. To express some uncertainty, particularly regarding the lack of robust abundance trends and catch data for populations in certain areas (*e.g.,* South Atlantic and Indian Ocean), as well as potential stabilizing trends observed in two areas (*e.g.,* Northwest Atlantic and Hawaii), the team placed some of their likelihood points in the ''low risk'' and ''high risk'' categories as well. Likelihood points attributed to the overall level of extinction risk categories were as follows: Low Risk (20/60), Moderate Risk (34/60), High Risk (6/60). The ERA team reiterated that the once abundant and ubiquitous oceanic whitetip shark has likely experienced significant historical population declines throughout its global range, with multiple data sources and analyses, including a stock assessment and trends in relative abundance, suggesting declines greater than 70–80 percent in most areas. The ERA team concluded that declining abundance trends of varying magnitudes are likely ongoing in all three ocean basins.

In terms of threats to the species, the ERA team noted that the most significant threat to the continued existence of the oceanic whitetip shark in the foreseeable future is ongoing and significantly high rates of fishing mortality driven by demands of the international trade in shark fins and meat, as well as impacts related to incidental bycatch and IUU fishing. The ERA team emphasized that the oceanic whitetip shark's vertical and horizontal distribution significantly increases its exposure to industrial fisheries, including pelagic longline and purse seine fisheries operating within the species' core tropical habitat throughout its global range. In addition to declines in oceanic whitetip catches throughout its range, there is also evidence of declining average size over time in some areas, which is particularly concerning given evidence that litter size is potentially correlated with maternal length. With such extensive declines in the species' global abundance and the ongoing threat of overutilization, the species' slow growth and relatively low fecundity may limit its ability for compensation. Related to this, the low genetic diversity of oceanic whitetip is also cause for concern and a viable risk over the foreseeable future for this species. This is particularly concerning since it is possible (though uncertain) that a reduction in genetic diversity following the large reduction in population size due to overutilization has not yet manifested in the species. Loss of genetic diversity can lead to reduced fitness and a limited ability to adapt to a rapidly changing environment, thus increasing the species' overall risk of extinction.

Finally, the species' extensive distribution, ranging across entire oceans and across multiple international boundaries complicates management of the species. The ERA team agreed that implementation and enforcement of management measures that could reduce the threat of overutilization to the species are likely highly variable and/or lacking altogether across the species' range. The ERA team acknowledged a significant increase in species-specific management measures to control for overutilization of oceanic whitetip shark across its range; however, the ERA team also noted that most of these regulations, particularly the retention prohibitions enacted by all relevant RFMOs throughout the range of the species, are too new to truly determine their efficacy in reducing mortality of oceanic whitetip shark. Despite this limitation, and with the exception of the Northwest Atlantic and Pacific Island States and Territories, the ERA team was not confident in the adequacy of these regulations to reduce the threat of overutilization and prevent further abundance declines in the foreseeable future. First, the ERA team discussed the fact that retention prohibitions do not prevent at-vessel and post-release mortality, which is likely high in some fisheries. In addition, the biggest concern to the ERA team with regard to these regulatory mechanisms going forward is the lack of full implementation and enforcement. The ERA team noted that proper implementation and enforcement of these regulations would likely result in a reduction in overall mortality of the species over time. However, the best available information suggests that this may not currently be the case. Given the species' depleted state throughout its range, the ERA team agreed that less than full implementation and enforcement of current regulations is likely undermining any conservation benefit to the species.

Based on all of the foregoing information, which represents the best scientific and commercial data available regarding current demographic risks and threats to the species, the ERA team concluded that the oceanic whitetip shark currently has a moderate risk of extinction throughout its range. We concluded that the species does not currently have a high risk of extinction because of the following: The species has a significantly broad distribution and does not seem to have been extirpated in any region, even in areas where there is heavy harvest bycatch and utilization of the species' high-value fins; there appears to be a potential for relative stability in population sizes on the order of 5–10 years at the post-decline depressed state, as evidenced by the potential stabilization of two populations (*e.g.,* NW Atlantic and Hawaii) at a diminished abundance, which suggests that this species is potentially capable of persisting at a low population size; and the overall reduction of the fin trade as well as increasing management regulations will likely reduce the threat of overutilization to some extent, and thus reduce the species' overall risk of extinction. However, given the species' significant historical and ongoing abundance declines of varying magnitudes in all three ocean basins, slow growth, low fecundity, and low genetic diversity, combined with ongoing threats of overutilization and largely inadequate regulatory mechanisms, the ERA team concluded that the oceanic whitetip shark currently has a moderate risk of extinction throughout its global range. In other words, due to significant and ongoing threats of overutilization and largely inadequate regulatory mechanisms, current trends in the species' abundance, productivity and genetic diversity place the species on a trajectory towards a high risk of extinction in the foreseeable future of ~30 years.

Conservation Efforts

Section 4(b)(1)(A) of the ESA requires the Secretary, when making a listing determination for a species, to take into account those efforts, if any, being made by any State or foreign nation to protect the species. In judging the efficacy of protective efforts, we rely on the Services' joint ''Policy for Evaluation of Conservation Efforts When Making Listing Decisions'' (''PECE;'' 68 FR 15100; March 28, 2003). The PECE is designed to guide determinations on whether any conservation efforts that have been recently adopted or implemented, but not yet proven to be successful, will result in recovering the species to the point at which listing is not warranted or contribute to forming a basis for listing a species as threatened rather than endangered. The purpose of the PECE is to ensure consistent and adequate evaluation of future or recently implemented conservation efforts identified in conservation agreements, conservation plans, management plans, and similar documents developed by Federal agencies, State and local governments, Tribal governments, businesses, organizations, and individuals when making listing decisions. The PECE provides direction for the consideration of such conservation efforts that have not yet been implemented, or have been implemented but have not yet demonstrated effectiveness. The policy is expected to facilitate the development by states and other entities of conservation efforts that sufficiently improve a species' status so as to make listing the species as threatened or endangered unnecessary. The PECE established two basic criteria: (1) The certainty that the conservation efforts will be implemented, and (2) the certainty that the efforts will be effective. Satisfaction of the criteria for implementation and effectiveness establishes a given protective effort as a candidate for consideration, but does not mean that an effort will ultimately change the risk assessment for the species. Overall, the PECE analysis ascertains whether the formalized conservation effort improves the status of the species at the time a listing determination is made.

The concern regarding the practice of finning and its effect on global shark populations has been growing both domestically and internationally. Notably, the push to stop shark finning and curb the trade of shark fins is evident overseas and even in Asian countries, where the demand for shark fin soup is highest. For example, in a recent report from WildAid, Whitcraft *et al.* (2014) reported the following regarding the declining demand for shark fins: An 82 percent decline in sales reported by shark fin vendors in Guangzhou, China and a decrease in prices (47 percent retail and 57 percent wholesale) over the past 2 years; 85 percent of Chinese consumers surveyed online said they gave up shark fin soup within the past 3 years, and two-thirds of these respondents cited awareness campaigns as a reason for ending their shark fin consumption; 43 percent of consumers responded that much of the shark fin in the market is fake; 24 airlines, 3 shipping lines, and 5 hotel groups have banned shark fins from their operations; there has been an 80 percent decline from 2007 levels in prices paid to fishermen in Tanjung Luar and Lombok in Indonesia and a decline of 19 percent since 2002–2003 in Central Maluku, Southeastern Maluku and East Nusa Tenggara; and of 20 Beijing restaurant representatives interviewed, 19 reported a significant decline in shark fin consumption. While there seems to be a growing trend to prohibit and discourage shark finning domestically and internationally, it is difficult to predict at this time whether the trend will be effective in reducing the threat of overutilization to the oceanic whitetip shark. Nonetheless, we conclude that these conservation measures are not likely to be effective in reducing current threats to oceanic whitetip shark to the point that listing would no longer be warranted.

There are also many other smaller national and international organizations with shark-focused goals that include advocating the conservation of sharks through education and campaign programs and conducting shark research to fill data gaps regarding the status of shark species. Some of these organizations include: The Pew Environment Group, Oceana, Ocean Conservancy, Shark Trust, Bite-Back, Shark Project, Pelagic Shark Research Foundation, Shark Research Institute, and Shark Savers. More information on the specifics of these programs and groups can be found on their Web sites. Important research on oceanic whitetip sharks is also being conducted in a joint partnership by Nova Southeastern University and the Guy Harvey Research Institute. To facilitate conservation and management efforts for oceanic whitetip sharks, the Guy Harvey Research Institute/Guy Harvey Ocean Foundation and their project partners are using integrative approaches to investigate the population connectivity of this species, including ongoing studies of the global stock structure of oceanic whitetip sharks by using genetic techniques, as well as migration patterns of this species in the western Atlantic with the aid of satellite tracking technologies. All of these conservation efforts and non-regulatory mechanisms are beneficial to the persistence of the oceanic whitetip shark. The implementation of many of these efforts, especially the shark research programs, will help to fill current data gaps in oceanic whitetip abundance, genetics, and movement patterns, which can ultimately help inform other conservation and management measures. However, it is too soon to tell whether the collective conservation efforts of both non-governmental and academic organizations will be effective in reducing threats to the species, particularly those related to overutilization of the oceanic whitetip shark.

Proposed Determination

Section 4(b)(1) of the ESA requires that NMFS make listing determinations based solely on the best scientific and commercial data available after conducting a review of the status of the species and taking into account those efforts, if any, being made by any state or foreign nation, or political subdivisions thereof, to protect and conserve the species. We have independently reviewed the best available scientific and commercial information, including the petition, public comments submitted on the 90-day finding (81 FR 1376; January 12, 2016), the status review report (Young *et al.,* 2016), and other published and unpublished information, and we have consulted with species experts and individuals familiar with the oceanic whitetip shark. We considered each of the section 4(a)(1) factors to determine whether it contributed significantly to the extinction risk of the species on its own. We also considered the combination of those factors to determine whether they collectively contributed significantly to the extinction risk of the species. Therefore, our determination set forth below is based on a synthesis and integration of the foregoing information, factors and considerations, and their effects on the status of the species throughout its range. With respect to the term ''foreseeable future,'' we accept the ERA team's definition and rationale of approximately 30 years as reasonable for the reliable prediction of threats on the biological status of the species. That rationale for a foreseeable future of approximately 30 years was provided in detail previously (refer back to the

Assessment of Extinction Risk—Methods section of this proposed rule).

We conclude that the oceanic whitetip shark is not presently in danger of extinction, but is likely to become so in the foreseeable future throughout all of its range. We summarize the factors supporting this conclusion as follows: (1) The best available information indicates that the species has experienced significant and ongoing abundance declines in all three ocean basins (*i.e.,* globally); (2) oceanic whitetip sharks possess life history characteristics that increase their vulnerability to harvest, including slow growth, relatively late age of maturity, and low fecundity; (3) the species' low genetic diversity in concert with steep global abundance declines and ongoing threats of overutilization may pose a viable risk to the species in the foreseeable future; (4) due to the species' preferred vertical and horizontal habitat, the oceanic whitetip shark is extremely susceptible to incidental capture in both longline and purse seine fisheries throughout its range, and thus experiences substantial levels of fishing mortality from these fisheries; (5) the oceanic whitetip shark is a preferred species in the international fin market for its large, morphologically distinct fins, which incentivizes the retention and/or finning of the species; and (6) despite the increasing number of regulations for the conservation of the species, existing regulatory mechanisms are largely inadequate for addressing the most important threat of overutilization throughout a large portion of the species' range. We conclude that the species is not presently in danger of extinction as a result of the following supporting factors: (1) The species is broadly distributed over a large geographic range, and does not seem to have been extirpated in any region, even in areas where there is heavy harvest bycatch and utilization of the species' high-value fins; (2) there appears to be a potential for relative stability in population sizes on the order of 5–10 years at the post-decline depressed state, as evidenced by the potential stabilization of two populations (*e.g.,* NW Atlantic and Hawaii) at a diminished abundance, which suggests that this species is potentially capable of persisting at a low population size; (3) there is no evidence of a range contraction and there is no evidence of habitat loss or destruction; (4) the overall reduction of the fin trade as well as increasing management regulations will likely reduce the threat of overutilization to some extent in the foreseeable future, and thus reduce the species' current overall risk of extinction; (5) there is no evidence that disease or predation are contributing to an increased risk of extinction of the species; and (6) there is no evidence that other natural or manmade factors are contributing to an increased risk of extinction of the species.

As a result of the foregoing findings, which are based on the best scientific and commercial data available, we conclude that while the oceanic whitetip shark is not presently in danger of extinction throughout all or a significant portion of its range, it is likely to become so within the foreseeable future. Accordingly, the oceanic whitetip shark meets the definition of a threatened species, and thus, the oceanic whitetip shark warrants listing as a threatened species at this time.

Effects of Listing

Conservation measures provided for species listed as endangered or threatened under the ESA include the development and implementation of recovery plans (16 U.S.C. 1533(f)); designation of critical habitat, if prudent and determinable (16 U.S.C. 1533(a)(3)(A)); a requirement that Federal agencies consult with NMFS under section 7 of the ESA to ensure their actions do not jeopardize the species or result in adverse modification or destruction of designated critical habitat (16 U.S.C. 1536); and prohibitions on ''taking'' (16 U.S.C. 1538). Recognition of the species' plight through listing may also promote conservation actions by Federal and state agencies, foreign entities, private groups, and individuals.

Identifying Section 7 Consultation Requirements

Section 7(a)(2) (16 U.S.C. 1536(a)(2)) of the ESA and NMFS/FWS regulations require Federal agencies to confer with us on actions likely to jeopardize the continued existence of species proposed for listing, or that result in the destruction or adverse modification of proposed critical habitat. If a proposed species is ultimately listed, Federal agencies must consult on any action they authorize, fund, or carry out if those actions may affect the listed species or its critical habitat and ensure that such actions do not jeopardize the species or result in adverse modification or destruction of critical habitat should it be designated. Examples of Federal actions that may affect the oceanic whitetip shark include, but are not limited to: Alternative energy projects, discharge of pollution from point sources, non-point source pollution, contaminated waste and plastic disposal, dredging, pile-driving, development of water quality standards, vessel traffic, military activities, and fisheries management practices.

Critical Habitat

Critical habitat is defined in section 3 of the ESA (16 U.S.C. 1532(3)) as: (1) The specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the ESA, on which are found those physical or biological features (a) essential to the conservation of the species and (b) that may require special management considerations or protection; and (2) specific areas outside the geographical area occupied by a species at the time it is listed upon a determination that such areas are essential for the conservation of the species. ''Conservation'' means the use of all methods and procedures needed to bring the species to the point at which listing under the ESA is no longer necessary. Section 4(a)(3)(a) of the ESA (16 U.S.C. 1533(a)(3)(A)) requires that, to the extent prudent and determinable, critical habitat be designated concurrently with the listing of a species. Designations of critical habitat must be based on the best scientific data available and must take into consideration the economic, national security, and other relevant impacts of specifying any particular area as critical habitat. If we determine that it is prudent and determinable, we will publish a proposed designation of critical habitat for the oceanic whitetip shark in a separate rule. Public input on features and areas in U.S. waters that may meet the definition of critical habitat for the oceanic whitetip shark is invited.

Protective Regulations Under Section 4(d) of the ESA

We are proposing to list the oceanic whitetip shark, *Carcharhinus longimanus,* as a threatened species under the ESA. In the case of threatened species, ESA section 4(d) leaves it to the Secretary's discretion whether, and to what extent, to extend the section 9(a) ''take'' prohibitions to the species, and authorizes us to issue regulations necessary and advisable for the conservation of the species. Thus, we have flexibility under section 4(d) to tailor protective regulations based on the needs of and threats to the species. The section 4(d) protective regulations may prohibit, with respect to threatened species, some or all of the acts which section 9(a) of the ESA prohibits with respect to endangered species. We are

not proposing such regulations at this time, but may consider potential protective regulations pursuant to section 4(d) for the oceanic whitetip in a future rulemaking. In order to inform our consideration of appropriate protective regulations for the species, we seek information from the public on the threats to oceanic whitetip shark and possible measures for their conservation.

Role of Peer Review

The intent of the peer review policy is to ensure that listings are based on the best scientific and commercial data available. In December 2004, the Office of Management and Budget (OMB) issued a Final Information Quality Bulletin for Peer Review establishing minimum peer review standards, a transparent process for public disclosure of peer review planning, and opportunities for public participation. The OMB Bulletin, implemented under the Information Quality Act (Pub. L. 106–554), is intended to enhance the quality and credibility of the Federal government's scientific information, and applies to influential or highly influential scientific information disseminated on or after June 16, 2005. To satisfy our requirements under the OMB Bulletin, we obtained independent peer review of the status review report. Independent specialists were selected from the academic and scientific community for this review. All peer reviewer comments were addressed prior to dissemination of the final status review report and publication of this proposed rule.

Public Comments Solicited on Listing

To ensure that the final action resulting from this proposal will be as accurate and effective as possible, we solicit comments and suggestions from the public, other governmental agencies, the scientific community, industry, environmental groups, and any other interested parties. Comments are encouraged on this proposal (See **DATES** and **ADDRESSES**). Specifically, we are interested in information regarding: (1) New or updated information regarding the range, distribution, and abundance of the oceanic whitetip shark; (2) new or updated information regarding the genetics and population structure of the oceanic whitetip shark; (3) habitat within the range of the oceanic whitetip shark that was present in the past, but may have been lost over time; (4) new or updated biological or other relevant data concerning any threats to the oceanic whitetip shark (*e.g.,* post-release mortality rates, finning rates in commercial fisheries, etc.); (5) current or planned activities within the range of the oceanic whitetip shark and their possible impact on the species; (6) recent observations or sampling of the oceanic whitetip shark; and (7) efforts being made to protect the oceanic whitetip shark.

Public Comments Solicited on Critical Habitat

We request quantitative evaluations describing the quality and extent of habitats for the oceanic whitetip shark, as well as information on areas that may qualify as critical habitat for the species in U.S. waters. Specific areas that include the physical and biological features essential to the conservation of the species, where such features may require special management considerations or protection, should be identified. Areas outside the occupied geographical area should also be identified, if such areas themselves are essential to the conservation of the species. ESA implementing regulations at 50 CFR 424.12(g) specify that critical habitat shall not be designated within foreign countries or in other areas outside of U.S. jurisdiction. Therefore, we request information only on potential areas of critical habitat within waters under U.S. jurisdiction.

Section 4(b)(2) of the ESA requires the Secretary to consider the ''economic impact, impact on national security, and any other relevant impact'' of designating a particular area as critical habitat. Section 4(b)(2) also authorizes the Secretary to exclude from a critical habitat designation those particular areas where the Secretary finds that the benefits of exclusion outweigh the benefits of designation, unless excluding that area will result in extinction of the species. For features and areas potentially qualifying as critical habitat, we also request information describing: (1) Activities or other threats to the essential features or activities that could be affected by designating them as critical habitat; and (2) the positive and negative economic, national security and other relevant impacts, including benefits to the recovery of the species, likely to result if these areas are designated as critical habitat. We seek information regarding the conservation benefits of designating areas within waters under U.S. jurisdiction as critical habitat. In keeping with the guidance provided by OMB (2000; 2003), we seek information that would allow the monetization of these effects to the extent possible, as well as information on qualitative impacts to economic values.

Data reviewed may include, but are not limited to: (1) Scientific or commercial publications; (2) administrative reports, maps or other graphic materials; (3) information received from experts; and (4) comments from interested parties. Comments and data particularly are sought concerning: (1) Maps and specific information describing the amount, distribution, and use type (*e.g.,* foraging or migration) by the oceanic whitetip shark, as well as any additional information on occupied and unoccupied habitat areas; (2) the reasons why any habitat should or should not be determined to be critical habitat as provided by sections 3(5)(A) and 4(b)(2) of the ESA; (3) information regarding the benefits of designating particular areas as critical habitat; (4) current or planned activities in the areas that might be proposed for designation and their possible impacts; (5) any foreseeable economic or other potential impacts resulting from designation, and in particular, any impacts on small entities; (6) whether specific unoccupied areas may be essential to provide additional habitat areas for the conservation of the species; and (7) potential peer reviewers for a proposed critical habitat designation, including persons with biological and economic expertise relevant to the species, region, and designation of critical habitat. We seek information regarding critical habitat for the oceanic whitetip shark as soon as possible, but no later than March 29, 2017.

Public Hearings

If requested by the public by February 13, 2017, hearings will be held regarding the proposal to list the oceanic whitetip shark as a threatened species under the ESA. If hearings are requested, details regarding location(s), date(s), and time(s) will be published in a subsequent **Federal Register** notice.

References

A complete list of all references cited herein is available upon request (see **FOR FURTHER INFORMATION CONTACT**).

Classification

National Environmental Policy Act

Section 4(b)(1)(A) of the ESA restricts the information that may be considered when assessing species for listing and sets the basis upon which listing determinations must be made. Based on the requirements in section 4(b)(1)(A) of the ESA and the opinion in *Pacific Legal Foundation* v. *Andrus,* 675 F. 2d 825 (6th Cir. 1981), we have concluded that ESA listing actions are not subject to the environmental assessment requirements

of the National Environmental Policy Act (NEPA).

Executive Order 12866, Regulatory Flexibility Act, and Paperwork Reduction Act

As noted in the Conference Report on the 1982 amendments to the ESA, economic impacts cannot be considered when assessing the status of a species. Therefore, the economic analysis requirements of the Regulatory Flexibility Act are not applicable to the listing process.

In addition, this proposed rule is exempt from review under Executive Order 12866. This proposed rule does not contain a collection-of-information requirement for the purposes of the Paperwork Reduction Act.

Executive Order 13132, Federalism

In accordance with E.O. 13132, we determined that this proposed rule does not have significant Federalism effects and that a Federalism assessment is not required. In keeping with the intent of the Administration and Congress to provide continuing and meaningful dialogue on issues of mutual state and Federal interest, this proposed rule will be given to the relevant state agencies in each state in which the species is believed to occur, and those states will be invited to comment on this proposal. We have considered, among other things, Federal, state, and local conservation measures. As we proceed, we intend to continue engaging in informal and formal contacts with the state, and other affected local or regional entities, giving careful consideration to all written and oral comments received.

List of Subjects in 50 CFR Part 223

Endangered and threatened species, Exports, Imports, Transportation.

Dated: December 22, 2016.

Samuel D Rauch, III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 223 is proposed to be amended as follows:

PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

■ 1. The authority citation for part 223 continues to read as follows:

Authority: 16 U.S.C. 1531–1543; subpart B, § 223.201–202 also issued under 16 U.S.C. 1361 *et seq.;* 16 U.S.C. 5503(d) for § 223.206(d)(9).

■ 2. In § 223.102, in paragraph (e), add a new entry for ''Shark, oceanic whitetip'' under Fishes in alphabetical order by Common Name to read as follows:

§ 223.102 Enumeration of threatened marine and anadromous species.

* * * * *

(e) * * *

Species [1]			Citation(s) for listing determination(s)	Critical habitat	ESA rules
Common name	Scientific name	Description of listed entity			
*	*	*	*	*	*
FISHES					
*	*	*	*	*	*
Shark, oceanic whitetip ...	*Carcharhinus longimanus*	Entire species	*[Insert **Federal Register** page where the document begins], [Insert date of publication when published as a final rule].*	NA	NA
*	*	*	*	*	*

[1] Species includes taxonomic species, subspecies, distinct population segments (DPSs) (for a policy statement, see 61 FR 4722; February 7, 1996), and evolutionarily significant units (ESUs) (for a policy statement, see 56 FR 58612; November 20, 1991).

[FR Doc. 2016–31460 Filed 12–28–16; 8:45 am]

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