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# Contents

## Federal Register

Vol. 82, No. 228

Wednesday, November 29, 2017

### Agriculture Department

*See* Animal and Plant Health Inspection Service

### Animal and Plant Health Inspection Service

#### RULES

##### Imports:

Fresh Mango Fruit from Vietnam Into the Continental United States, 56531–56536

### Centers for Disease Control and Prevention

#### NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 56604–56605

### Civil Rights Commission

#### NOTICES

##### Meetings:

Arizona Advisory Committee, 56580  
Indiana Advisory Committee, 56580–56581

### Coast Guard

#### RULES

##### Safety Zones:

Delaware River, Marcus Hook, PA, 56566–56568  
Savannah River, Savannah, GA, 56568–56570

### Commerce Department

*See* Industry and Security Bureau

*See* International Trade Administration

*See* National Oceanic and Atmospheric Administration

### Comptroller of the Currency

#### RULES

Mandatory Contractual Stay Requirements for Qualified Financial Contracts, 56630–56669

### Employee Benefits Security Administration

#### RULES

18-Month Extension of Transition Period and Delay of Applicability Dates; Best Interest Contract Exemption (PTE 2016–01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (PTE 2016–02); etc., 56545–56560  
Claims Procedure for Plans Providing Disability Benefits: Delay of Applicability Date, 56560–56566

### Energy Department

*See* Federal Energy Regulatory Commission

### Farm Credit Administration

#### RULES

Board Policy Statements, 56536–56539

### Federal Communications Commission

#### RULES

Sunset Order; Access Charge Reform; Business Data Services, 56570–56571

#### PROPOSED RULES

Submission of Form Used to Report TV Stations' Ancillary or Supplementary Services, 56574–56579

### Federal Energy Regulatory Commission

#### NOTICES

##### Applications:

Blue Mountain Midstream, LLC, 56596–56597  
Kaukauna, WI, 56595–56596

Combined Filings, 56598

##### Complaints:

Occidental Energy Marketing, Inc. v. BridgeTex Pipeline Co., LLC, 56597

##### Environmental Assessments; Availability, etc.:

Northwest Pipeline, LLC; North Seattle Lateral Upgrade Project, 56587–56594

RH energytrans, LLC; Risberg Line Project, 56599–56604

##### Filings:

City Water and Light Plant of City of Jonesboro, 56596  
Western Area Power Administration, 56598

##### Meetings:

Electric Quarterly Report Users Group, 56594

##### Requests under Blanket Authorizations:

Southern Star Central Gas Pipeline, Inc., 56594–56595

### Federal Highway Administration

#### RULES

Metropolitan Planning Organization Coordination and Planning Area Reform, 56540–56545

### Federal Transit Administration

#### RULES

Metropolitan Planning Organization Coordination and Planning Area Reform, 56540–56545

### Food and Drug Administration

#### NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:

Recordkeeping and Reporting Requirements for Human Food and Cosmetics Manufactured from, Processed with, or Otherwise Containing Material from Cattle, 56615–56617

##### Guidance:

Recommendations for Dual 510(k) and Clinical Laboratory Improvement Amendments Waiver by Application Studies, 56610–56612

Select Updates for Recommendations for Clinical Laboratory Improvement Amendments of 1988 Waiver Applications for Manufacturers of In Vitro Diagnostic Devices, 56607–56609

##### New Drug Applications:

Roxane Laboratories, Inc.; Withdrawal of Approval, 56606–56607

##### Regulatory Review Periods for Purposes of Patent

##### Extensions:

REXULTI, 56612–56613  
SOLX SYSTEM, 56613–56615  
VELTASSA, 56609–56610  
XURIDEN, 56605–56606

### Health and Human Services Department

*See* Centers for Disease Control and Prevention

*See* Food and Drug Administration

*See* Health Resources and Services Administration

*See* National Institutes of Health

**Health Resources and Services Administration****NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:  
 Health Professions Student Loan Program and Nursing Student Loan Program Administrative Requirements (Regulations and Policy), 56619–56621  
 NURSE Corps Scholarship Program, 56618–56619

**Homeland Security Department**

*See* Coast Guard

**Industry and Security Bureau****NOTICES**

Impact of Implementation of Chemical Weapons Convention on Legitimate Commercial Chemical, Biotechnology, and Pharmaceutical Activities Involving “Schedule 1” Chemicals (including Schedule 1 Chemicals Produced as Intermediates) through Calendar Year 2017, 56581–56582

**International Trade Administration****NOTICES**

Antidumping or Countervailing Duty Investigations, Orders, or Reviews:  
 Certain Tool Chests and Cabinets from the People’s Republic of China, 56582–56586

**International Trade Commission****NOTICES**

Investigations; Determinations, Modifications, and Rulings, etc.:  
 Certain Road Construction Machines and Components Thereof, 56625–56626  
 Meetings; Sunshine Act, 56625

**Labor Department**

*See* Employee Benefits Security Administration

**National Institutes of Health****NOTICES**

Meetings:  
 National Cancer Institute, 56622  
 National Center for Advancing Translational Sciences, 56624–56625  
 National Heart, Lung, and Blood Institute, 56625  
 National Institute on Aging, 56624  
 Prospective Grants of Exclusive Patent Licenses:  
 Concatenated L2 Peptide Based Human Papillomavirus Vaccines, 56621–56622  
 N6, A Novel, Broad, Highly Potent HIV-Specific Antibody, 56623–56624  
 T-Cells Transduced with HLA A11 Restricted CT-RCC HERV-E Reactive T-Cell Receptors for Treatment of Renal Cell Carcinoma, 56622–56623

**National Oceanic and Atmospheric Administration****RULES**

Fisheries of the Exclusive Economic Zone Off Alaska:  
 Several Groundfish Species in Bering Sea and Aleutian Islands Management Area, 56571–56573

**NOTICES**

Meetings:  
 New England Fishery Management Council, 56586

Pacific Fishery Management Council; Webinar, 56586–56587

**National Science Foundation****NOTICES**

Antarctic Conservation Act Permits, 56626–56627

**National Transportation Safety Board****NOTICES**

Meetings; Sunshine Act, 56627

**Nuclear Regulatory Commission****NOTICES**

Petitions:  
 U.S. Army Installation Command, 56627

**Postal Service****NOTICES**

Product Changes:  
 Priority Mail Express and Priority Mail Negotiated Service Agreement, 56628  
 Priority Mail Negotiated Service Agreement, 56628

**Presidential Documents****ADMINISTRATIVE ORDERS**

Foreign Aid Transparency and Accountability Act of 2016; Delegation of Authority (Memorandum of November 21, 2017), 56529

**Securities and Exchange Commission****NOTICES**

Self-Regulatory Organizations; Proposed Rule Changes:  
 Nasdaq PHLX, LLC, 56672–56701

**Transportation Department**

*See* Federal Highway Administration

*See* Federal Transit Administration

**Treasury Department**

*See* Comptroller of the Currency

**Separate Parts In This Issue****Part II**

Treasury Department, Comptroller of the Currency, 56630–56669

**Part III**

Securities and Exchange Commission, 56672–56701

**Reader Aids**

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

To subscribe to the Federal Register Table of Contents electronic mailing list, go to <https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new>, enter your e-mail address, then follow the instructions to join, leave, or manage your subscription.

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**CFR PARTS AFFECTED IN THIS ISSUE**

---

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

**3 CFR****Administrative Orders:****Memorandums:****Memorandum of**

November 21,

2017 .....56529

**7 CFR**

319.....56531

**12 CFR**

Ch. VI.....56536

3.....56630

47.....56630

50.....56630

**23 CFR**

450.....56540

**29 CFR**

2550.....56545

2560.....56560

**33 CFR**165 (2 documents) .....56566,  
56568**47 CFR**

1.....56570

69.....56570

**Proposed Rules:**

73.....56574

**49 CFR**

613.....56540

**50 CFR**

679.....56571

---

# Presidential Documents

---

Title 3—

Memorandum of November 21, 2017

The President

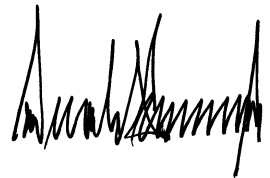
## Delegation of Authority Under the Foreign Aid Transparency and Accountability Act of 2016

### Memorandum for the Director of the Office of Management and Budget

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, I hereby delegate to the Director of the Office of Management and Budget the functions and authorities vested in the President by sections 3(b) and 3(d) of the Foreign Aid Transparency and Accountability Act of 2016 (Public Law 114–191) (the “Act”), including updating the guidelines required by section 3(b) as he may think proper, in accordance with the Act.

The delegation in this memorandum shall apply to any provision of any future public law that is the same or substantially the same as sections 3(b) and 3(d) of the Act.

You are authorized and directed to publish this memorandum in the *Federal Register*.



THE WHITE HOUSE,  
Washington, November 21, 2017

# Rules and Regulations

Federal Register

Vol. 82, No. 228

Wednesday, November 29, 2017

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

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## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

#### 7 CFR Part 319

[Docket No. APHIS–2016–0026]

RIN 0579–AE25

### Importation of Fresh Mango Fruit From Vietnam Into the Continental United States

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** We are amending the regulations to allow the importation of fresh mango fruit from Vietnam into the continental United States. As a condition of entry, fresh mango fruit from Vietnam will be subject to a systems approach that includes orchard or packinghouse requirements, irradiation treatment, and port of entry inspection. The fruit will also be required to be imported in commercial consignments and accompanied by a phytosanitary certificate issued by the national plant protection organization of Vietnam with an additional declaration stating that the consignment was inspected and found free of *Macrophoma mangiferae* and *Xanthomonas campestris* pv. *mangiferaeindicae*. This action will allow for the importation of fresh mango fruit from Vietnam while continuing to provide protection against the introduction of plant pests into the continental United States.

**DATES:** Effective December 29, 2017.

**FOR FURTHER INFORMATION CONTACT:** Mr. Tony Román, Senior Regulatory Policy Specialist, Regulatory Coordination and Compliance, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737–1231; (301) 851–2242.

**SUPPLEMENTARY INFORMATION:**

### Background

Under the regulations in “Subpart—Fruits and Vegetables” (7 CFR 319.56–1 through 319.56–80, referred to below as the regulations or the fruits and vegetables regulations), the Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture (USDA) prohibits or restricts the importation of fruits and vegetables into the United States from certain parts of the world to prevent plant pests from being introduced into and spread within the United States.

On August 4, 2016, we published in the *Federal Register* (81 FR 51381–51383, Docket No. APHIS–2016–0026) a proposal<sup>1</sup> to amend the regulations by allowing for the importation of commercially produced fresh mango (*Mangifera indica* L.) fruit from Vietnam into the continental United States.

We solicited comments concerning our proposal for 60 days ending October 3, 2016. We received 21 comments by that date. They were from producers, exporters, and representatives of State and foreign governments. Of these, four were fully supportive of the proposed action. The remaining 17 are discussed below by topic.

### General Comments

One commenter asked why APHIS focused on the importation of fresh mango fruit instead of other fruits that cannot be grown in the United States.

APHIS’s phytosanitary evaluation process only begins once a country has submitted a formal request for market access for a particular commodity. APHIS does not solicit such requests, nor do we control which countries submit requests.

Two commenters argued that there is already an adequate fresh mango supply in the domestic market to meet existing demand. The commenters stated that importation of fresh mango fruit carries a risk of diminished market share for local producers and suggested that the importation of fresh mango fruit from Vietnam not be allowed.

Such prohibitions would be beyond the scope of APHIS’ statutory authority under the Plant Protection Act (7 U.S.C. 7701 *et seq.*, referred to below as the PPA). Under the PPA, APHIS may

<sup>1</sup> To view the proposed rule, supporting documents, and the comments we received, go to <http://www.regulations.gov/#!docketDetail;D=APHIS-2016-0026>.

prohibit the importation of a fruit or vegetable into the United States only if we determine that the prohibition is necessary in order to prevent the introduction or dissemination of a plant pest or noxious weed within the United States.

Additionally, as a signatory to the World Trade Organization’s Agreement on Sanitary and Phytosanitary Measures (SPS Agreement), the United States has agreed that any prohibitions it places on the importation of fruits and vegetables will be based on scientific evidence related to phytosanitary measures and issues, and will not be maintained without sufficient scientific evidence. The blanket prohibitions requested by the commenters would not be in keeping with this agreement.

Another commenter suggested that, given the transit time from Vietnam to the continental United States, the fresh mango fruit would have to be harvested in a very under ripe state in order to survive transit and would therefore prove unsuitable for the domestic market.

While the quality of the fresh mango fruit and the timing of harvest are important factors in its marketability, we are solely concerned with plant health and phytosanitary risk. The timing of harvest solely for marketability reasons is outside the scope of this regulation.

Another commenter suggested that APHIS consider the effect of imported pests, bacteria, and fungi on domestic producers.

We considered these potential effects in the pest risk assessment (PRA) and laid out mitigations against phytosanitary impact in the risk management document (RMD) that accompanied the proposed rule.

### Comments on the Impetus for the Proposal

One commenter stated that there is no reason to risk the accidental importation of pests associated with fresh mango fruit from Vietnam except for political gain.

This action was predicated on several risk assessment documents that provide a scientific basis for potential importation of fresh mango fruit from Vietnam. Without these risk assessment documents, which have withstood several reviews and public comment periods, APHIS would not have proposed this action. Political and

economic interests may stimulate consideration of the expansion of trade of agricultural commodities between countries, but all decision making concerning phytosanitary restrictions on trade must be science-based. APHIS stands behind the risk assessment documents that support this rule, and believes they are based on sound science.

Two other commenters wanted to know why Vietnam would choose to export fresh mangos to the United States given that those fresh mangos would represent only 1 percent of the overall domestic supply. The commenters inquired about the benefits of adding another source of fresh mango fruit to the existing stock.

APHIS' phytosanitary evaluation process only begins once a country has submitted a formal request for market access for a particular commodity. APHIS does not solicit such requests, nor do we control which countries submit requests. APHIS does not solicit information regarding the motivations for such requests, we merely subject them to science-based evaluation.

#### Comments on the Pest List

The PRA identified 18 quarantine pests that could be introduced into the continental United States in consignments of fresh mango fruit from Vietnam. A quarantine pest is defined in § 319.56–2 as “a pest of potential economic importance to the area endangered thereby and not yet present there, or present but not widely distributed and being officially controlled.” The pests listed in the PRA are:

- Carambola fruit fly, *Bactrocera carambolae* Drew & Hancock
- Guava fruit fly, *Bactrocera correcta* (Bezzi)
- Melon fly, *Bactrocera cucurbitae* Coquillett
- Oriental fruit fly, *Bactrocera dorsalis* Hendel
- Pumpkin fruit fly, *Bactrocera tau* Walker
- Peach fruit fly, *Bactrocera zonata* (Saunders)
- Yellow peach moth, *Conogethes punctiferalis*
- Mango seed borer, *Deanolis albizonalis*
- Old World bollworm, *Helicoverpa armigera*
- Pink hibiscus mealybug, *Maconellicoccus hirsutus*
- The fungus *Macrophoma mangiferae*
- Spherical mealybug, *Nipaecoccus viridis*
- Coffee mealybug, *Planococcus lilacinus*

- Citriculus mealybug, *Pseudococcus cryptus*
- Fruit tree mealybug, *Rastrococcus invadens*
- Chili thrips, *Scirtothrips dorsalis*
- Mango pulp weevil, *Sternonchus frigidus*
- Mango black spot, *Xanthomonas campestris* pv. *mangiferaeindicae*

One commenter said that the chance of a mutation occurring that allows for one or multiple species to become resistant to the chemical treatments applied to fresh mango fruit from Vietnam was of potential concern. The commenter argued that, given the size of the pest list, such a mutation might be overlooked, resulting in an introduction of that mutated pest into the United States.

We believe that the standard suggested by the commenter would call for APHIS to postulate based on wholly unknowable risk factors. The PRA that accompanied the proposed rule provided a list of all pests of fresh mango fruit known to exist in Vietnam. This list was prepared using multiple data sources to ensure its completeness. For this same reason, we are confident it is accurate. If, however, a mutation of a pest is detected in Vietnam, APHIS will conduct further risk analysis in order to evaluate that pest to determine whether it is a quarantine pest, and whether it is likely to follow the importation pathway. If we determine that the pest is a quarantine pest and is likely to follow the pathway, we will work with the national plant protection organization (NPPO) of Vietnam to adjust the pest list and related phytosanitary measures to prevent its introduction into the United States.

Another commenter stated that Florida and Texas, two mango producing States, are already dealing with an emerging population of chili thrips. The commenter argued against the importation of fresh mango fruit from Vietnam given the prevalence of the pest in that country.

Given the findings of the PRA, we are confident that the systems approach required for fresh mango fruit from Vietnam will mitigate the risk posed by such fresh mango fruit to introduce these pests.

A commenter suggested that chili thrips be removed from the pest list, because the pest does not have any developing stages associated with fresh mango fruit.

As cited in the PRA, chili thrips only attacks immature fruit of its hosts, including fresh mango fruit.<sup>2</sup> The

commenter provided no evidence to support the claim that the pest does not have any developing stages associated with fresh mango fruit.

#### Comments on the Systems Approach

Based on the findings of the PRA, we determined that measures beyond standard port-of-entry inspection will be needed to mitigate the risks posed by the pests listed above. These measures were identified in the RMD and were used as the basis for the requirements of the systems approach.

One commenter asked if there is a fund to compensate domestic producers for crop loss were the systems approach to fail. The commenter proposed that fresh mango fruit from Vietnam be subject to a hot water treatment as has been required for fresh mango fruit from other countries.

The mitigations listed are proven effective in preventing the introduction of foreign pests into the United States and are the same or equivalent to those measures required for the importation of fresh mango fruit from other countries (e.g., India, Pakistan, and Australia). There is currently no fund to compensate farmers as a result of pest introduction.

The same commenter stated that exporting countries may lie in their certifications of pest freedom.

For the reasons explained in the proposed rule, the RMD, and this final rule, we consider the provisions of this final rule adequate to mitigate the risk associated with the importation of fresh mango fruit from Vietnam. The commenter did not provide any evidence suggesting that the mitigations are individually or collectively ineffective.

Another commenter requested that fresh mango fruit from Vietnam not be allowed into the State of Florida given that the climate in that State is conducive to the establishment of the listed pests.

We have determined, for the reasons described in the RMD that accompanied the proposed rule, that the measures specified in the RMD will effectively mitigate the risk associated with the importation of fresh mango fruit from Vietnam. The commenter did not provide any evidence suggesting that the mitigations are not effective. Therefore, we are not taking the action requested by the commenter.

Fresh mango fruit from Vietnam will be required to be imported into the

<sup>2</sup> *rubrocinctus* (Giard) on the flower buds, inflorescences, and fruits of mango (*Mangifera indica*) plants cultivated in greenhouses on Amami-Oshima Island, Japan [Abstract]. Kyushu byogaichu kenkyukaiho 53:103–106.

<sup>2</sup> Yamaguchi, T. 2007. Seasonal prevalence of *Scirtothrips dorsalis* Hood and *Selenothrips*

continental United States in commercial consignments only. One commenter asked how APHIS will determine whether a given operation is commercial. The commenter wanted to know if a list of approved producers will be made available.

An inspector will identify commercial consignments using such factors as: Quantity of produce, type of packaging, identification of grower or packinghouse on the packaging, and documents consigning the fruits or vegetables to a wholesaler or retailer. The NPPO of the exporting country verifies and approves commercial growing areas and maintains the list of all approved growers in that country. Anyone wishing to request this list should contact the NPPO of Vietnam for access.

Another commenter asked how we will ensure that non-commercial producers are not selling their fruit to commercial producers in order to skirt the requirements of the regulations.

APHIS and the NPPO of Vietnam will jointly develop an operational workplan. The workplan will incorporate details of traceability, treatment, and preclearance activities, including any inspection of articles that APHIS may perform before or after treatment. Traceability and verification that the fresh mango fruit was grown commercially will serve to prevent the scenario envisioned by the commenter.

Fresh mango fruit from Vietnam will be required to be treated with a minimum absorbed irradiation dose of 400 gray in accordance with § 305.9 of the phytosanitary treatment regulations in 7 CFR part 305. This is the established generic dose for all insect pests except pupae and adults of the order Lepidoptera and mango fruit pathogens. Consignments of fresh mango fruit from Vietnam will also have to meet all other relevant requirements in part 305, including monitoring of treatment by APHIS inspectors.

A commenter stated that irradiation is designed for certain insect species and may not be an effective treatment for the many other tropical fruit and citrus pests such as mites, as well as various pathogens, found in Vietnam.

We agree with the commenter, which is why the systems approach includes other phytosanitary procedures designed to provide protection from pests against which irradiation is not effective.

Another commenter was particularly concerned about peach fruit fly and pumpkin fruit fly and the potential for those pests to damage and infest domestic crops if they were to be accidentally introduced. The commenter inquired whether the

required irradiation dose would kill all peach and pumpkin fruit flies.

While no treatment can be guaranteed to be 100 percent effective, the absorbed dose of 400 gray has been shown to be effective in preventing insects from reproducing. Irradiation treatment does not kill insects but instead renders them sterile or incapable of completing development.

One commenter stated that we should provide scientific evidence of how irradiation affects all the plant pests associated with fresh mango fruit from Vietnam.

We would not include data on the ways in which a given phytosanitary treatment affects plant pests for which it is not an approved treatment. All the pests associated with fresh mango fruit from Vietnam are not meant to be mitigated by the listed irradiation treatment; instead the required treatment works in concert with the other aspects of the systems approach in order to provide phytosanitary security. For a complete discussion of the efficacy of irradiation on those plant pests for which it is an approved treatment, please refer to the proposed and final rules entitled "Treatments for Fruits and Vegetables" (70 FR 33857–33873, Docket No. 03–077–1 and 71 FR 4451–4464, Docket No. 03–077–2).

In order to mitigate the risks posed by *Macrophoma mangiferae*, we proposed three options: (1) The mangoes be treated with a broad-spectrum post-harvest fungicidal dip, (2) the orchard of origin be inspected at a time prior to the beginning of harvest and be found free of *Macrophoma mangiferae*, or (3) fruit must originate from an orchard that was treated with a broad-spectrum fungicide during the growing season.

One commenter wanted to know who will conduct orchard inspections.

Inspections are performed by the NPPO of Vietnam or its designee. If necessary, based on noncompliance events or program audits conducted in accordance with APHIS' policy, APHIS will provide qualified personnel to work cooperatively with the NPPO of Vietnam and all other program participants to review and evaluate operations in the field and packinghouses, quarantine pest management and control activities, and other safeguarding measures.

Another commenter asked when the broad-spectrum fungicide will be required to be applied during the growing season. The commenter also wanted to know whether the fungicide or fungicides are safe to use in conjunction with fresh mango fruit.

Fungicides are applied at the recommended rate deemed effective

against the target pest, and, as stated in the proposed rule, may be applied at any time during the growing season but prior to harvest. Fungicide safety in relation to the growing environment is subject to oversight by Vietnam's environmental authorities. The U.S. Food and Drug Administration (FDA) regulates and monitors the level of fungicide residues present on imported fruits and vegetables intended for human consumption.

A commenter wanted to know how we will ensure that all necessary treatments are being applied prior to harvest and export.

Our standard practice is to conduct site visits prior to the initiation of any import program. This is to ensure that all required mitigations are in place and the agreed upon operational workplan is being enforced. Subject matter experts inspect production sites and packinghouses and report their findings to APHIS. Furthermore, the operational workplan authorizes the regional APHIS International Services Director to conduct periodic audit visits of production sites.

Another commenter inquired about the authorization process for inspectors in Vietnam, stating that we need to ensure that authorized inspectors have the relevant experience and a strong background in agriculture and food safety.

All inspections will be performed by APHIS and the NPPO of Vietnam as part of the established preclearance program in Vietnam. The NPPO of Vietnam is responsible for recruiting, vetting, and training inspectors so that they possess the necessary skills to successfully perform their duties. Preclearance programs, including the program in Vietnam, are an important piece in our safeguarding strategy.

Each consignment of fruit will have to be accompanied by a phytosanitary certificate issued by the NPPO of Vietnam that contains an additional declaration stating that the fruit in the consignment was inspected and found free of *Macrophoma mangiferae* and *Xanthomonas campestris* pv. *mangiferaeindicae*. A commenter argued that APHIS's claim that inspection would mitigate the risks posed by *Xanthomonas campestris* pv. *mangiferaeindicae* since symptoms of *Xanthomonas campestris* pv. *mangiferaeindicae* are easily discernible to the naked eye was insufficient as some fruit might be asymptomatic. The commenter stated that testing may need to be done. Another commenter said that many of the listed pests are known to feed inside the fruit and have the potential to escape detection. The

commenter argued that these pests would be difficult to routinely detect by inspection alone either due to their feeding habits or life stages. A third commenter stated that, while the risks would be minimized, they would not be eliminated.

We are confident that field inspection or treatment or packinghouse treatment and culling, in concert with the other requirements of the systems approach will be effective in mitigating phytosanitary risk. Any fruit that appeared asymptomatic, as posited by the commenters, would likely be in the early stages of infection. Given the transit time required to ship mangoes from Vietnam to the United States as well as mandatory port of entry inspections, it is likely that latent infection would be detected at this point in the importation process.

Consignments of fresh mango fruit from Vietnam will be subject to inspection at the port of entry. One commenter wanted to know if there is a defined set of requirements for halting the importation of fresh mango fruit from Vietnam based on the results of these inspections.

Consignments of fresh mango fruit from Vietnam will be seized at the port of entry in the United States if they fail to meet the entry requirements set out in the regulations or if quarantine pests are found.

Another commenter wanted to know the rate at which consignments will be inspected.

All shipments are inspected at the first port of entry into the United States. Fruit sampling will be conducted either as part of the pre-clearance program in Vietnam or, for those shipments of fresh mango fruit that were not subject to the pre-clearance program, by U.S. Customs and Border Protection (CBP). Actual sampling rates vary. In a pre-clearance program, fruits must be sampled at a rate that produces a 95 percent confidence of detecting a 2 percent or greater pest population for external pests and a 95 percent confidence of detecting a 10 percent or greater pest population for internal feeders. In the case of fresh mango fruit that were not subject to the pre-clearance program in Vietnam the sampling rate will be set by CBP inspectors. Generally speaking the CBP sampling rate is 2 percent of fruit in each consignment but may vary depending on various factors such as surface abnormalities noted during visual inspection.

A commenter questioned whether we should raise the costs and workload of inspectors at the ports by increasing their inspection duties.

APHIS has reviewed its resources and consulted with CBP and believes there is adequate coverage across the United States to ensure compliance with APHIS regulations, including the Vietnamese mango import program, as established by this rule.

#### Comments on Irradiation Treatment

Two commenters expressed concern regarding the use of irradiation as a phytosanitary treatment, saying that the potential effects of irradiation on those who consume irradiated foods should be considered. One of the commenters was particularly worried about the effect of irradiation on the enzymes found in raw foods, arguing that the long-term effects of irradiated food consumption have yet to be studied. The commenter argued that irradiated foods should be labeled accordingly.

While the impact of food on human health is regulated and monitored by the Food and Drug Administration (FDA) and, as such, these concerns are outside the scope of our authority, irradiated foods are wholesome and nutritious. Nutrient losses caused by irradiation are less than or about the same as losses caused by cooking and freezing.

Public health agencies worldwide have evaluated the safety of food irradiation over the last 50 years and found it to be safe. In 37 countries, more than 40 food products are irradiated. In some European countries, irradiation has been in use for decades. In the United States, the FDA regulates food irradiation. In addition, food irradiation has received official endorsement from the American Medical Association, the World Health Organization, and the International Atomic Energy Agency.

#### Comments on Additional Phytosanitary Measures

One commenter suggested that all pre-harvest orchard inspections and all treatments be performed by APHIS inspectors in addition to the NPPO of Vietnam.

APHIS will monitor and audit Vietnam's implementation of the systems approach for the importation of fresh mango fruit into the continental United States.

The same commenter said we should add a methyl bromide treatment requirement for an additional layer of phytosanitary protection against *Macrophoma mangiferae*, mango black spot, and lepidopteran pests. Another commenter suggested that we include vapor heat as a treatment option.

Methyl bromide fumigation is not necessary. Neither methyl bromide nor vapor heat are approved treatments for fresh mango fruit. For the reasons

explained in the proposed rule, the PRA, the RMD, and this final rule, we consider the current provisions adequate to mitigate the risk associated with the importation of fresh mango fruit from Vietnam.

A commenter asked if it would be possible to observe inspectors at the port of entry to monitor implementation of the requirements.

The inspectors referenced by the commenter are trained agricultural specialists and we trust their knowledge and experience in phytosanitary inspections. Allowing outside parties to observe or participate in inspection work would potentially impede the inspectors' ability to perform their duties in a thorough and efficient manner. Inspections are performed in restricted areas and no civilians are allowed entry.

#### Comments on Vietnamese Oversight

Some commenters expressed concerns that the NPPO of Vietnam would not be able to adequately implement the required systems approach. One commenter asked how APHIS would enforce production standards in order to provide phytosanitary protection. Another commenter stated that the integrated pest management program in Vietnam is in its early stages and most farmers overdose their crops due to inexperience. The commenter said that this practice demonstrates a lack of concern for water and soil quality and suggests that the NPPO will not hold Vietnamese produce to a sufficiently high standard. A third commenter requested further information on how we will ensure that our standards for a pest free consignment are made clear.

APHIS personnel in Vietnam will take part in the preclearance program we have established and ensure that our required mitigation measures are enforced, including those relating to the application of fungicides in the field. In addition, as previously stated, APHIS will monitor and audit Vietnam's implementation of the systems approach for the importation of fresh mango fruit into the continental United States. If we determine that the systems approach has not been fully implemented or maintained, we will take appropriate remedial action to ensure that the importation of fresh mango fruit from Vietnam does not result in the dissemination of plant pests within the United States.

One commenter voiced concern regarding potential transshipment of fresh mango fruit from neighboring countries. The commenter wanted to know how we will prevent fresh mango fruit from being shipped into Vietnam

and subsequently repackaged as a Vietnamese consignment.

It is the responsibility of the NPPO of Vietnam to verify that production sites that grow articles for export and packinghouses that handle such articles are registered with the NPPO. Fresh mango fruit received and packed for export to the United States must be from approved orchards only and APHIS reserves the right to inspect packinghouses participating in the export program. Failure to adhere to program standards, including packaging transshipped fruits, may result in removal from the export program.

#### Comments on Economic Factors

One commenter asked if the importation of fresh mango fruit from Vietnam would create economic benefits for special interests in either the United States or Vietnam. The commenter asked for assurance that the rule represents a good business deal for the United States.

APHIS bases its decisionmaking process on evaluation and mitigation of phytosanitary risk and not on the economic and trade factors referenced by the commenter.

Another commenter speculated that the work and resources required to allow for the importation of fresh mango fruit from Vietnam would be better expended on a higher value commodity.

Contrary to the commenter's assertion, the mechanisms, systems, and personnel for importing fruits and vegetables already exist. The addition of another commodity to the list of allowable imports, particularly as import levels are expected to be low, will not unduly tax the existing system.

A commenter observed that the economic analysis that accompanied the proposed rule stated that the expected importation level (3,000 metric tons [MT] annually) for fresh mango fruit from Vietnam was equal to the amount of fresh mango fruit produced domestically. The commenter questioned how the importation of an equal amount of fresh mango fruit to what is domestically grown represents a non-significant impact on U.S. mango producers.

U.S. fresh mango fruit production levels are indeed low and are estimated at 3,000 MT annually. However, from 1997 to 2015, fresh mango fruit imports increased from 187,000 MT to 391,000 MT. While the quantity that is imported from Vietnam is equivalent to the quantity produced in the United States, these imports will simply help meet the growing demand for mangoes. Fresh mango fruit imports from Vietnam

represent less than one percent of total fresh mango fruit imports.

Therefore, for the reasons given in the proposed rule and in this document, we are adopting the proposed rule as a final rule, without change.

#### Executive Orders 12866 and 13771 and Regulatory Flexibility Act

This final rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget. This rule is not an Executive Order 13771 regulatory action because this rule is not significant under Executive Order 12866.

In accordance with the Regulatory Flexibility Act, we have analyzed the potential economic effects of this action on small entities. The analysis is summarized below. Copies of the full analysis are available on the *Regulations.gov* Web site (see footnote 1 in this document for a link to *Regulations.gov*) or by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

This rule is in response to a request from Vietnam to be allowed to export fresh mango fruit to the continental United States. The annual quantity that Vietnam expects to export to the United States, 3,000 MT, represents less than 1 percent of U.S. fresh mango fruit imports, which grew from 187,000 MT in 1997 to 391,000 MT in 2015. Primary sources are Mexico, Peru, Ecuador, Brazil, and Guatemala. While mangoes are grown in Florida and Hawaii, with smaller quantities produced in California and Texas, U.S. annual production totals only about 3,000 MT.

Most if not all U.S. mango farms and wholesalers are small entities. However, given the small quantity expected to be imported from Vietnam relative to current import levels, the rule will not have a significant impact on U.S. mango producers. While Vietnam's mango season runs from February to September, encompassing that of the United States (Florida's season is from May to September), U.S. importers may benefit marginally in having Vietnam as another source of fresh mangoes that will help meet the growing demand.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

#### Executive Order 12988

This final rule allows fresh mango fruit to be imported into the continental United States from Vietnam. State and

local laws and regulations regarding fresh mango fruit imported under this rule will be preempted while the fruit is in foreign commerce. Fresh fruits are generally imported for immediate distribution and sale to the consuming public, and remain in foreign commerce until sold to the ultimate consumer. The question of when foreign commerce ceases in other cases must be addressed on a case-by-case basis. No retroactive effect will be given to this rule, and this rule will not require administrative proceedings before parties may file suit in court challenging this rule.

#### Paperwork Reduction Act

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this final rule, which were filed under 0579-0452, have been submitted for approval to the Office of Management and Budget (OMB). When OMB notifies us of its decision, if approval is denied, we will publish a document in the **Federal Register** providing notice of what action we plan to take.

#### E-Government Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the E-Government Act to promote the use of the Internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes. For information pertinent to E-Government Act compliance related to this rule, please contact Ms. Kimberly Hardy, APHIS' Information Collection Coordinator, at (301) 851-2483.

#### List of Subjects in 7 CFR Part 319

Coffee, Cotton, Fruits, Honey, Imports, Nursery stock, Plant diseases and pests, Plants, Quarantine, Reporting and recordkeeping requirements, Rice, Sugar, Vegetables.

Accordingly, we are amending 7 CFR part 319 as follows:

#### PART 319—FOREIGN QUARANTINE NOTICES

■ 1. The authority citation for part 319 continues to read as follows:

**Authority:** 7 U.S.C. 450 and 7701-7772 and 7781-7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

■ 2. Add § 319.56-81 to read as follows:

#### § 319.56-81 Fresh mango from Vietnam.

Fresh mango (*Mangifera indica* L.) fruit may be imported into the

continental United States under the following conditions:

(a) The fresh mango fruit may be imported in commercial consignments only.

(b) The fresh mango fruit must be treated for plant pests of the class Insecta, except pupae and adults of the order Lepidoptera, with irradiation in accordance with part 305 of this chapter.

(c) The risks presented by *Macrophoma mangiferae* must be addressed in one of the following ways:

(1) The fresh mango fruit are treated with a broad-spectrum post-harvest fungicidal dip; or

(2) The orchard of origin is inspected prior to the beginning of harvest and found free of *Macrophoma mangiferae*; or

(3) The fresh mango fruit must originate from an orchard that was treated with a broad-spectrum fungicide during the growing season.

(d) Each consignment of fresh mango fruit must be accompanied by a phytosanitary certificate issued by the NPPO of Vietnam that contains an additional declaration stating that the fruit in the consignment was inspected and found free of *Macrophoma mangiferae* and *Xanthomonas campestris* pv. *mangiferaeindicae* and has been produced in accordance with the requirements of the systems approach in this section.

(e) The fruit is subject to inspection at the port of entry for all quarantine pests of concern.

(Approved by the Office of Management and Budget under control number 0579-0452)

Done in Washington, DC, this 22nd day of November 2017.

**Kevin Shea,**

*Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2017-25764 Filed 11-28-17; 8:45 am]

**BILLING CODE 3410-34-P**

## FARM CREDIT ADMINISTRATION

### 12 CFR Chapter VI

#### Farm Credit Administration Board Policy Statements

**AGENCY:** Farm Credit Administration.

**ACTION:** Notification of policy statements and index.

**SUMMARY:** The Farm Credit Administration (FCA), as part of its annual public notification process, is publishing for notice an index of the 18 Board policy statements currently in existence. Most of the policy statements remain unchanged since our last

**Federal Register** document on October 14, 2016, except for a minor technical update to the policy statement on Equal Employment Opportunity and Diversity, and an update and modification to the policy statement on Farm Credit System Building Association Management Operations Policies and Practices.

**DATES:** November 29, 2017.

#### FOR FURTHER INFORMATION CONTACT:

Dale L. Aultman, Secretary to Board, (703) 883-4009, TTY (703) 883-4056, [aultmand@fca.gov](mailto:aultmand@fca.gov); or

Mary Alice Donner, Senior Counsel, Office of General Counsel, (703) 883-4020, TTY (703) 883-4020, [donnerm@fca.gov](mailto:donnerm@fca.gov).

**SUPPLEMENTARY INFORMATION:** A list of the 18 FCA Board policy statements is set forth below. FCA Board policy statements may be viewed online at [www.fca.gov/handbook.nsf](http://www.fca.gov/handbook.nsf).

On August 24, 2017, the FCA Board updated FCA-PS-62 on, “Equal Employment Opportunity and Diversity.” The policy was published in the **Federal Register** on August 30, 2017 (82 FR 41258). The policy had no changes other than a citation clarification.

On July 27, 2017, the FCA Board updated FCA-PS-68 on, “Farm Credit System Building Association Management Operations Policies and Practices.” The updated policy increases the dollar amount on contracts the Farm Credit System Building Association is required to competitively bid, to reflect current economic conditions. It clarifies requirements for FCA Board approval of Farm Credit System Building Association contracts to reflect current FCA practices. The complete policy statement is published below.

The FCA will continue to publish new or revised policy statements in their full text.

#### FCA Board Policy Statements

FCA-PS-34 Disclosure of the Issuance and Termination of Enforcement Documents

FCA-PS-37 Communications During Rulemaking

FCA-PS-41 Alternative Means of Dispute Resolution

FCA-PS-44 Travel

FCA-PS-53 Examination Philosophy

FCA-PS-59 Regulatory Philosophy

FCA-PS-62 Equal Employment

Opportunity and Diversity

FCA-PS-64 Rules for the Transaction of Business of the Farm Credit Administration Board

FCA-PS-65 Release of Consolidated Reporting System Information

FCA-PS-67 Nondiscrimination on the Basis of Disability in Agency Programs and Activities

FCA-PS-68 FCS Building Association Management Operations Policies and Practices

FCA-PS-71 Disaster Relief Efforts by Farm Credit Institutions

FCA-PS-72 Financial Institution Rating System (FIRS)

FCA-PS-77 Borrower Privacy

FCA-PS-78 Official Names of Farm Credit Institutions

FCA-PS-79 Consideration and Referral of Supervisory Strategies and Enforcement Actions

FCA-PS-80 Cooperative Operating Philosophy—Serving the Members of Farm Credit System Institutions

FCA-PS-81 Ethics, Independence, Arm’s-Length Role, Ex Parte Communications and Open Government

#### Farm Credit System Building Association Management Operations Policies and Practices

##### FCA-PS-68

*Effective Date:* 27-JUL-17.

*Effect on Previous Action:* Amends NV-95-40, FCA-PS-68-7-JUL-95; amended by NV-11-15 (08-JUL-11), NV-17-19 (27-JUL-17).

*Source of Authority:* Farm Credit Act of 1971, as amended (Act), and the FCS Building Association (FCSBA) Articles of Association and Bylaws.

*The Farm Credit Administration (FCA) Board Hereby Adopts the Following Policy Statement:*

The FCSBA was established to provide the facilities and related services for the FCA and its field offices. The FCSBA is owned by the banks of the Farm Credit System (banks) and is funded by assessments, rental income from commercial tenants, and other income. The original ownership interest of each bank was based on the bank’s assets as a percentage of total Farm Credit System (FCS) assets on June 30, 1981. The FCSBA owns and operates the FCA headquarters in McLean, Virginia, and holds the leases and provides certain services and furnishings for FCA field offices. The FCA Board has sole discretionary authority under section (1)5.16 of the Act to approve the plans and decisions for such building and facilities. In order to carry out this authority and to preserve the FCA’s arms-length relationship with the banks, the Articles of Association and Bylaws of the FCSBA grant the FCA Board the responsibility to oversee the affairs of the FCSBA.

The purpose of this policy statement is to outline general parameters and

policies for various operational practices of the FCSBA that are supplementary to the FCSBA Bylaws.

#### A. FCA Board Responsibilities

**Board Responsibilities.** As outlined further in this policy statement, the FCA Board is responsible for items including, but not limited to, approval of all budgets and subsequent changes in object class limitations, signature authorities for financial expenditures, and long-term investment decisions. The FCA Board concurs in the development of performance standards, goals and pay scales for the FCSBA President as provided by the FCA Chairman and Chief Executive Officer (Chairman). Contracts that cover the selection of outside auditors, property management services or the commission of special studies with a cost in excess of \$25,000 that were not approved during the annual budget process require the approval of the FCA Board. All other contracts in excess of \$150,000 per year not approved during the annual budget process require approval of the FCA Board. FCA Board approval for contracts of \$250,000 or less may be obtained by oral briefing of the FCA Board by the Chief Operating Officer (COO). FCA Board approval for contracts in excess of \$250,000 may be obtained by FCA Board action as set forth in Article II of FCA-PS-64, Rules for the Transaction of Business of the Farm Credit Administration Board.

**Chairman's Responsibilities.** The Chairman shall be responsible for coordinating the FCA Board's involvement in, and responsibilities for, the operation of the FCSBA, including: (1) Developing performance standards and pay scales for the President of the FCSBA and appraising the President's performance with the concurrence of other FCA Board Members, (2) reviewing periodic financial and operating reports, (3) providing procedures as necessary concerning the FCA staff's relationship with the FCSBA, and (4) reviewing such other matters as the Chairman may deem advisable for the purpose of bringing such matters to the attention of the FCA Board. The Chairman may delegate these responsibilities to one or more FCA staff, as he or she deems advisable, except those responsibilities related to pay and performance.

#### B. FCSBA President

**General Signature Authority.** As required by Article V, Section 2 of the FCSBA Bylaws, in addition to member certificates, the FCA Board authorizes the FCSBA President to sign general correspondence and contracts deemed

necessary for the administration of FCSBA activities. The FCSBA President must get Board approval before changing the signatory authority for checks and before changing any banks with which the FCSBA does business.

**Duties.** The FCSBA President reports to the FCA Board and is generally responsible within the context of governing policies for all activities necessary to: (1) Manage FCSBA support to FCA, (2) manage the assets of the FCSBA, and (3) understand and consider the interests of the banks. Specific responsibilities include budget preparation and execution; planning; financial reporting and control; preparation of quarterly cash flow reports; supervision of inventory and supporting schedules for all fixed assets (furniture, fixtures and equipment); maintenance of management objectives schedules; supervision of the telecommunications system; the purchase and contracting for all supplies and services; records management; necessary correspondence; public relations activities in consultation with the FCA Office of Congressional and Public Affairs; personnel supervision and evaluation; the leasing and management of all space in the Farm Credit Building; site selection and lease negotiation for all FCA Field Offices; investment management; preparation and administration of all policies and operating procedures; engineering oversight; construction management; and preparation of all monthly, quarterly and annual reports required by the FCA Board. The FCSBA President shall coordinate these activities with the FCA Liaison as appropriate or required.

**Standard Operating Procedures.** In addition to those duties outlined under Article V, Section 2, of the FCSBA Bylaws and this Policy Statement, the FCSBA President is authorized to issue Standard Operating Procedures (SOPs), as he or she deems appropriate, in an effort to carry out the mission of the FCSBA provided that each SOP is reviewed by the FCA Board in advance. The President shall maintain all SOPs in a manner that reflects current policies and practices. SOPs will be filed with the Secretary to the Board, the FCSBA and others as requested.

**Periodic Reports.** The FCSBA President shall submit such periodic reports and proposals to the FCA Board and Liaison as may be necessary to facilitate budgets, assessments, audits, finances, plans, investments, reserve policy and accounting procedures that support the needs of the FCA Board and the banks as owners of the FCSBA. The FCSBA President shall normally report

to the FCA Board at least quarterly. At a minimum, the report shall include:

1. A cash statement of operations, an explanation of budget variances, and month-to-date cash reconciliation report. This report will include specific notations of any expected reallocations of funds requiring Board approval.

2. A status of all projects/building improvements that are planned, including current accounting of actual costs of each project.

3. A summary of the status of reserve accounts and investments including documentation as available demonstrating compliance with investment policies.

4. A comprehensive Management Objectives tracking report outlining the status of issues and projects resulting from a combination of one or more sources such as audit and examination recommendations, FCA Board directives, as well as management initiatives.

5. Other matters such as insurance, leasing and contract performance issues that may be timely for the particular reporting period.

**Annual Report.** The FCSBA President shall prepare an annual report on the operations of the FCSBA. The draft of the report shall be provided to the FCA Board for its review within approximately 30 days of receiving the final report from the independent auditors. After FCA Board review, the report shall be provided to the banks and may be provided to others who have an interest in FCSBA affairs. Although other reports to the banks may be warranted from time to time, the Annual Report shall serve as the primary report to the FCS. The report shall include:

1. A discussion of significant issues and accomplishments.

2. Audited financial statements and reportable conditions.

3. A discussion of the previous year's and current year's budget.

4. A discussion of basic and supplemental services provided to FCA by the FCSBA including an estimate of market and actual values of those services.

5. A discussion of non-budgeted expenditures, that have been reimbursed by the FCA.

#### C. FCA Liaison

**Duties.** The FCA Chief Executive Officer appoints the Liaison to the FCS Building Association. The FCA Liaison facilitates and coordinates the FCA's needs with the FCSBA in such areas as office renovations, internal moves, telecommunications services, field office support, and matters concerning

building security and Emergency Preparedness. The FCA Liaison provides an internal control function through the countersigning of certain categories of checks as designated by the FCA Board. Additionally, the FCA Liaison reviews FCSBA proposals that come before the FCA Board, and provides counsel regarding issues on which the FCA Board must decide or provide direction. The FCA Liaison is also responsible for assuring that FCA operations, as appropriate, comply with FCSBA policies and practices as well as FCA guidance relating to the FCSBA. Finally, the FCA Liaison shall review monthly cash reconciliation reports as provided by the FCSBA President and report irregularities, as appropriate.

#### *D. Annual Audit and Management Controls*

*Annual Audit and Management Controls Review.* As provided by Article IV, Section 9, of the FCSBA Bylaws, the FCSBA shall produce audited financial statements on an annual basis. A review of material internal control procedures shall be included in the audit process on a periodic basis.

#### *E. Financial Management*

*Budget Philosophy.* It is FCA Board policy to ensure that every effort is made to minimize operating expenses without jeopardizing the banks' investment in the assets that are managed. Approved budgets are planned and implemented in consideration of a series of policy objectives as outlined in this statement and always in an effort to balance income and expenses.

*Budget Development Time Frames.* FCSBA budgets are prepared on a calendar year basis. Each November 1, the FCSBA President shall provide the proposed budget for the next calendar year to the FCA Board for its review and comment. With FCA Board concurrence, the proposed budget may be made available to the banks for further comment.

*Operating Revenues.* The FCSBA receives annual operating revenues from (1) bank assessments, (2) office rental income from private commercial tenants, (3) other income from operating balances, and (4) reserve account transfers as necessary.

*Operating Expenses.* Operating expenses are budgeted using the appropriate object classifications as follows, which may be modified with FCA Board approval:  
FCA Field Office Rent  
Taxes and Contract Services  
Maintenance and Repair  
Utilities

Salaries and Benefits  
Professional and Consulting Fees  
Property Management Fees  
Other Expenses

As a part of the draft budget proposal to the FCA Board on or before November 1st every year, the FCSBA President shall provide an individual expense breakdown for each item within the object class. This breakdown shall include the actual expense from the previous year, the estimated expense for the current year, and the projected expense for the proposed year. Unanticipated and emergency expenses during the course of the year as well as expenditures beyond amounts approved for object classes may be funded out of the operating reserve subject to FCA Board approval.

Capital expenditures funded by transfers from the component reserve account should be shown separately with a breakdown of individual expenditures.

*Operating Reserves.* In consideration of liquidity needs as well as unanticipated expenses, each approved budget shall include the sum equivalent to 15 percent of the annual operating expense as operating reserves.

*Component Reserve Account.* To reserve for capital replacement items and repairs to the McLean facility, the FCSBA shall maintain a component reserve account which is separate from operating funds and reserves. The funding for this account shall be initially based on the Capital Reserve Study of June 1, 2005, which is then to be updated every 10 years by an independent engineering assessment. The policy objective is to ensure adequate funding, on a net present value basis, to cover up to a 10-year capital repair and replacement program to be updated, as necessary, with each approved budget.

*Assessments.* To ensure the maintenance of minimum "cash on hand," FCSBA assessments are based on bank assets as of June 30, and issued quarterly consistent with the FCSBA Bylaws. After taking interest, rental, and other revenue into consideration, budgeted annual assessments must be sufficient to fund the operations of the FCSBA, including the ability to hold operating reserves equal to 15 percent of expenses as well as component reserves consistent with FCSBA policy.

Adjustments to assessments can occur subject to FCA Board approval when total year end "cash and cash equivalents" exceed or are below operating and component reserve requirements. Adjustments are normally considered for third quarter assessments

and are based upon the previous year's audited financial statements. Earnings, if any, are distributed through this process in lieu of direct payment.

*Investments.* The FCSBA invests its funds in an effort to achieve maximum yield consistent with liquidity needs and investment safety. For short-term accessibility, operating reserves and other operating "cash on hand" may be invested in short-term money market accounts, certificates of deposits of federally insured institutions, and short-term instruments of the U.S. Government or commercial paper rated P-1 or A-1 by Moody's and Standard and Poor's, respectively. Operating reserves investment decisions are made by the FCSBA President consistent with this policy.

With the goal of achieving the best long-term returns while minimizing risk, component reserves are invested solely in instruments backed by the U.S. Government and agencies of the U.S. Government. The maturities and amounts of component reserve investments shall be generally consistent with the anticipated liquidity needs of the FCSBA capital replacement and repair program. Component reserve investment decisions require FCA Board approval.

*Budgeting for Reimbursable Expenses.* The FCA regularly reimburses the FCSBA for telecommunications and other expenditures on a cost recovery basis. Because there is no positive or negative financial impact on the FCSBA, these transactions are handled on a "net" basis and thus not included in the budget.

*Budget Execution.* The FCSBA President shall administer the annual budget as approved by the FCA Board. Expenditures during the course of the year that would exceed the object class budget require prior FCA Board approval. Exceptions to this policy are made in the event of emergency or the funding of accrued employee benefits. Expenditures in these cases will be brought to the FCA Board in the form of an Executive Summary for approval within 10 business days of occurrence. In considering its approval, the FCA Board has the option of either adjusting other object classes, utilizing the operating reserve, or taking other action, as it deems appropriate.

#### *F. Contract Management*

*General.* In accordance with Article IV of the FCSBA Bylaws, it is the policy of the FCA Board that all contracts issued by or on behalf of the FCSBA be:

1. Competitively bid with a minimum of three bids, when in excess of \$25,000.

2. Obtained with a minimum of three price quotes, when less than \$25,000, and more than \$10,000.

3. Generally awarded to the lowest bidder meeting contract specifications except in those instances where the differences in cost are considered negligible relative to a particular benefit offered by a higher bid.

4. Reviewed and approved by the FCA Board when in excess of \$150,000 unless for outside auditors, property managers, or special studies. Contracts approved as part of the Budget do not need separate approval.

5. Reviewed and approved by the FCA Board when in excess of \$25,000 if for outside auditors, property managers, or special studies. Contracts approved as part of the Budget do not need separate approval.

6. Retained in file a minimum of 3 years.

7. When possible, bid in conjunction with the budget year.

**Exceptions.** Notwithstanding the above requirements, the FCA Board has the authority to make exceptions, as it deems appropriate to the circumstances. These exceptions shall be evidenced by the COO's written memorandum documenting FCA Board briefing and approval for exceptions involving expenditures of \$250,000 or less, and Notational Vote or other FCA Board action for exceptions involving expenditures in excess of \$250,000. Additionally, competitive bidding is not required if the circumstances warrant immediate resolution or are vendor specific to equipment, in which case the FCSBA President will, within 10 business days, provide the FCA Board with a detailed report of the surrounding circumstances, with a copy to the COO and the FCA Liaison.

**Contract Timeframes.** Recurring contracts are normally for annual terms; however, when deemed cost effective, the FCSBA may allow terms up to 3 years. Obtaining best and final offers from bidders is encouraged.

**Approval Authorization.** The FCSBA President is authorized to approve contracts consistent with these guidelines and the FCSBA SOP. The FCSBA President may re-delegate up to \$50,000 of contracting authority to the building property manager.

**Contract Performance.** The FCSBA President shall insure that adequate systems are in place to measure, administer, and report on the performance of FCSBA contracts.

#### G. Asset Management

**Personal Property.** The FCSBA President shall insure that adequate methodologies and systems are in place

to ensure that FCSBA property is effectively accounted for on a periodic basis.

#### H. The FCSBA as a System Institution

**Examination.** The FCSBA is examined as provided by the Act. The scope of examination shall be generally consistent with the level of risk deemed associated with the operating practices of FCSBA management.

**Assessments for Examination.** The FCSBA will be charged annually for assessments consistent with FCA regulation found in 12 CFR (2)607.4, "Assessment of other System entities."

**Liquidation by System Request.** Should the Boards of the banks adopt, pursuant to Article IX of the FCSBA Articles of Association, a resolution to dissolve and liquidate the FCSBA, the dissolution and liquidation will be subject to, and conducted in accordance with, the Act and the regulations promulgated thereunder.

#### I. FCSBA Services to the FCA

**Basic Services.** The FCSBA provides space to the FCA headquarters in McLean, Virginia, and leases space on behalf of FCA for its field offices. Basic services provided to the FCA are similar to what is typical of rented office space and include, but are not limited to, such items as utilities, janitorial service, repairs for normal wear and tear, parking and appropriate landscaping as well as amenities which are available to all tenants and have the effect of maintaining property values and/or enhancing rental income.

**Supplemental Services.** In addition to providing basic services, the FCSBA will, on a case-by-case basis, provide certain supplemental support services related to FCA's housing needs under the following kinds of circumstances:

1. The FCSBA can provide the service on better terms than the FCA.

2. The service, if not provided by the FCSBA, could potentially adversely affect the aesthetic or other value of property, systems, building infrastructure, the health and safety of occupants, or the occupancy level of commercial tenants.

3. The capacity exists for the FCSBA to provide the service within the context of its employee expertise and/or its overall responsibilities to all tenants.

4. By providing the service, an advantage inures to the benefit of the FCS that would not otherwise occur.

5. An FCA Board determination that the service will be of particular benefit to the FCA, the FCS or the public. In the event of such a determination, no further FCA Board approval under

Section A or Section F of this Policy Statement is necessary.

These supplemental services must be documented, and approved by the COO for services valued at \$25,000 or less and approved by the FCA Board if valued in excess of \$25,000. If the FCA Board approves a supplemental service, no further FCA Board authority under this Policy Statement is necessary. As deemed necessary, the FCSBA President shall issue SOPs prescribing operational or other details of FCSBA services provided to the FCA.

**Non-Reimbursable and Reimbursable Services.** Whether or not the FCA will reimburse the FCSBA for a supplemental service will generally be determined as follows:

1. Reimbursement is not required for support provided by the FCSBA when resources are available within FCA Board approved budgets for the FCSBA and one or more of the criteria for supplemental services expenditures outlined above have been met.

2. Unless otherwise determined by an FCA Board action, supplemental support services requiring resources beyond that available within the FCSBA budget will require reimbursement.

3. Reimbursement that is not required is permitted at the discretion of the FCA Board.

Reimbursements in excess of \$10,000 that occur on an ongoing basis will require a written Memorandum of Understanding between the FCA and the FCSBA outlining the terms and conditions of the services provided and reimbursement. One time or minor recurring reimbursements may be handled by purchase orders. Reimbursable expenses shall be determined on an actual cost basis or a recognized methodology to achieve the goal of fully reimbursing the FCSBA on the transaction.

Dated this 27th day of July 2017.

By order of the board.

**Mary Alice Donner,**

*Acting Secretary to the Board.*

Dated: November 17, 2017.

**Dale L. Aultman,**

*Secretary, Farm Credit Administration Board.*

[FR Doc. 2017-25343 Filed 11-28-17; 8:45 am]

**BILLING CODE 6705-01-P**

**DEPARTMENT OF TRANSPORTATION****Federal Highway Administration****23 CFR Part 450****Federal Transit Administration****49 CFR Part 613**

[Docket No. FHWA–2017–0003]; FHWA RIN 2125–AF75; FTA RIN 2132–AB33]

**Metropolitan Planning Organization  
Coordination and Planning Area  
Reform**

**AGENCY:** Federal Highway Administration (FHWA), Federal Transit Administration (FTA); U.S. Department of Transportation (DOT).

**ACTION:** Final rule.

**SUMMARY:** This rulemaking rescinds certain transportation planning regulations pertaining to the establishment of the metropolitan planning area (MPA) boundaries, the designation of metropolitan planning organizations (MPO), and the coordination among MPOs. The amendments contained in this rule carry out the statutory mandate to rescind the final rule published on December 20, 2016, on this topic.

**DATES:** Effective on December 29, 2017.

**FOR FURTHER INFORMATION CONTACT:** For FHWA: Mr. Harlan W. Miller, Planning Oversight and Stewardship Team (HEPP–10), (202) 366–0847; or Ms. Janet Myers, Office of the Chief Counsel (HCC–30), (202) 366–2019. For FTA: Ms. Sherry Riklin, Office of Planning and Environment, (202) 366–5407; Mr. Dwayne Weeks, Office of Planning and Environment, (202) 493–0316; or Mr. Christopher Hall, Office of the Chief Counsel, (202) 366–5218. Both agencies are located at 1200 New Jersey Avenue SE., Washington, DC 20590. Office hours are from 8 a.m. to 4:30 p.m., ET for FHWA, and 9 a.m. to 5:30 p.m., ET for FTA, Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

**Electronic Access and Filing**

This document may be viewed online through the Federal eRulemaking portal at <http://www.regulations.gov>. Retrieval help and guidelines are available on the Web site. It is available 24 hours each day, 365 days a year. An electronic copy of this document may also be downloaded from the Office of the Federal Register home page at: <http://www.ofr.gov> and the Government Publishing Office Web page at: <http://www.gpo.gov>.

**Background**

Transportation planning is a cooperative, performance-driven process by which long and short-range transportation improvement priorities are determined. States, MPOs, and transit operators conduct transportation planning, with active involvement from the traveling public, the business community, community groups, environmental organizations, and freight operators. State governments, MPOs, and transit operators are essential partners in the management of the Nation's transportation system and best suited to develop and implement a continuing, cooperative, and comprehensive, or "3-C," planning process for their States and metropolitan regions.

On December 20, 2016, FHWA and FTA promulgated a rule at 23 CFR part 450 and 49 CFR part 613 (81 FR 93448) (December 2016 Final Rule), which required MPOs to achieve compliance with the statutory requirement that an MPA include an entire urbanized area (UZA) and the contiguous area expected to become urbanized within a 20-year forecast period through a range of coordination options including: Adjustment of their boundaries; coordination with other MPOs within their UZA to create unified planning products for the MPA; mergers; or the receipt of an exception from the Secretary.

On May 12, 2017, the President signed Public Law 115–33 (131 Stat. 845) repealing the December 2016 Final Rule. The legislation provides that the 2016 Final Rule shall have no force or effect, and any regulation revised by that rule shall be applied as if that rule had not been issued. As a result, the amendments in this final rule carry out that statutory instruction by revising the regulations to read as if the December 2016 Final Rule had not been issued.

The FHWA and FTA will continue to evaluate their regulations and guidance to promote improvements to the planning process in the least burdensome manner.

**Discussion of the Changes**

This rulemaking removes the revisions made by the December 2016 Final Rule, and restores the language promulgated in the May 27, 2016, rulemaking (81 FR 34050). Under the Administrative Procedure Act (5 U.S.C. 553(b)), an agency may waive the normal notice-and-comment procedure if it finds, for good cause, that notice and comment would be impracticable, unnecessary, or contrary to the public interest. The Agencies find good cause

that notice and comment for this rule is unnecessary due to the nature of the revisions (*i.e.*, the rule simply carries out the statutory language found in Public Law 115–33 without interpretation to rescind the December 2016 Final Rule). The statutory language does not require regulatory interpretation to carry out its intent. The regulatory amendments in this final rule implement the statutory language, and comments cannot alter the regulation given the explicit mandate. Accordingly, the Agencies find good cause under 5 U.S.C. 553(b)(3)(B) to waive notice and opportunity for comment.

**Rulemaking Analyses and Notices**

*Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs), and DOT Regulatory Policies and Procedures*

The FHWA and FTA have determined that this rulemaking is a significant regulatory action within the meaning of Executive Order (E.O.) 12866, and within the meaning of DOT regulatory policies and procedures. This action complies with E.O.s 12866, 13563, and 13771 to improve regulation.

This final rule is considered an E.O. 13771 deregulatory action. This rulemaking eliminates requirements that MPOs achieve compliance with the statutory requirement that an MPA include an entire UZA and the contiguous area expected to become urbanized within a 20-year forecast period for the metropolitan transportation plan by implementing one of several coordination options including: By adjusting their boundaries; by coordinating with other MPOs within their UZA to create unified planning products for the MPA; by merging; or by receiving an exception from the Secretary.

The FHWA and FTA have estimated that modifying these requirements would provide a maximum average annual cost savings of \$86.3 million annually over 4 years and impose no additional costs on MPOs and States. This equates to a present value, using end of period discounting, of \$330.4 million at a 3 percent discount rate and \$312.8 million at a 7 percent discount rate. An indefinite horizon (*i.e.*, annuity) equivalent is approximated by the calculation  $\$330.4 \times 0.03 = \$9.9$  million for a 3 percent discount rate and  $\$312.8 \times 0.07 = \$21.9$  million for a 7 percent discount rate. This estimate is consistent with the cost estimate the

Agencies previously provided in which FHWA and FTA estimated the total costs for merging all 142 affected MPOs, and the one-time cost of developing a dispute resolution process would result in an estimated maximum average annual cost of this rule of \$86.3 million over 4 years. The FHWA and FTA do not anticipate that this rule would impose any additional costs for States and MPOs to implement because it allows these entities to follow the procedures and protocols they had in place as of December 2016.

This action complies with the principles of E.O. 13563. After evaluating the costs and benefits of the rule, FHWA and FTA believe that the cost savings from this rulemaking would exceed the foregone benefits. These changes are not anticipated to adversely affect, in any material way, any sector of the economy. In addition, these changes will not create a serious inconsistency with any other agency's action or materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs.

#### Regulatory Flexibility Act

Since the Agencies find good cause under 5 U.S.C. 553(b)(3)(B) to waive notice and opportunity for comment for this rule, the provisions of the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612) do not apply. However, the Agencies evaluated the effects of this action on small entities and determined the action would not have a significant economic impact on a substantial number of small entities. The rule addresses the obligation of Federal funds to State DOTs for Federal-aid highway projects. The rule affects two types of entities: State governments and MPOs. State governments do not meet the definition of a small entity under 5 U.S.C. 601, which have a population of less than 50,000.

The MPOs are considered governmental jurisdictions, and to qualify as a small entity, they need to serve less than 50,000 people. The MPOs serve UZAs with populations of 50,000 or more. Therefore, the MPOs that might incur economic impacts under this rule do not meet the definition of a small entity.

The FHWA and FTA hereby certify that this rule will not have a significant economic impact on a substantial number of small entities.

#### Unfunded Mandates Reform Act of 1995

The FHWA and FTA have determined that this rule does not impose unfunded mandates, as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, March 22, 1995, 109 Stat. 48).

This rule does not include a Federal mandate that may result in expenditures of \$155.1 million or more in any single year (when adjusted for inflation) in 2012 dollars for either State, local, and Tribal governments in the aggregate, or by the private sector. In addition, the definition of “Federal mandate” in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or Tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal Government. The Federal-aid highway program and the Federal Transit Act permit this type of flexibility.

#### *Executive Order 13132 (Federalism Assessment)*

Executive Order 13132 requires agencies to ensure meaningful and timely input by State and local officials in the development of regulatory policies that may 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. This action has been analyzed in accordance with the principles and criteria contained in E.O. 13132 dated August 4, 1999, and the Agencies determined this action will not have a substantial direct effect or sufficient federalism implications on the States. The Agencies also determined this action will not preempt any State law or regulation or affect the States' ability to discharge traditional State governmental functions.

#### *Executive Order 12372 (Intergovernmental Review)*

The regulations implementing E.O. 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program. Local entities should refer to the Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction, for further information.

#### Paperwork Reduction Act

Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct, sponsor, or require through regulations. The FHWA and FTA have analyzed this rule under the Paperwork Reduction Act (PRA), and this rule does not impose additional information collection requirements for the purposes of the PRA above and beyond existing information collection clearances from OMB.

#### National Environmental Policy Act

Federal agencies are required to adopt implementing procedures for the National Environmental Policy Act (NEPA) that establish specific criteria for, and identification of, three classes of actions: (1) Those that normally require preparation of an Environmental Impact Statement, (2) those that normally require preparation of an Environmental Assessment, and (3) those that are categorically excluded from further NEPA review (40 CFR 1507.3(b)). This rule qualifies for categorical exclusions under 23 CFR 771.117(c)(20) (promulgation of rules, regulations, and directives) and 771.117(c)(1) (activities that do not involve or lead directly to construction) for FHWA, and 23 CFR 771.118(c)(4) (planning and administrative activities that do not involve or lead directly to construction) for FTA. The FHWA and FTA have evaluated whether the rule will involve unusual or extraordinary circumstances and have determined that it will not.

#### *Executive Order 12630 (Taking of Private Property)*

The FHWA and FTA have analyzed this rule under E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights. The FHWA and FTA do not believe this rule affects a taking of private property or otherwise has taking implications under E.O. 12630.

#### *Executive Order 12988 (Civil Justice Reform)*

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

#### *Executive Order 13045 (Protection of Children)*

The FHWA and FTA have analyzed this rule under E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks. The FHWA and FTA certify that this action will not cause an environmental risk to health or safety that might disproportionately affect children.

#### *Executive Order 13175 (Tribal Consultation)*

The FHWA and FTA have analyzed this rule under E.O. 13175, dated November 6, 2000, and believe that it will not have substantial direct effects on one or more Indian tribes; will not impose substantial direct compliance costs on Indian Tribal governments; and will not preempt Tribal laws. The rule addresses obligations of Federal funds

to State DOTs for Federal-aid highway projects and will not impose any direct compliance requirements on Indian Tribal governments. Therefore, a Tribal summary impact statement is not required.

*Executive Order 13211 (Energy Effects)*

The FHWA and FTA have analyzed this action under E.O. 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. The FHWA and FTA have determined that this action is not a significant energy action under that order and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required.

*Executive Order 12898 (Environmental Justice)*

The E.O. 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations) and DOT Order 5610.2(a) (77 FR 27534, May 10, 2012) (available online at [http://www.fhwa.dot.gov/environment/environmental\\_justice/ej\\_at\\_dot\\_order\\_56102a/index.cfm](http://www.fhwa.dot.gov/environment/environmental_justice/ej_at_dot_order_56102a/index.cfm)) require DOT agencies to achieve environmental justice (EJ) as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies, and activities on minority and low-income populations. All DOT agencies must address compliance with E.O. 12898 and the DOT Order in all rulemaking activities.

The FHWA and FTA have issued additional documents relating to administration of E.O. 12898 and the DOT Order. On June 14, 2012, FHWA issued an update to its EJ order, FHWA Order 6640.23A (FHWA Actions to Address Environmental Justice in Minority Populations and Low Income Populations (available online at <http://www.fhwa.dot.gov/legisregs/directives/orders/664023a.htm>)). On August 15, 2012, FTA's Circular 4703.1 became effective, which contains guidance for States and MPOs to incorporate EJ into their planning processes (available online at [http://www.fta.dot.gov/documents/FTA\\_EJ\\_Circular\\_7.14-12\\_FINAL.pdf](http://www.fta.dot.gov/documents/FTA_EJ_Circular_7.14-12_FINAL.pdf)).

The FHWA and FTA have evaluated this action under the E.O., the DOT Order, the FHWA Order, and the FTA Circular. The EJ principles, in the context of planning, should be considered when the planning process is being implemented at the State and

local level. As part of their stewardship and oversight of the federally aided transportation planning process of the States, MPOs, and operators of public transportation, FHWA and FTA encourage these entities to incorporate EJ principles into the statewide and metropolitan planning processes and documents, as appropriate and consistent with the applicable orders and the FTA Circular. When FHWA and FTA make a future funding or other approval decision on a project basis, they will consider EJ.

Nothing inherent in the rule will disproportionately impact minority or low-income populations. The rule establishes procedures and other requirements to guide future State and local decisionmaking on programs and projects. Neither the rule nor 23 U.S.C. 134 and 135 dictate the outcome of those decisions. The FHWA and FTA have determined that this action will not cause disproportionately high and adverse human health and environmental effects on minority or low-income populations.

**Regulation Identifier Number**

A Regulation Identifier Number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this rule with the Unified Agenda.

**List of Subjects**

*23 CFR Part 450*

Grant programs—transportation, Highway and roads, Mass transportation, Reporting and recordkeeping requirements.

*49 CFR Part 613*

Grant programs—transportation, Highways and roads, Mass transportation.

Issued in Washington, DC, on November 21, 2017 under authority delegated in 49 CFR 1.85.

**Brandye L. Hendrickson,**

*Acting Administrator, Federal Highway Administration.*

**K. Jane Williams,**

*Acting Administrator, Federal Transit Administration.*

In consideration of the foregoing, FHWA and FTA amend title 23, Code of Federal Regulations, part 450, and title 49, Code of Federal Regulations, part 613, as set forth below:

**Title 23—Highways**

**PART 450—PLANNING ASSISTANCE AND STANDARDS**

■ 1. The authority citation for part 450 continues to read as follows:

**Authority:** 23 U.S.C. 134, 135, and 315; 42 U.S.C. 7410 *et seq.*; 49 U.S.C. 5303 and 5304; 49 CFR 1.85 and 1.90.

■ 2. Amend § 450.104 by revising the definitions for “Metropolitan planning agreement”, “Metropolitan planning area (MPA)”, “Metropolitan transportation plan”, and “Transportation improvement program (TIP)” to read as follows:

**§ 450.104 Definitions.**

\* \* \* \* \*

*Metropolitan planning agreement* means a written agreement between the MPO, the State(s), and the providers of public transportation serving the metropolitan planning area that describes how they will work cooperatively to meet their mutual responsibilities in carrying out the metropolitan transportation planning process.

*Metropolitan planning area (MPA)* means the geographic area determined by agreement between the MPO for the area and the Governor, in which the metropolitan transportation planning process is carried out.

\* \* \* \* \*

*Metropolitan transportation plan* means the official multimodal transportation plan addressing no less than a 20-year planning horizon that the MPO develops, adopts, and updates through the metropolitan transportation planning process.

\* \* \* \* \*

*Transportation improvement program (TIP)* means a prioritized listing/program of transportation projects covering a period of 4 years that is developed and formally adopted by an MPO as part of the metropolitan transportation planning process, consistent with the metropolitan transportation plan, and required for projects to be eligible for funding under title 23 U.S.C. and title 49 U.S.C. chapter 53.

\* \* \* \* \*

■ 3. Amend § 450.208 by revising paragraph (a)(1) to read as follows:

**§ 450.208 Coordination of planning process activities.**

(a) \* \* \*

(1) Coordinate planning carried out under this subpart with the metropolitan transportation planning activities carried out under subpart C of

this part for metropolitan areas of the State. The State is encouraged to rely on information, studies, or analyses provided by MPOs for portions of the transportation system located in metropolitan planning areas;

\* \* \* \* \*

**§ 450.218 [Amended]**

■ 4. Amend § 450.218(b) by removing “MPO(s)” and adding in its place “MPO” in both places it appears.

**§ 450.226 [Amended]**

■ 5. Amend § 450.226 by removing paragraph (g).

■ 6. Amend § 450.300 as follows:

■ a. Revise paragraph (a); and

■ b. Remove from paragraph (b) the word “Encourage” and add in its place “Encourages”.

The revision reads as follows:

**§ 450.300 Purpose.**

\* \* \* \* \*

(a) Set forth the national policy that the MPO designated for each urbanized area is to carry out a continuing, cooperative, and comprehensive performance-based multimodal transportation planning process, including the development of a metropolitan transportation plan and a TIP, that encourages and promotes the safe and efficient development, management, and operation of surface transportation systems to serve the mobility needs of people and freight (including accessible pedestrian walkways, bicycle transportation facilities, and intermodal facilities that support intercity transportation, including intercity buses and intercity bus facilities and commuter vanpool providers) fosters economic growth and development, and takes into consideration resiliency needs, while minimizing transportation-related fuel consumption and air pollution; and

\* \* \* \* \*

■ 7. Amend § 450.306 by removing paragraph (d)(5) and revising paragraph (i) to read as follows:

**§ 450.306 Scope of the metropolitan transportation planning process.**

\* \* \* \* \*

(i) In an urbanized area not designated as a TMA that is an air quality attainment area, the MPO(s) may propose and submit to the FHWA and the FTA for approval a procedure for developing an abbreviated metropolitan transportation plan and TIP. In developing proposed simplified planning procedures, consideration shall be given to whether the abbreviated metropolitan transportation

plan and TIP will achieve the purposes of 23 U.S.C. 134, 49 U.S.C. 5303, and this part, taking into account the complexity of the transportation problems in the area. The MPO shall develop simplified procedures in cooperation with the State(s) and public transportation operator(s).

■ 8. Amend § 450.310 by revising paragraphs (e) and (m) introductory text to read as follows:

**§ 450.310 Metropolitan planning organization designation and redesignation.**

\* \* \* \* \*

(e) To the extent possible, only one MPO shall be designated for each urbanized area or group of contiguous urbanized areas. More than one MPO may be designated to serve an urbanized area only if the Governor(s) and the existing MPO, if applicable, determine that the size and complexity of the urbanized area make designation of more than one MPO appropriate. In those cases where two or more MPOs serve the same urbanized area, the MPOs shall establish official, written agreements that clearly identify areas of coordination, and the division of transportation planning responsibilities among the MPOs.

\* \* \* \* \*

(m) Each Governor with responsibility for a portion of a multistate metropolitan area and the appropriate MPOs shall, to the extent practicable, provide coordinated transportation planning for the entire MPA. The consent of Congress is granted to any two or more States to:

\* \* \* \* \*

■ 9. Section 450.312 is revised to read as follows:

**§ 450.312 Metropolitan Planning Area boundaries.**

(a) The boundaries of a metropolitan planning area (MPA) shall be determined by agreement between the MPO and the Governor.

(1) At a minimum, the MPA boundaries shall encompass the entire existing urbanized area (as defined by the Bureau of the Census) plus the contiguous area expected to become urbanized within a 20-year forecast period for the metropolitan transportation plan.

(2) The MPA boundaries may be further expanded to encompass the entire metropolitan statistical area or combined statistical area, as defined by the Office of Management and Budget.

(b) An MPO that serves an urbanized area designated as a nonattainment area for ozone or carbon monoxide under the Clean Air Act (42 U.S.C. 7401 *et seq.*)

as of August 10, 2005, shall retain the MPA boundary that existed on August 10, 2005. The MPA boundaries for such MPOs may only be adjusted by agreement of the Governor and the affected MPO in accordance with the redesignation procedures described in § 450.310(h). The MPA boundary for an MPO that serves an urbanized area designated as a nonattainment area for ozone or carbon monoxide under the Clean Air Act (42 U.S.C. 7401 *et seq.*) after August 10, 2005, may be established to coincide with the designated boundaries of the ozone and/or carbon monoxide nonattainment area, in accordance with the requirements in § 450.310(b).

(c) An MPA boundary may encompass more than one urbanized area.

(d) MPA boundaries may be established to coincide with the geography of regional economic development and growth forecasting areas.

(e) Identification of new urbanized areas within an existing metropolitan planning area by the Bureau of the Census shall not require redesignation of the existing MPO.

(f) Where the boundaries of the urbanized area or MPA extend across two or more States, the Governors with responsibility for a portion of the multistate area, the appropriate MPO(s), and the public transportation operator(s) are strongly encouraged to coordinate transportation planning for the entire multistate area.

(g) The MPA boundaries shall not overlap with each other.

(h) Where part of an urbanized area served by one MPO extends into an adjacent MPA, the MPOs shall, at a minimum, establish written agreements that clearly identify areas of coordination and the division of transportation planning responsibilities among and between the MPOs. Alternatively, the MPOs may adjust their existing boundaries so that the entire urbanized area lies within only one MPA. Boundary adjustments that change the composition of the MPO may require redesignation of one or more such MPOs.

(i) The MPO (in cooperation with the State and public transportation operator(s)) shall review the MPA boundaries after each Census to determine if existing MPA boundaries meet the minimum statutory requirements for new and updated urbanized area(s), and shall adjust them as necessary. As appropriate, additional adjustments should be made to reflect the most comprehensive boundary to foster an effective planning process that ensures connectivity between modes,

improves access to modal systems, and promotes efficient overall transportation investment strategies.

(j) Following MPA boundary approval by the MPO and the Governor, the MPA boundary descriptions shall be provided for informational purposes to the FHWA and the FTA. The MPA boundary descriptions shall be submitted either as a geo-spatial database or described in sufficient detail to enable the boundaries to be accurately delineated on a map.

■ 10. Section 450.314 is revised to read as follows:

**§ 450.314 Metropolitan planning agreements.**

(a) The MPO, the State(s), and the providers of public transportation shall cooperatively determine their mutual responsibilities in carrying out the metropolitan transportation planning process. These responsibilities shall be clearly identified in written agreements among the MPO, the State(s), and the providers of public transportation serving the MPA. To the extent possible, a single agreement between all responsible parties should be developed. The written agreement(s) shall include specific provisions for the development of financial plans that support the metropolitan transportation plan (see § 450.324) and the metropolitan TIP (see § 450.326), and development of the annual listing of obligated projects (see § 450.334).

(b) The MPO, the State(s), and the providers of public transportation should periodically review and update the agreement, as appropriate, to reflect effective changes.

(c) If the MPA does not include the entire nonattainment or maintenance area, there shall be a written agreement among the State department of transportation, State air quality agency, affected local agencies, and the MPO describing the process for cooperative planning and analysis of all projects outside the MPA within the nonattainment or maintenance area. The agreement must also indicate how the total transportation-related emissions for the nonattainment or maintenance area, including areas outside the MPA, will be treated for the purposes of determining conformity in accordance with the EPA's transportation conformity regulations (40 CFR part 93, subpart A). The agreement shall address policy mechanisms for resolving conflicts concerning transportation-related emissions that may arise between the MPA and the portion of the nonattainment or maintenance area outside the MPA.

(d) In nonattainment or maintenance areas, if the MPO is not the designated agency for air quality planning under section 174 of the Clean Air Act (42 U.S.C. 7504), there shall be a written agreement between the MPO and the designated air quality planning agency describing their respective roles and responsibilities for air quality related transportation planning.

(e) If more than one MPO has been designated to serve an urbanized area there shall be a written agreement among the MPOs, the State(s), and the public transportation operator(s) describing how the metropolitan transportation planning processes will be coordinated to assure the development of consistent metropolitan transportation plans and TIPs across the MPA boundaries, particularly in cases in which a proposed transportation investment extends across the boundaries of more than one MPA. If any part of the urbanized area is a nonattainment or maintenance area, the agreement also shall include State and local air quality agencies. The metropolitan transportation planning processes for affected MPOs should, to the maximum extent possible, reflect coordinated data collection, analysis, and planning assumptions across the MPAs. Alternatively, a single metropolitan transportation plan and/or TIP for the entire urbanized area may be developed jointly by the MPOs in cooperation with their respective planning partners. Coordination efforts and outcomes shall be documented in subsequent transmittals of the UPWP and other planning products, including the metropolitan transportation plan and TIP, to the State(s), the FHWA, and the FTA.

(f) Where the boundaries of the urbanized area or MPA extend across two or more States, the Governors with responsibility for a portion of the multistate area, the appropriate MPO(s), and the public transportation operator(s) shall coordinate transportation planning for the entire multistate area. States involved in such multistate transportation planning may:

(1) Enter into agreements or compacts, not in conflict with any law of the United States, for cooperative efforts and mutual assistance in support of activities authorized under this section as the activities pertain to interstate areas and localities within the States; and

(2) Establish such agencies, joint or otherwise, as the States may determine desirable for making the agreements and compacts effective.

(g) If part of an urbanized area that has been designated as a TMA overlaps

into an adjacent MPA serving an urbanized area that is not designated as a TMA, the adjacent urbanized area shall not be treated as a TMA. However, a written agreement shall be established between the MPOs with MPA boundaries, including a portion of the TMA, which clearly identifies the roles and responsibilities of each MPO in meeting specific TMA requirements (e.g., congestion management process, Surface Transportation Program funds suballocated to the urbanized area over 200,000 population, and project selection).

(h)(1) The MPO(s), State(s), and the providers of public transportation shall jointly agree upon and develop specific written provisions for cooperatively developing and sharing information related to transportation performance data, the selection of performance targets, the reporting of performance targets, the reporting of performance to be used in tracking progress toward attainment of critical outcomes for the region of the MPO (see § 450.306(d)), and the collection of data for the State asset management plan for the NHS for each of the following circumstances:

(i) When one MPO serves an urbanized area;

(ii) When more than one MPO serves an urbanized area; and

(iii) When an urbanized area that has been designated as a TMA overlaps into an adjacent MPA serving an urbanized area that is not a TMA.

(2) These provisions shall be documented either:

(i) As part of the metropolitan planning agreements required under paragraphs (a), (e), and (g) of this section; or

(ii) Documented in some other means outside of the metropolitan planning agreements as determined cooperatively by the MPO(s), State(s), and providers of public transportation.

**§ 450.316 [Amended]**

■ 11. Amend § 450.316 in paragraphs (b) introductory text, (c), and (d) by removing "MPO(s)" and adding in its place "MPO" wherever it occurs.

**§ 450.324 [Amended]**

■ 12. Amend § 450.324 as follows:

■ a. In paragraph (a), remove "MPO(s)" and add in its place "MPO" wherever it occurs;

■ b. Remove new paragraph (c);

■ c. Redesignate paragraphs (d) through (n) as paragraphs (c) through (m), respectively; and

■ d. In newly redesignated paragraphs (c), (d), (e), (f)(10), (f)(11)(iv), (g) introductory text, (j), (k), and (m),

remove “MPO(s)” with and add in its place “MPO” wherever it occurs.

■ 13. Amend § 450.326 as follows:

- a. Revise paragraph (a); and
- b. In paragraphs (b), (j), and (p), remove “MPO(s)” and add in its place “MPO” wherever it occurs.

The revision reads as follows:

**§ 450.326 Development and content of the transportation improvement program (TIP).**

(a) The MPO, in cooperation with the State(s) and any affected public transportation operator(s), shall develop a TIP for the metropolitan planning area. The TIP shall reflect the investment priorities established in the current metropolitan transportation plan and shall cover a period of no less than 4 years, be updated at least every 4 years, and be approved by the MPO and the Governor. However, if the TIP covers more than 4 years, the FHWA and the FTA will consider the projects in the additional years as informational. The MPO may update the TIP more frequently, but the cycle for updating the TIP must be compatible with the STIP development and approval process. The TIP expires when the FHWA/FTA approval of the STIP expires. Copies of any updated or revised TIPs must be provided to the FHWA and the FTA. In nonattainment and maintenance areas subject to transportation conformity requirements, the FHWA and the FTA, as well as the MPO, must make a conformity determination on any updated or amended TIP, in accordance with the Clean Air Act requirements and the EPA’s transportation conformity regulations (40 CFR part 93, subpart A).

\* \* \* \* \*

**§ 450.328 [Amended]**

- 14. Amend § 450.328 by removing “MPO(s)” and adding in its place “MPO” wherever it occurs.

**§ 450.330 [Amended]**

- 15. Amend § 450.330 in paragraphs (a) and (c) by removing “MPO(s)” and adding in its place “MPO” wherever it occurs.

**§ 450.332 [Amended]**

- 16. Amend § 450.332 in paragraphs (b) and (c) by removing “MPO(s)” and adding in its place “MPO” wherever it occurs.

**§ 450.334 [Amended]**

- 17. Amend § 450.334 as follows:
  - a. In paragraph (a), remove “MPO(s)” and add in its place “MPO”; and
  - b. In paragraph (c), remove “MPO(s)” and add in its place “MPO’s”.

**§ 450.336 [Amended]**

- 18. Amend § 450.336 in paragraphs (b)(1)(i) and (ii) and (b)(2) by removing “MPO(s)” and adding in its place “MPO” wherever it occurs.

**§ 450.340 [Amended]**

- 19. Amend § 450.340 as follows:
  - a. In paragraph (a), remove “or MPOs” wherever it occurs; and
  - b. Remove paragraph (h).

**Title 49—Transportation**

**PART 613—METROPOLITAN AND STATEWIDE AND NONMETROPOLITAN PLANNING**

- 20. The authority citation for part 613 is revised to read as follows:

**Authority:** 23 U.S.C. 134, 135, and 217(g); 42 U.S.C. 3334, 4233, 4332, 7410 *et seq.*; 49 U.S.C. 5303–5306, 5323(k); and 49 CFR 1.91(a) and 21.7(a).

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**DEPARTMENT OF LABOR**

**Employee Benefits Security Administration**

**29 CFR Part 2550**

**[Application Number D–11712; D–11713; D–11850]**

**ZRIN 1210–ZA27**

**18-Month Extension of Transition Period and Delay of Applicability Dates; Best Interest Contract Exemption (PTE 2016–01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (PTE 2016–02); Prohibited Transaction Exemption 84–24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters (PTE 84–24)**

**AGENCY:** Employee Benefits Security Administration, Labor.

**ACTION:** Extension of the transition period for PTE amendments.

**SUMMARY:** This document extends the special transition period under sections II and IX of the Best Interest Contract Exemption and section VII of the Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs for 18 months. This document also delays the applicability of certain amendments to

Prohibited Transaction Exemption 84–24 for the same period. The primary purpose of the amendments is to give the Department of Labor the time necessary to consider public comments under the criteria set forth in the Presidential Memorandum of February 3, 2017, including whether possible changes and alternatives to these exemptions would be appropriate in light of the current comment record and potential input from, and action by, the Securities and Exchange Commission and state insurance commissioners. The Department is granting the delay because of its concern that, without a delay in the applicability dates, consumers may face significant confusion, and regulated parties may incur undue expense to comply with conditions or requirements that the Department ultimately determines to revise or repeal. The former transition period was from June 9, 2017, to January 1, 2018. The new transition period ends on July 1, 2019, rather than on January 1, 2018. The amendments to these exemptions affect participants and beneficiaries of plans, IRA owners and fiduciaries with respect to such plans and IRAs.

**DATES:** This document extends the special transition period under sections II and IX of the Best Interest Contract Exemption and section VII of the Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (82 FR 16902) to July 1, 2019, and delays the applicability of certain amendments to Prohibited Transaction Exemption 84–24 from January 1, 2018 (82 FR 16902) until July 1, 2019. See Section G of the **SUPPLEMENTARY INFORMATION** section for a list of dates for the amendments to the prohibited transaction exemptions.

**FOR FURTHER INFORMATION CONTACT:** Brian Shiker or Susan Wilker, telephone (202) 693–8824, Office of Exemption Determinations, Employee Benefits Security Administration.

**SUPPLEMENTARY INFORMATION:**

**A. Procedural Background**

*ERISA & the 1975 Regulation*

Section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), in relevant part provides that a person is a fiduciary with respect to a plan to the extent he or she renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so. Section 4975(e)(3)(B) of the Internal Revenue Code (“Code”) has a parallel

provision that defines a fiduciary of a plan (including an individual retirement account or individual retirement annuity (IRA)). The Department of Labor (“the Department”) in 1975 issued a regulation establishing a five-part test under this section of ERISA. See 29 CFR 2510.3–21(c)(1) (2015).<sup>1</sup> The Department’s 1975 regulation also applied to the definition of fiduciary in the Code.

#### *The New Fiduciary Rule & Related Exemptions*

On April 8, 2016, the Department replaced the 1975 regulation with a new regulatory definition (the “Fiduciary Rule”). The Fiduciary Rule defines who is a “fiduciary” of an employee benefit plan under section 3(21)(A)(ii) of ERISA as a result of giving investment advice to a plan or its participants or beneficiaries for a fee or other compensation. The Fiduciary Rule also applies to the definition of a “fiduciary” of a plan in the Code pursuant to Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1, 92 Stat. 3790. The Fiduciary Rule treats persons who provide investment advice or recommendations for a fee or other compensation with respect to assets of a plan or IRA as fiduciaries in a wider array of advice relationships than was true under the 1975 regulation. On the same date, the Department published two new administrative class exemptions from the prohibited transaction provisions of ERISA (29 U.S.C. 1106) and the Code (26 U.S.C. 4975(c)(1)) (the Best Interest Contract Exemption (BIC Exemption) and the Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Principal Transactions Exemption)) as well as amendments to previously granted exemptions (collectively referred to as “PTEs,” unless otherwise indicated). The Fiduciary Rule and PTEs had an original applicability date of April 10, 2017.

#### *Presidential Memorandum*

By Memorandum dated February 3, 2017, the President directed the Department to prepare an updated analysis of the likely impact of the Fiduciary Rule on access to retirement information and financial advice. The President’s Memorandum was published in the **Federal Register** on February 7, 2017, at 82 FR 9675. On March 2, 2017, the Department published a notice of proposed

rulemaking that proposed a 60-day delay of the applicability date of the Rule and PTEs. The proposal also sought public comments on the questions raised in the Presidential Memorandum and generally on questions of law and policy concerning the Fiduciary Rule and PTEs.<sup>2</sup> As of the close of the first comment period on March 17, 2017, the Department had received nearly 200,000 comment and petition letters expressing a wide range of views on the proposed 60-day delay. Approximately 650 commenters supported a delay of 60 days or longer, with some requesting at least 180 days and some up to 240 days or a year or longer (including an indefinite delay or repeal); approximately 450 commenters opposed any delay. Similarly, approximately 15,000 petitioners supported a delay and approximately 178,000 petitioners opposed a delay.

#### *First Delay of Applicability Dates*

On April 7, 2017, the Department promulgated a final rule extending the applicability date of the Fiduciary Rule by 60 days from April 10, 2017, to June 9, 2017 (“April Delay Rule”).<sup>3</sup> It also extended from April 10 to June 9, the applicability dates of the BIC Exemption and Principal Transactions Exemption and required investment advice fiduciaries relying on these exemptions to adhere only to the Impartial Conduct Standards as conditions of those exemptions during a transition period from June 9, 2017, through January 1, 2018. The April Delay Rule also delayed the applicability of amendments to an existing exemption, Prohibited Transaction Exemption 84–24 (PTE 84–24), until January 1, 2018, other than the Impartial Conduct Standards, which became applicable on June 9, 2017. Lastly, the April Delay Rule extended for 60 days, until June 9, 2017, the applicability dates of amendments to other previously granted exemptions. The 60-day delay, including the delay of the Impartial Conduct Standards in the BIC Exemption and Principal Transactions Exemption, was considered appropriate by the Department at that time. Compliance with other conditions for transactions covered by these exemptions, such as requirements to make specific disclosures and representations of fiduciary compliance in written communications with investors, was postponed until January 1, 2018, by which time the Department intended to complete the examination and analysis

directed by the Presidential Memorandum.

#### *Request for Information*

On July 6, 2017, the Department published in the **Federal Register** a Request for Information (RFI).<sup>4</sup> The purpose of the RFI was to augment some of the public commentary and input received in response to the April Delay, and to request comments on issues raised in the Presidential Memorandum. In particular, the RFI sought public input that could form the basis of new exemptions or changes to the Rule and PTEs. The RFI also specifically sought input regarding the advisability of extending the January 1, 2018, applicability date of certain provisions in the BIC Exemption, the Principal Transactions Exemption, and PTE 84–24. Question 1 of the RFI specifically asked whether a delay in the January 1, 2018, applicability date of the provisions in the BIC Exemption, Principal Transactions Exemption and amendments to PTE 84–24 would benefit retirement investors by allowing for more efficient implementation responsive to recent market developments and reduce burdens on financial services providers. Comments relating to an extension of the January 1, 2018, applicability date of certain provisions were requested by July 21, 2017. All other comments were requested by August 7, 2017. The Department received approximately 60,000 comment and petition letters expressing a wide range of views on whether the Department should grant an additional delay and what should be the duration of any such delay. Many commenters supported delaying the January 1, 2018, applicability dates of these PTEs. Other commenters disagreed, however, asserting that full application of the Fiduciary Rule and PTEs is necessary to protect retirement investors from conflicts of interests, that the original applicability dates should not have been delayed from April, 2017, and that the January 1, 2018, date should not be further delayed. Still others stated their view that the Fiduciary Rule and PTEs should be repealed and replaced, either with the original 1975 regulation or with a substantially revised rule. Among the commenters supporting a delay, some suggested a fixed length of time and others suggested a more open-ended delay. Supporters of a fixed-length delay did not express a consensus view on the appropriate length, but the range generally was 1 to 2 years from the current applicability date of January 1,

<sup>1</sup> The 1975 Regulation was published as a final rule at 40 FR 50842 (Oct. 31, 1975).

<sup>2</sup> 82 FR 12319.

<sup>3</sup> 82 FR 16902.

<sup>4</sup> 82 FR 31278.

2018. Those commenters suggesting a more open-ended framework for measuring the length of the delay generally recommended that the applicability date be delayed for at least as long as it takes the Department to finish the reexamination directed by the President. These commenters suggested that the length of the delay should be measured from the date the Department, after finishing the reexamination, either announces that there will be no new amendments or exemptions or publishes a new exemption or major revisions to the Fiduciary Rule and PTEs.

## B. Proposed Amendments—18-Month Delay

On August 31, 2017, the Department published a proposal (the August 31 Notice) to extend the current special transition period under sections II and IX of the BIC Exemption and section VII of the Principal Transactions Exemption from January 1, 2018, to July 1, 2019. The Department also proposed in the August 31 Notice to delay the applicability of certain amendments to PTE 84–24 for the same period.<sup>5</sup> Although proposing a date-certain delay (18 months), the Department specifically asked for input on various alternative approaches. The Department received approximately 145 comment letters. Approximately 110 commenters support a delay of 18 months or longer; and, by contrast, approximately 35 commenters oppose any delay.<sup>6</sup> The Department also received two petitions containing approximately 2,860 signatures or letters supporting the delay. These comment letters are available for public inspection on EBSA's Web site. Specific views and positions of commenters are discussed below in section C of this document.

### *BIC Exemption (PTE 2016–01) and Principal Transactions Exemption (PTE 2016–02)*

Although the Fiduciary Rule, BIC Exemption, and Principal Transactions Exemption first became applicable on June 9, 2017, with transition relief through January 1, 2018, the August 31 Notice proposed to extend the Transition Period until July 1, 2019. During this extended Transition Period, “Financial Institutions” and “Advisers,” as defined in the exemptions, would only have to comply with the “Impartial Conduct Standards” to satisfy the exemptions’ requirements. In general, this means that Financial Institutions and Advisers must give prudent advice that is in retirement investors’ best interest, charge no more than reasonable compensation, and avoid misleading statements.<sup>7</sup>

The August 31 Notice proposed that the remaining conditions of the BIC Exemption would not become applicable until July 1, 2019. Remaining conditions include the requirement, for transactions involving IRA owners, that the Financial Institution enter into an enforceable written contract with the retirement investor. The contract would include an enforceable promise to adhere to the Impartial Conduct Standards, an express acknowledgement of fiduciary status, and a variety of disclosures related to fees, services, and conflicts of interest. IRA owners, who do not have statutory enforcement rights under ERISA, would be able to enforce their contractual rights under state law. Also, as of July 1, 2019, the exemption would require Financial Institutions to adopt a substantial number of new policies and procedures that meet specified conflict-mitigation criteria. In particular, the policies and procedures must be reasonably and prudently designed to ensure that Advisers adhere to the Impartial Conduct Standards and must provide that neither the Financial Institution nor (to the best of its knowledge) its affiliates or related entities will use or rely on quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other actions or incentives that are intended or would reasonably be expected to cause advisers to make recommendations that are not in the best interest of the retirement investor. Also as of July 1, 2019, Financial

Institutions entering into contracts with IRA owners pursuant to the exemption would have to include a warranty that they have adopted and will comply with the required policies and procedures. Financial Institutions would also be required at that time to provide disclosures, both to the individual retirement investor on a transaction basis, and on a Web site.

Similarly, while the Principal Transactions Exemption is conditioned solely on adherence to the Impartial Conduct Standards during the Transition Period, the August 31 Notice also proposed that its remaining conditions would become applicable on July 1, 2019. The Principal Transactions Exemption permits investment advice fiduciaries to sell to or purchase from plans or IRAs “principal traded assets” through “principal transactions” and “riskless principal transactions”—transactions involving the sale from or purchase for the Financial Institution’s own inventory. As of July 1, 2019, the exemption would require a contract and a policies and procedures warranty that mirror the requirements in the BIC Exemption. The Principal Transactions Exemption also includes some conditions that are different from the BIC Exemption, including credit and liquidity standards for debt securities sold to plans and IRAs pursuant to the exemption and additional disclosure requirements.

### *PTE 84–24*

PTE 84–24, which applies to advisory transactions involving insurance and annuity contracts and mutual fund shares, was most recently amended in 2016 in conjunction with the development of the Fiduciary Rule, BIC Exemption, and Principal Transactions Exemption.<sup>8</sup> Among other changes, the amendments included new definitional terms, added the Impartial Conduct Standards as requirements for relief, and revoked relief for transactions involving fixed indexed annuity contracts and variable annuity contracts, effectively requiring those Advisers who receive conflicted compensation for recommending these products to rely upon the BIC Exemption. However, except for the Impartial Conduct Standards, which were applicable beginning June 9, 2017, the August 31 Notice proposed that the remaining amendments would not be applicable until July 1, 2019. Thus, because the amendment revoking the availability of PTE 84–24 for fixed indexed annuities would not be not be applicable until July 1, 2019, affected parties (including

<sup>5</sup> 82 FR 41365 (entitled “Extension of Transition Period and Delay of Applicability Dates; Best Interest Contract Exemption (PTE 2016–01); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (PTE 2016–02); Prohibited Transaction Exemption 84–24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters (PTE 84–24)”).

<sup>6</sup> The Department includes these counts only to provide a rough sense of the scope and diversity of public comments. For this purpose, the Department counted letters that do not expressly support or oppose the proposed delay, but that express concerns or general opposition to the Fiduciary Rule or PTEs, as supporting delay. Similarly, letters that do not expressly support or oppose the proposed delay, but that express general support for the Rule or PTEs, were counted as opposing a delay.

<sup>7</sup> In the Principal Transactions Exemption, the Impartial Conduct Standards specifically refer to the fiduciary’s obligation to seek to obtain the best execution reasonably available under the circumstances with respect to the transaction, rather than to receive no more than “reasonable compensation.”

<sup>8</sup> 81 FR 21147 (April 8, 2016).

insurance intermediaries) would be able to rely on PTE 84–24, subject to the existing conditions of the exemption and the Impartial Conduct Standards, for recommendations involving all annuity contracts during the Transition Period.

### C. Comments and Decisions

#### *Extension of the Transition Period*

Based on its review and evaluation of the public comments, the Department is adopting the proposed amendments without change. Thus, the Transition Period in the BIC Exemption and Principal Transaction Exemption is extended for 18 months until July 1, 2019, and the applicability date of the amendments to PTE 84–24, other than the Impartial Conduct Standards, is delayed for the same period.

Accordingly, the same rules and standards in effect between June 9, 2017, and December 31, 2017, will remain in effect throughout the duration of the extended Transition Period. Consequently, Financial Institutions and Advisers must continue to give prudent advice that is in retirement investors' best interest, charge no more than reasonable compensation, and avoid misleading statements. As the Department has stated previously:

The Impartial Conduct Standards represent fundamental obligations of fair dealing and fiduciary conduct. The concepts of prudence, undivided loyalty and reasonable compensation are all deeply rooted in ERISA and the common law of agency and trusts. These longstanding concepts of law and equity were developed in significant part to deal with the issues that arise when agents and persons in a position of trust have conflicting loyalties, and accordingly, are well-suited to the problems posed by conflicted investment advice.<sup>9</sup>

It is based on the continued adherence to these fundamental protections that the Department, pursuant to 29 U.S.C. 1108 and 26 U.S.C. 4975, is making the necessary findings and granting the extension until July 1, 2019.

A delay of the remaining conditions of the BIC Exemption and Principal Transactions Exemption, and of the remaining amendments to PTE 84–24, is necessary and appropriate for multiple reasons. To begin with, the Department has not yet completed the reexamination of the Fiduciary Rule and PTEs, as directed by the President on February 3, 2017. More time is needed to carefully and thoughtfully review the substantial commentary received in response to the multiple solicitations for

comments in 2017 and to honor the President's directive to take a hard look at any potential undue burden.

Whether, and to what extent, there will be changes to the Fiduciary Rule and PTEs as a result of this reexamination is unknown until its completion. The examination will help identify any potential alternative exemptions or conditions that could reduce costs and increase benefits to all affected parties, without unduly compromising protections for retirement investors. The Department anticipates that it will have a much clearer sense of the range of such alternatives only after it completes a careful review of the responses to the RFI. The Department also anticipates that it will propose in the near future a new streamlined class exemption. However, neither such a proposal nor any other changes or modifications to the Fiduciary Rule and PTEs, if any, realistically could be finalized by the current January 1, 2018, applicability date. Nor would that timeframe accommodate the Department's desire to coordinate with the Securities and Exchange Commission (SEC) and other regulators, such as the Financial Industry Regulatory Authority (FINRA) and the National Association of Insurance Commissioners (NAIC) in the development of any such proposal or changes. The Chairman of the SEC has recently published a statement seeking public comments on the standards of conduct for investment advisers and broker-dealers, and has welcomed the Department's invitation to engage constructively as the SEC moves forward with its examination of the standards of conduct applicable to investment advisers and broker-dealers, and related matters. Absent a delay, however, Financial Institutions and Advisers would feel compelled to ready themselves for the provisions that would become applicable on January 1, 2018, despite the possibility of changes and alternatives on the horizon. The 18-month delay avoids obligating financial services providers to incur costs to comply with conditions, which may be revised, repealed, or replaced. The delay also avoids attendant investor confusion, ensuring that investors do not receive conflicting and confusing statements from their financial advisors as the result of any later revisions.

Not all commenters support this approach. As mentioned above, the Department received approximately 145 comment letters on the proposed 18-month delay. As with earlier comments on the April Delay Rule, as well as those received in response to Question 1 of the RFI, there is no uniform consensus

on whether a delay is appropriate, or on the appropriate length of any delay. Some commenters supported the proposed 18-month delay, some commenters sought longer delays, and still other commenters opposed any delay at all. However, a clear majority of commenters support a delay of at least 18 months, with many supporting a much longer delay.

The primary reason commenters cited in support of the delay was to avoid unnecessary costs of compliance with provisions of the Fiduciary Rule and PTEs that the commenters believed could be changed or rescinded upon completion of the review under the Presidential Memorandum.<sup>10</sup> Other reasons cited by commenters were to provide time for the Department to coordinate with the SEC and other regulators such as FINRA and the NAIC; allow more time for industry to come into compliance with the Fiduciary Rule and PTEs, including additional time to develop disclosures and train employees; and to reduce the possibility of client confusion resulting from attempts to comply with provisions of the Fiduciary Rule and PTEs that may change following the review pursuant to the President's Memorandum.<sup>11</sup>

<sup>10</sup> See, e.g., Comment Letter #42 (Western & Southern Financial Group) ("only after the Fiduciary Regulation has been reviewed and revisions to it have been proposed and finalized (all in accordance with President Trump's February 3, 2017 memorandum) will WSF&G and other similarly situated companies know with certainty what conditions will be placed on providing investment advice to retirement investors. Only then, can we appropriately design and implement compliance structures, make investments in information technology, and produce products and services that meet both the revised Fiduciary Regulation requirements and the needs of retirement investors."); Comment Letter #76 (Groom Law Group, on Behalf of Annuity and Insurance Company Clients) ("[i]n the absence of the eighteen-month extension, financial service providers, retirement plans, and individual savers would be subjected to extreme market dislocations. The pricing of investment products and services, the distribution models under which those services are delivered and the job responsibilities of thousands of financial services firm employees would be subject to severe dislocation as new requirements take effect. In addition, retirement savers' access to investment advice and the terms and conditions under which that investment advice would be provided could change repeatedly and dramatically as changes to the Fiduciary Rule are made and new FAQs are issued."); Comment Letter #79 (Investment Company Institute) ("[a]bsent a delay, service providers will continue to spend significant amounts preparing for January 1, 2018, the vast majority of which will be spent implementing the more cumbersome and technically complicated aspects of the BIC Exemption conditions.").

<sup>11</sup> See, e.g., Comment Letter #52 (Transamerica) ("to avoid wasteful and duplicative compliance costs and business model changes" and "to permit further time for coordination with the SEC."); Comment Letter #55 (Prudential Financial) (supporting the proposed extension/delay as "sufficient for the Department to assess and develop

<sup>9</sup> Best Interest Contract Exemption, 81 FR 21002, 21026 (April 8, 2016) (footnote omitted).

The primary reason commenters gave against the delay is that investors will be economically harmed during the 18-month delay period because, according to these commenters, there would not be any meaningful enforcement mechanism in the PTEs without the contract, warranty, disclosure and other enforcement and accountability conditions.<sup>12</sup> According to these

needed Rule changes, engage in meaningful coordination with the Securities and Exchange Commission, as well as the states and other prudential regulators, and adopt those changes” and also to minimize “confusion on the part of consumers and brings certainty to the financial services industry.”); Comment Letter #63 (Massachusetts Mutual Life Insurance Company) (will “benefit retirement investors by ensuring that their access to products or advice is not needlessly restricted or reduced as a result of . . . changes to business models . . . that may prove unnecessary,” and “will provide time for the Department to complete its review of the Fiduciary Rule pursuant to the Presidential Memorandum,” and “to work with the Securities and Exchange Commission and the National Association of Insurance Commissioners.”); Comment Letter #88 (AXA US) (“will provide the Department with sufficient time to work with other regulators to develop a harmonized regulatory framework” and also “will allow industry participants adequate time to comply with the Rule’s final requirements.”); Comment Letter #375 (Stifel Financial Corp.) (July 25, 2017, response to RFI) (“Thus, with the Impartial Conduct Standards already in place for retirement accounts, the DOL and SEC should move together and conduct a proper and fulsome study of whether additional requirements are needed to achieve appropriate consumer protections while maintaining investor choice. As the DOL and SEC study these issues, and to prevent further disruption to Brokerage and Advisory business models, it is critical that the DOL delay the January 1, 2018 implementation date for the additional conditions of the Best Interest Contract Exemption, including the contractual warranties, until a solution is determined.”).

<sup>12</sup> See, e.g., Comment Letter #20 (Consumer Action) (“no real evidence to believe that there will be compliance with the best-interest rule without enforcement.”); Comment Letter #44 (Economic Policy Institute) (“Delaying DOL enforcement an additional 18 months (from January 1, 2018 to July 1, 2019) would cost retirement savers an additional \$5.5 billion to \$16.3 billion over 30 years, with a middle estimate of \$10.9 billion.”); Comment Letter #68 (AARP) (“every day the protections of the prohibited transactions class exemptions are delayed the retirement security of hard working Americans is put at risk, along with potential negative impacts on the economy as a whole.”); Comment Letter #78 (Financial Planning Coalition) (“Without the PTEs, consumers do not have access to legally binding contracts on which they can rely to uphold their right to conflict-free advice in their best interest.”); Comment Letter #80 (Consumer Federation of America) (“Extending this transition period will mean that the full protections and benefits of the fiduciary rule won’t be realized and retirement savers, particularly IRA investors, will continue to suffer the harmful consequences of conflicted advice.”); Comment Letter #81 (National Employment Law Project) (“Without any meaningful enforcement mechanism, which does not exist in the IRA market without the Contract Condition, there is no basis to conclude—as the Department erroneously does—that a significant number of investment-advice fiduciaries will adhere to the ICSs when advising IRA owners during the period of the proposed delay.”); Comment Letter #84 (Better Markets) (“The long-

commenters, there is no credible basis to believe that significant numbers of Financial Institutions and Advisers will actually comply with the Impartial Conduct Standards when advising investors during the Transition Period without these enforcement and accountability conditions. In the view of these commenters, the Department’s 2016 RIA supports their position that compliance numbers will be low with the enforcement and accountability conditions being delayed until July 1, 2019. If Financial Institutions and Advisers do not adhere to the Impartial Conduct Standards, the investor gains predicted in the Department’s 2016 RIA for the Transition Period will not remain intact, according to these commenters, in which case the cost of the 18-month delay would exceed its benefits. Assuming twenty-five, fifty, and seventy-five percent compliance rates, one commenter estimates that delaying the enforcement conditions an additional 18 months would cost retirement savers an additional \$5.5 billion (75 percent compliance) to \$16.3 billion (25 percent compliance) over 30 years, with a middle estimate of \$10.9 billion (50 percent compliance).<sup>13</sup> To support adherence to the Impartial Conduct Standards during the Transition Period, and thereby preserve some predicted investor gains, several of these commenters suggested that the Department, at a bare minimum, should add the specific disclosure and representation of fiduciary compliance conditions originally required for transition relief (but which were delayed by the April Delay Rule).<sup>14</sup> A

term suspension of these accountability conditions will remove an important deterrent against violations of the Rule, resulting in conflicts of interest taking a greater toll on IRA investors in particular and causing greater overall losses in retirement savings, especially as they are compounded over time.”); Comment Letter #91 (Public Investors Arbitration Bar Association) (“If the PTEs are not permitted to be fully implemented on January 1, 2018, retirement investors will continue to be harmed by the same conflicts of interests that made the Rule and PTEs necessary in the first place.”); Comment Letter #120 (AFL–CIO) (“The Economic Policy Institute estimates that this proposal will cost retirement savers between \$5.5 billion and \$16.3 billion over thirty years—on top of the estimated \$2.0 billion to \$5.9 billion losses resulting from the Department’s previous delay.”); Comment Letter #126 (Institute for Policy Integrity at New York University School of Law) (“In sum, the Department’s proposal that the benefits would remain intact even with the postponement of the enforcement provisions is at odds with its earlier analysis of the necessity of these provisions.”).

<sup>13</sup> Comment Letter #44 (Economic Policy Institute).

<sup>14</sup> Comment Letter #20 (Consumer Action) (“we recommend that—at a minimum—the Department require that by January 2018 firms and advisers agree to abide by the impartial conduct standard to acknowledge their fiduciary status.”); Comment Letter #80 (Consumer Federation of America) (“at

subset of enforcement conditions, less than the full set of conditions scheduled now for July 1, 2019, would increase the likelihood of greater levels of adherence to the Impartial Conduct Standards during the Transition Period over those levels of adherence likely if no enforcement conditions are included, according to these commenters.

Because the contract, warranty, disclosure and other enforcement and accountability conditions in the PTEs are intended to support adherence to the Impartial Conduct Standards, the Department acknowledges that the 18-month delay may result in a deferral of some of the estimated investor gains. As discussed below in the regulatory impact analysis, the precise amount of such deferral is unknown because the precise degree of adherence during the 18-month period also is unknown. Many commenters strongly dispute the likelihood of any harm to investors as result of the delay of the enforcement and accountability conditions. These commenters emphatically believe that investors are sufficiently protected by the imposition of the Impartial Conduct Standards along with many applicable non-ERISA consumer protections.<sup>15</sup>

a bare minimum, the Department must require firms and advisers to comply with the original transitional requirements of the exemptions, as set forth in Section IX of the BIC Exemption and Section VII of the Principal Transactions Exemption, not just the Impartial Conduct Standards. These include: (1) The minimal transition written disclosure requirements in which firms acknowledge their fiduciary status and that of their advisers with respect to their advice, state the Impartial Conduct Standards and provide a commitment to adhere to them, and describe the firm’s material conflicts of interest and any limitations on product offering; (2) the requirement that firms designate a person responsible for addressing material conflicts of interest and monitoring advisers’ adherence to the Impartial Conduct Standards; and (3) the requirement that firms maintain records necessary to prove that the conditions of the exemption have been met.”).

<sup>15</sup> See, e.g., Comment Letter #11 (Alternative and Direct Investment Securities Association) (The Impartial Conduct Standards requirement “can and does go a long way toward ensuring that retirement savers are provided with investment advice designed to allow them to meet their goals for retirement and otherwise.”); Comment Letter #23 (Wells Fargo) (Because retirement investors will continue to receive the protections of the Impartial Conduct Standards, “imposing additional compliance conditions in connection with any extension is unnecessary.”); Comment letter #38 (Federal Investors, Inc.) (“investor losses (if any) from extending the transition period would be expected to be relatively small, and as such, outweighed by the cost savings to firms by postponing changes that may prove unnecessary, or may have to be revisited.”); Comment Letter #45 (Madison Securities) (“Because the Impartial Conduct Standards remain in place . . . to protect consumers, it is important for the Department to take the time necessary to address applicable issues and for the financial services industry to build adequate and appropriate systems to comply with

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Many of these industry commenters note that fiduciary advisers who do not provide impartial advice as required by the Fiduciary Rule and PTEs in the IRA market would violate the prohibited transaction rules of the Code and become subject to the prohibited transaction excise tax. In addition, comments received by the Department assert that many financial institutions already have completed or largely completed work to establish policies and procedures necessary to make many of the business structure and practice shifts necessary to support compliance with the Fiduciary Rule and Impartial Conduct Standards (*e.g.*, drafting and implementing training for staff, drafting client correspondence and explanations of revised product and service offerings, negotiating changes to agreements with product manufacturers as part of their approach to compliance with the PTEs, changing employee and agent compensation structures, and designing product offerings that mitigate conflicts of interest).<sup>16</sup> After review of these

any final rule.”); Comment Letter #50 (Paul Hastings LLP on behalf of Advisors Excel) (“with the Impartial Conduct Standards in place during the evaluation period, the interests of Retirement Investors are protected during the Department’s review of the Rule.”); Comment Letter #56 (Benjamin F. Edwards & Co.) (“Given that the Impartial Conduct Standards are already in place and that there is an additional existing and overlapping robust infrastructure of regulations that are enforced by the SEC, FINRA, Treasury, and the IRS, not to mention the Department, investors are well protected and will continue to be well protected during any extension.”); Comment Letter #57 (Pacific Life Insurance Company) (“Since advisers are now required to adhere to the requirements set forth in the Impartial Conduct Standards . . . the Rule’s stated goal to eliminate conflicted advice has been largely addressed and procedures to avoid said conflicted advice will be thoroughly engrained in advisers’ practices during the delay.”); Comment Letter #65 (Securities Industry and Financial Markets Association) (“We would also use this opportunity to address the question of the potential harm to investors if the Department was to move forward with this delay. We would refer the Department back to our comment letter of August 9, 2017. . . . In that letter we refute the supposed harm to investors if the rule is delayed, while also showing the harm if the Department actually moves forward with the current rule unchanged. We were concerned then, and are even more concerned now, that some of the changes that have taken effect in order to comply with this rule, will make it even more difficult for investors to save.”); Comment Letter #116 (Financial Services Roundtable) (“Any concern that Retirement Investors will be harmed by an extended transition period should be allayed because the Impartial Conduct Standards will continue to protect them during the extended transition period.”).

<sup>16</sup> See, *e.g.*, Comment Letter # 39 (Financial Services Institute) (incorporating March 17, 2017, response to RFI) (“During the transition period . . . financial institutions and financial advisors relying on the Best Interest Contract Exemption (BICE) must adhere to the Fiduciary Rule’s Impartial Conduct Standards. These Impartial Conduct Standards require financial institutions and

comments, and meeting with stakeholders, the Department believes that many financial institutions are using their compliance infrastructure to ensure that they currently are meeting the requirements of the Impartial Conduct Standards, which the Department believes will substantially protect the investor gains estimated in the 2016 RIA. Additionally, the Department believes that there are two enforcement mechanisms in place: The imposition of excise taxes, and a statutorily-provided cause of action for advice to ERISA plan assets, including advice concerning rollovers of these assets.<sup>17</sup> Given these conclusions, the Department declines to add additional conditions to the PTEs during the Transition Period, but will reevaluate this issue as part of the reexamination of the Fiduciary Rule and PTEs and in the context of considering the development of additional and more streamlined exemption approaches. Accordingly, as the Department continues its reexamination, the Department welcomes input and data from stakeholders demonstrating the

advisors to provide advice in the retirement investors’ best interest, charge no more than reasonable compensation for their services and to avoid misleading statements. As a result, firms that are relying on the BICE have already implemented procedures to ensure that they are meeting these new obligations. These new procedures may include changes to the firms’ compensation structures, restrictions on the availability of certain investment products, reductions in the overall number of product and service providers, improvements to their due diligence review of products and service providers, additional surveillance efforts to monitor the sales practices of their affiliated financial advisors for compliance and the creation and maintenance of books and records sufficient to demonstrate compliance with the Impartial Conduct Standards. Thus, investors are already benefitting from stronger protections since the Fiduciary Rule became partly applicable on June 9, 2017. . . . As a result, we believe any harm to investors caused by further delay of the additional requirements, to the extent it exists, is greatly reduced by the application of the Fiduciary Rule’s Impartial Conduct Standards.”). *But see* Comment Letter #141 (Consumer Federation of America) (October 10, 2017 Supplement) (noting a recent survey of broker-dealers in which 64% of survey participants answered that they have not made any changes in their product mix or internal compensation structures, and concluding therefore that “it is unreasonable for the Department to believe that a significant percentage of firms have made efforts to adhere to the rule and Impartial Conduct Standards. If the Department does not factor this into its decisionmaking, it will have failed to consider an important aspect of the problem.”). *See also* the Department’s Conflict of Interest FAQs, Transition Period (Set 1), Q6 (“During the transition period, the Department expects financial institutions to adopt such policies and procedures as they reasonably conclude are necessary to ensure that advisers comply with the impartial conduct standards”) available at <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-transition-period-1.pdf>.

<sup>17</sup> 82 FR 16902, 16909 (April 7, 2017).

regulated community’s implementation of the Impartial Conduct Standards.

In this regard, the Department notes that, despite the view of several commenters, the duties of prudence and loyalty embedded in the Impartial Conduct Standards provide protection to retirement investors during the Transition Period, apart from the additional delayed enforcement and accountability provisions. The Department previously articulated the view that, during the Transition Period, it expects that advisers and financial institutions will adopt prudent supervisory mechanisms to prevent violations of the Impartial Conduct Standards.<sup>18</sup> Likewise, the Department also previously articulated its view that the Impartial Conduct Standards require that fiduciaries, during the Transition Period, exercise care in their communications with investors, including a duty to fairly and accurately describe recommended transactions and compensation practices.<sup>19</sup>

#### *Authority To Delay PTE Conditions/ Amendments*

Some commenters questioned the Department’s authority to delay the PTE conditions and amendments as proposed. They focused their arguments on section 705 of the APA (5 U.S.C. 705), which permits an agency to postpone the effective date of an action, pending judicial review, if the agency finds that justice so requires. These commenters say that this provision is the only method by which a federal agency may delay or stay the applicability or effective date of a rule, even if another statute confers general rulemaking authority on that agency. Since the PTEs were applicable to transactions occurring on or after June 9, 2017, the commenters argue that section 705 of the APA, by its terms, is not available in this circumstance. In the absence of the availability of section 705 of the APA, they assert, the Department lacks authority to delay the applicability date of the PTE conditions and amendments, as proposed. However, the Department disagrees that it lacks authority to adopt the 18-month delay of the conditions and amendments in this circumstance, where the Department is acting through and in accordance with its ordinary notice and comment rulemaking procedures for PTEs, pursuant to both the APA and 29 U.S.C. 1108. As noted elsewhere in the document, the Department is granting

<sup>18</sup> 81 FR 21002, 21070 (April 8, 2016).

<sup>19</sup> 82 FR 16902, 16909 (April 7, 2017) (recognizing fiduciary duty to fairly and accurately describe recommended transactions and compensation practices).

this delay pursuant to section 408 of ERISA.<sup>20</sup> Under this provision, the Secretary of Labor has discretionary authority to grant administrative exemptions, with or without conditions, under ERISA and the Code on an individual or class basis, if the Secretary finds that the exemptions are (1) administratively feasible, (2) in the interests of plans and their participants and beneficiaries and IRA owners, and (3) protective of the rights of the participants and beneficiaries of such plans and IRA owners. Having made these findings in this case after reviewing the substantial public comments received in response to the RFI and August 31 Notice, the Department is confident of its authority to grant the 18-month delay. In the Department's view, it can delay, modify or revoke, temporarily or otherwise, some or all of a PTE, using notice and comment rulemaking, as long as—pursuant to the appropriate procedures—the Department makes the required findings and is not arbitrary or capricious in doing so. The Department has fully satisfied those requirements in this case, just as it did when it delayed applicability dates from June 9, 2017, through January 1, 2018.

#### *Length of Delay*

Although the August 31 Notice proposed a fixed 18-month delay, the proposal also specifically solicited comments on the benefit or harms of two alternative delay approaches: (1) A contingent delay that ends a specified period after the occurrence of a specific event, such as the Department's completion of the reexamination ordered by the President or the publication of changes to the Fiduciary Rule or PTEs; and (2) a tiered approach postponing full applicability until the earlier of or the later of (a) a time certain and (b) the end of a specified period after the occurrence of a specific event. There was no consensus among the commenters as to either the proper amount of time for a delay or the best approach (time certain delay versus contingent or tiered delays). Pros and cons were reported on all three approaches.

Many commenters supported the fixed 18-month delay in the proposal. The proposed 18-month period would commence on January 1, 2018, and end on July 1, 2019, regardless of exactly when the Department might complete its reexamination or take any other action or actions. The premise behind this approach is that, whatever action or actions may or may not be taken by the

Department, such actions would be completed within the 18-month period. These commenters believe this approach provides more certainty, to both industry stakeholders and investors, as compared to the other approaches.<sup>21</sup> This is these commenters'

<sup>21</sup> Comment Letter #38 (Federated Investors, Inc.) ("the time-certain delay is the most appropriate and workable choice under the circumstances, because it provides financial services firms, plan sponsors, plan participants and beneficiaries, IRA owners with the certainty of a clear target date. If the circumstances approaching July 1, 2019, indicate the need for a further delay, we would expect that the Department will, at that time, evaluate and provide what would be a reasonable time period to come into compliance based on the nature and extent of any changes to the existing regulation and exemptions."); Comment Letter #39 (Financial Services Institute) (tiered delay or conditional delay "would harm consumers by adding uncertainty and confusion to the market, while providing insufficient certainty to industry stakeholders."); Comment Letter #46 (American Bankers' Assoc.) ("fixed 18-month period would minimize the costs that would be incurred by financial services providers to comply with Fiduciary Rule and exemptions as currently written. It would also allow the Department to measure the progress of its regulatory review against a firm deadline. If, as the deadline date approaches, it appears additional time might be needed to complete its regulatory review, then the Department can consider at that time whether to propose such additional time as may be needed for completion."); Comment Letter #51 (Morgan Stanley) ("A delay solely based on a specific contingent future event (e.g., the issuance of new exemptive relief) poses a host of problems for financial institutions. . . . By enacting a time-certain delay of at least eighteen months, financial institutions will be better able to plan for and implement any changes that are necessary to comply with new guidance and create or modify product and platform offerings. . . . A 'floating timeline' as suggested by the Department also poses the risk of further confusing the retirement investors that the Rule is intended to protect."); Comment Letter #73 (Raymond James) ("While there are benefits and drawbacks to any method chosen, we feel that the 18-month period certain delay provides a level of certainty which is beneficial to the Department's ongoing analysis of the Rule and the retirement marketplace. Along with the Department's continued analysis and potential rulemaking, please consider that an 18-month delay may be insufficient to not only complete the Department's work, but also the subsequent implementation efforts firms will need to undertake. As a means to maintain assurance in the marketplace and provide adequate time to accomplish all relevant objectives, please consider during your analysis whether it may be prudent to issue an additional delay further in advance of the July 1, 2019 date."); Comment Letter #82 (Standard Insurance Company, Standard Retirement Services) ("The Department should *not* adopt a tiered delay approach. The other methods proposed in the request for comments would only add further confusion. A fixed time period will be in the best interests of retirement investors because it will allow financial service companies to be able to continue to provide advice, education and services to retirement plan investors without uncertainty. Once any changes to the Regulations and Exemptions are proposed and finalized, the Department will be in a better position to evaluate what, if any, additional time is needed to implement the changes. A fixed time period for the Extensions will provide the industry and retirement investors alike a more definite environment in which to conduct business."); Comment Letter #110 (Association for Advanced Life Underwriting)

view, even though many of them recognized that an additional delay could be needed in the future, depending on the extent of future changes to the Fiduciary Rule and PTEs, if any.<sup>22</sup> These commenters believe that certainty is needed for planning and implementation purposes and that a flat delay of 18 to 24 months provides that certainty.<sup>23</sup> Even among the

("Given the 'lead' time required for compliance, only the date certain approach provides necessary stability for retirement investors and their financial professionals by removing unnecessary and harmful regulatory uncertainty. The contingent event approach and the tiered approach both introduce too much uncertainty. Not only would the compliance deadline be vague and undefined, based on when some future event may happen (and accurately predicting when a Federal Agency may complete an action is a notoriously difficult thing to achieve), but uncertainty would also result from which contingent act is selected as the basis for the end of the Transition Period."); Comment Letter #116 (Financial Services Roundtable) ("the Department should not adopt a tiered transition period . . .").

<sup>22</sup> See, e.g., Comment Letter #75 (Groom Law Group—Recordkeeping Clients) ("The Groom Group supports a fixed delay as opposed to a tiered delay structure because the Department has already evaluated the cost-benefit analysis of the Proposed Extension and because the Department could always propose an additional delay closer to July 1, 2019 if it determines that additional time is needed. Right now, it is most important that the Department finalize the Proposed Extension promptly. Evaluating extensions of different lengths or with variable end points will only prolong the amount of time it takes for the Department to finalize the Proposed Extension."); Comment Letter #7 (Tucker Advisors) ("Should the Department determine that additional time is necessary to complete its review or should the Department ultimately propose changes, the Department can, at that time, propose an additional extension to provide plan service providers sufficient time to build out the systems necessary to comply with such changes."); Comment Letter #27 (State Farm Mutual Automobile Insurance Company) ("State Farm suggests that the Department maintain a position of flexibility to the extent additional time is needed to ensure the implementation of an effective, workable and efficient rule."); Comment Letter #57 (Pacific Life Insurance Company) ("if the Department retains flexibility in this delay, potentially revisiting when the revised final rule is released and changes are actually known, then Pacific Life does not feel the tiered-approach is a necessary method of delay."); Comment Letter #69 (Teachers Insurance and Annuity Association of America-TIAA) ("While an extension tied to completion of the Department's review may offer some additional benefit, we believe it is more urgent that Proposed Extension be finalized."); Comment Letter #79 (Investment Company Institute) ("The Department should clarify that it will provide a period of at least one year following the finalization of any modifications, and more time, depending on the nature of modifications made and the resultant lead time required to meet any attendant compliance requirements.");

<sup>23</sup> Comment Letter #115 (Bank of New York Mellon & Pershing, LLC) ("we are supportive of an 18-month extension and delay to allow the Department to complete its review and consider modifications to the Rule and PTEs because it provides certainty that the marketplace needs to minimize disruptions for retirement investors. Whether the Department ultimately pursues a tiered approach or a fixed duration approach with respect

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<sup>20</sup> 29 U.S.C. 1108(a); see also 26 U.S.C. 4975(c)(2).

commenters generally opposed to any delay, one commenter stated that, as between a fixed 18-month delay and the more open-ended contingent or tiered approaches, the fixed 18-month delay provides more certainty and protection to consumers.<sup>24</sup>

By contrast, many commenters believe a contingent or tiered approach is the better way forward.<sup>25</sup> Of paramount importance to most of these commenters is that they have sufficient time to ready themselves for compliance with any changes to the requirements of the Fiduciary Rule and PTEs, which they believe should be substantially different than the current Fiduciary Rule and PTEs. These commenters assert that it is improbable that the Department will complete the directed reexamination within the proposed 18-month period, let alone propose and finalize amendments to the Fiduciary Rule and PTEs and provide adequate time to come into compliance with any

to the proposed extension and delay period, once any modifications to the Rule and PTEs are finalized, the Department will need to allow adequate time for firms to comply with such modified Rule and PTEs. We expect any changes proposed to the Rule and PTEs, or any newly proposed PTEs, will be made available to the public for notice and comment with the opportunity to review. Because we don't yet know the scope of these proposed changes or when such changes would become applicable, however, the need for additional potential transition period extensions and applicability date delays with respect to the PTEs is unavoidable.”); Comment Letter #112 (Northwestern Mutual Life Insurance Company) (“Northwestern Mutual supports a minimum delay of eighteen months as proposed by the Department and a further delay if the Department concludes that changes should be made to the Fiduciary Duty Rule or the Exemptions. . . . If, for example, the Department determines that significant changes should be made to the BIC, and those changes are made final in early 2019, then at least an additional transition year should be provided from that date to allow firms enough time to make the necessary changes to processes and systems and to be able to communicate in an orderly manner with their clients.”); Comment Letter #114 (BBVA Compass) (“In our view, however, the proposed 18-month extension provides the minimum period needed to allow the Department and other interested parties to review the Rule and the accompanying Exemptions, make appropriate determinations regarding what changes to the Rule are warranted and afford financial institutions reasonable time to develop and implement processes and systems changes necessary to conduct activity in a compliant manner.”).

<sup>24</sup> See, e.g., Comment Letter # 68 (AARP) (although generally opposed to any delay, as between a fixed 18-month delay and a contingent or tiered delay, the commenter stated it “is concerned that tiered compliance dates will exacerbate investor confusion and will make it more difficult for Americans saving for retirement to understand. A single compliance date would be preferred.”).

<sup>25</sup> See, e.g., Comment Letter #29 (American Retirement Association) (Recommends a tiered approach in which the applicability date is delayed until “the later of January 1, 2019, or a date that is at least 18-months from the date a revised exemption or rule is promulgated.”).

such revisions—all within that same 18-month period.<sup>26</sup> They, therefore, identify the contingent and tiered varieties as the better approaches because, in their estimation, these approaches would ensure adequate time for compliance with the Fiduciary Rule and PTEs, as revised, and thereby more effectively avoid a scenario of consecutive or serial piecemeal delays in the future.<sup>27</sup> These commenters generally favored a range of 12 to 24 months following the Department’s finalization of changes to the Fiduciary Rule and PTEs or following the publication of a decision that no changes are on the horizon.

As between the proposed 18-month fixed delay and the contingent and tiered alternatives, the Department continues to believe that using a date-certain approach, rather than one of the other alternatives, is the best way to respond to and minimize concerns about uncertainty with respect to the eventual application and scope of the Fiduciary Rule and PTEs. Although the contingent and tiered approaches have the built-in advantage of an automatic extension, if needed, it is difficult to choose the appropriate triggering event before the Department completes its reexamination of the Fiduciary Rule and PTEs. Interjecting unnecessary uncertainty regarding the future applicability and scope of the Fiduciary Rule and PTEs is harmful to all stakeholders. In addition, the Department believes that the additional 18 months is sufficient to complete review of the new information in the record and to implement changes to the Fiduciary Rule and/or PTEs, if any, including opportunity for notice and comment and coordination with other regulatory agencies.

<sup>26</sup> See, e.g., Comment Letter #127 (Cetera Financial Group) (a delay to July 1, 2019, or any other fixed date does not take into account the possibility that the review itself takes more than 18 months, the additional time that it will take financial advisers to digest any amendments to the rule and incorporate changes to their own systems and processes after a final rule is published, and the likelihood of confusion on the part of investors as to what standards apply to advice they receive in connection with retirement investments prior to publication of any amendments to the Fiduciary Rule.).

<sup>27</sup> See, e.g., Comment Letter #65 (Securities Industry and Financial Markets Association) (“We believe that a tiered approach extending the delay to the later of the 18-month period the Department proposed and a period ending 24 months after the completion of the review and publication of final rules will best avoid the confusion, uncertainty and cost associated with continued piecemeal delays.”); Comment Letter #97 (Insured Retirement Institute) (“the tiered approach . . . would provide the greatest level of certainty for our members and the customers they serve. This structure would avoid the need for the Department to propose additional delays in the future. . . .”).

The proposal also solicited comments on whether to condition any extension of the Transition Period on the behavior of the entity seeking relief under the Transition Period. For example, the Department specifically asked for comment on whether to condition the delay on a Financial Institution’s showing that it has, or a promise that it will, take steps to harness recent innovations in investment products and services, such as “clean shares.” All of the comments in response to this question opposed this idea. Some commenters expressed their concern that this approach would add confusion for Financial Institutions, who would be forced to change their products and services, and for retirement consumers, who would be forced to react to such changes.<sup>28</sup> Other commenters believed that this approach would create an unlevel playing field by providing relief to select business models and investments rather than providing more neutral relief to many different business models and investments.<sup>29</sup> Other

<sup>28</sup> See, e.g., Comment Letter #76 (Groom Law Group on Behalf of Annuity and Insurance Company Clients) (“Not only would imposing additional conditions reduce the benefit of the Proposed Extension, but additional conditions would add confusion for Financial Institutions, who would be forced to change their products and services, and for retirement consumers, who would be forced to react to such changes.”); Comment Letter #82 (Standard Life Insurance Company, Standard Retirement Services) (“To condition a further delay on certain steps toward ‘innovations’ would only serve to confuse investors and the retirement industry.”).

<sup>29</sup> See, e.g., Comment Letter #62 (Lincoln Financial Group) (“We continue to urge the Department to . . . hold fee-based compensation and commissions to the same standard and process, so that guaranteed lifetime income products can be made available to consumers on a level playing field with other products.”); Comment Letter #65 (Securities Industry and Financial Markets Association) (“Further, we do not believe the Department should condition delays upon adoption of any specific ‘innovations’ by entities that rely on the Transition Period. [E]xemptions should be generally applicable to many different business models, and not simply the model that the Department prefers.”); Comment Letter #48 (American Council of Life Insurers) (“we strongly oppose a delay approach based on subjective criteria. . . . A subjective delay approach, based on undefined and ambiguous factors, such as whether firm has taken ‘concrete steps’ to ‘harness’ market developments, would require the Department to subjectively and inappropriately pick and choose among providers and products based on vague factors. We question the constitutionality and legality of such an approach.”); Comment Letter #53 (PSF Investments/Primerica) (“Tying a delay to firms’ adoption of certain ‘innovations’ or business models would only add further to the perception or actuality that the government is favoring a product, an industry, a business model or a compensation structure.”); Comment Letter #109 (Fidelity Investments) (“Finally, we agree with the Department that applicability of the delay should not be conditioned on an advice provider engaging in certain behavior, such as making a promise to harness recent innovations in investment products

commenters are concerned that this approach would create uncertainty and confusion as to whether a particular firm is being held to a different legal standard than its peers, which would be detrimental to clients, investors, and other stakeholders.<sup>30</sup> One commenter indicated that it is strongly opposed to this approach because essentially it would be a new or different exemption, and not really an extension of the current Transition Period.<sup>31</sup> The Department is persuaded that conditions of this type generally seem more relevant in the context of considering the development of additional and more streamlined exemption approaches that take into account recent marketplace innovations, and less appropriate and germane in the context of a decision whether to extend the Transition Period.

#### Miscellaneous

The Department rejects certain comments beyond the scope of this rulemaking, whether such comments were received pursuant to the August 31 Notice or the RFI. For instance, one commenter urged the Department to amend the Principal Transactions Exemption for the Transition Period to remove the limits on products that can be traded on a principal basis, and allow those products that have historically been traded in the principal market to

and services. Such conditions would unduly pressure advice providers to engage in whatever behavior might be designated. Slanting advice in this manner, however favorably the Department or any other person might view a particular product or service or behavior, will necessarily constrain choice and options to the detriment of retirement savers. Making an advice provider's use of a specific product or service the price of avoiding the needless costs and investor confusion associated with the January 1 applicability date is not appropriate or warranted.”).

<sup>30</sup> See, e.g., Comment Letter #64 (BlackRock) (“The uncertainty and confusion as to whether a particular firm is being held to a different legal standard than its peers would be detrimental to clients, investors and other stakeholders.”). See also Comment Letter #103 (Committee of Annuity Insurers) (stated that “it could stifle innovation in product and advice models,” that “the Department should not substitute its own investment preferences for the preferences and insights of advisers,” and that “the conditional relief contemplated in the Department’s proposal would be ‘too imprecise’ for any firm seeking to avail themselves of the potential relief.”).

<sup>31</sup> Comment Letter #86 (Spark Institute) (“The circumstances necessitating the existing Transition Period have not changed in any way since its announcement in the spring. The Department has not completed its examination and it has not announced whether, and how, the Investment Advice Regulation will be amended. Until the Department has completed both of those tasks, it should not alter its existing Transition Period rules in any way, other than to extend its expiration. Any contrary decision would result in significant market disruptions, substantial confusion, and would be difficult to monitor and administer.”).

continue to be bought and sold by IRAs and plans, including, but not limited to, foreign currency, municipal bonds, and equity and debt IPOs. A different commenter requested that the Department revise the “grandfather” exemption, in section VII of the BIC Exemption, so that grandfathering treatment would apply to recommendations made prior to the expiration of the extended Transition Period (July 1, 2019).<sup>32</sup> Inasmuch as amendments such as these were not suggested in the August 31 Notice, the public did not have notice or a full opportunity to comment on these issues and they are beyond the scope of this final rule. The Department, however, is open to further consideration of the merits of these requests, and the submission of additional relevant information, as part of its ongoing reexamination of the Fiduciary Rule and related exemptions.

#### D. Findings by Secretary of Labor

ERISA section 408(a) specifically authorizes the Secretary of Labor to grant administrative exemptions from ERISA’s prohibited transaction provisions.<sup>33</sup> Reorganization Plan No. 4 of 1978 generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975(c)(2) to the Secretary of Labor.<sup>34</sup> Regulations at 29 CFR 2570.30 to 2570.52 describe the procedures for applying for an administrative exemption. Under these authorities, the Secretary of Labor has discretionary authority to grant new or modify existing administrative exemptions under ERISA and the Code on an individual or class basis, if the Secretary finds that the exemptions are (1) administratively feasible, (2) in the interests of plans and their participants and beneficiaries and IRA owners, and (3) protective of the rights of the participants and beneficiaries of such plans and IRA owners. The Department has made such findings with respect to

<sup>32</sup> Due to the delay of certain exemption conditions as part of the April Delay Rule, the standards applicable to grandfathered assets and non-grandfathered assets during the Transition Period are similar. For this reason, the Department sees no compelling reason to extend grandfathering treatment through the Transition Period. The primary purpose of the grandfathering exemption was to preserve compensation for services rendered prior to the Fiduciary Rule and to permit orderly transition from past arrangements, not to exempt future advice and investments from important protections scheduled to become applicable after the Transition Period. Nevertheless, commenters are encouraged to supplement their comments on this point during the reexamination period.

<sup>33</sup> 29 U.S.C. 1108(a).

<sup>34</sup> 5 U.S.C. app at 214 (2000).

the 18-month extension of the Transition Period under the BIC and Principal Transactions Exemptions and the 18-month delay in the applicability of certain amendments to PTE 84–24. It is largely the continued imposition of the Impartial Conduct Standards that enables the Department to grant the delay under these standards, but other factors are also important to these findings. For instance, it is in the interests of plans and their participants and beneficiaries and IRA owners to avoid the cost and confusion of a potentially disorderly transition to PTE conditions that are under reexamination pursuant to a Presidential Executive Order and that may change in the near future. In addition, to be protective of the rights of participants, beneficiaries, and IRA owners, the Department chose a time certain delay of 18 months, rather than a more open-ended contingent or tiered alternative. These factors are discussed further in the RIA section of this document.

#### E. Extension of Temporary Enforcement Relief—FAB 2017–02

On May 22, 2017, the Department issued a temporary enforcement policy covering the transition period between June 9, 2017, and January 1, 2018, during which the Department will not pursue claims against investment advice fiduciaries who are working diligently and in good faith to comply with their fiduciary duties and to meet the conditions of the PTEs, or otherwise treat those investment advice fiduciaries as being in violation of their fiduciary duties and not compliant with the PTEs. See Field Assistance Bulletin 2017–02 (May 22, 2017) (FAB 2017–02). Comments were solicited on whether to extend this policy for the same period covered by the proposed extension of the Transition Period.

Commenters supporting an extension of the Transition Period overwhelmingly indicated their support for also extending the temporary enforcement policy in FAB 2017–02, to align the two periods.<sup>35</sup> These

<sup>35</sup> See, e.g., Comment Letter #29 (American Retirement Association) (“ARA would strongly recommend continuing the temporary enforcement policy announced in Field Assistance Bulletin 2017–02. This would be consistent with the Department’s announced intention to assist (rather than citing violations and imposing penalties on) plans, plan fiduciaries, financial institutions and others who are working diligently and in good faith to understand and come into compliance with the fiduciary duty rule and exemptions. Further, if a Financial Institution acts in bad faith, the Department could pursue an enforcement action.”); Comment Letter #30 (Neuberger Berman Group) (“We unconditionally support the common sense answer that the Temporary Enforcement Policy be

Continued

commenters believe such an alignment will significantly help to avoid market disruptions during the Transition Period. These commenters strongly oppose adding any new conditions to the enforcement policy during this period. They also request clarification that the relief under FAB 2017–02 is conditioned on diligent and good faith efforts to comply with the Fiduciary Rule and Impartial Conduct Standards, and does not also require diligent and good faith efforts towards implementing the delayed provisions of the PTEs.<sup>36</sup>

extended to line up with the final applicability dates in respect of those originally scheduled for January 1, 2018.”); Comment Letter #48 (American Council of Life Insurers) (“An extension of FAB 2017–02’s temporary enforcement policy is consistent with the Department’s stated ‘good faith’ compliance approach to implementation. . . .”); Comment Letter # 86 (Spark Institute) (“SPARK strongly supports an extension of the Department’s temporary enforcement policy because of all of the uncertainty surrounding the future of the Investment Advice Regulation. The Department’s proposal to extend the Transition Period notes that the Department is considering an extension of the Transition Period because it is still not known whether, and to what extent, there will be changes to the Department’s interpretation of ‘investment advice’ and the new and revised PTEs. Given this rationale, it simply would not make any sense for the Department to start enforcing portions of a regulation that is actively being reconsidered.”); Comment Letter #92 (E\*TRADE) (“any delay should include a corresponding extension of Field Assistance Bulletin 2017–02. As firms are already subject to the Impartial Conduct Standards . . . we believe a corresponding extension of FAB 2017–02 will benefit financial service providers without harming retirement investors, while retaining enforcement powers for firms not implementing requirements in good faith.”); Comment Letter #128 (U.S. Chamber of Commerce) (“The Chamber believes the Department should extend the applicability of Field Assistance Bulletin 2017–02 from January 1, 2018, until the end of the Transition Period.”).

<sup>36</sup> See, e.g., Comment Letter #28 (Empower Retirement) (“The relief offered under FAB 2017–02 was conditioned on fiduciaries working diligently and in good faith to comply with the fiduciary rule and exemptions. The DOL should make clear that this does not require continuing implementation efforts that would have been required for the January 1, 2018 applicability date, but is based on continued adherence to the Impartial Conduct Standards.”); Comment Letter #41 (Great-West Financial) (“To avoid disruption in the market, the DOL should refrain from adding new conditions but should simultaneously announce that the non-enforcement policy announced in FAB 2017–02 will be extended during the eighteen-month extension. The relief offered under FAB 2017–02 was conditioned on fiduciaries working diligently and in good faith to comply with the fiduciary duty rule and exemptions. The DOL should make clear that this does not require continuing implementation efforts that would have been required for the January 1, 2018 applicability date, but is based on continued adherence to the Impartial Conduct Standards.”). See also Comment Letter #82 (Standard Insurance Company and Standard Retirement Services, Inc.) (“we ask that The Department also extend the temporary enforcement policy providing relief to investment advice fiduciaries who are working in good faith to comply with the Regulations. Adding subjective requirements like ‘taking steps toward innovations’ would only add further uncertainty and confusion to the current situation.”).

Although the Department has a statutory responsibility and broad authority to investigate or audit employee benefit plans and plan fiduciaries to ensure compliance with the law, compliance assistance for plan fiduciaries and other service providers is also a high priority for the Department. The Department has repeatedly said that its general approach to implementation will be marked by an emphasis on assisting (rather than citing violations and imposing penalties on) plans, plan fiduciaries, financial institutions, and others who are working diligently and in good faith to understand and come into compliance with the Fiduciary Rule and PTEs. Consistent with that approach, the Department has determined that extended temporary enforcement relief is appropriate and in the interest of plans, plan fiduciaries, plan participants and beneficiaries, IRAs, and IRA owners. Accordingly, during the phased implementation period from June 7, 2016, to July 1, 2019, the Department will not pursue claims against fiduciaries who are working diligently and in good faith to comply with the Fiduciary Rule and applicable provisions of the PTEs, or treat those fiduciaries as being in violation of the Fiduciary Rule and PTEs.<sup>37</sup> At the same time, however, the Department emphasizes, as it has in the past, that firms and advisers should work “diligently and in good faith to comply”<sup>38</sup> with their fiduciary obligations during the Transition Period. The “basic fiduciary norms and standards of fair dealing”<sup>39</sup> are still

<sup>37</sup> On March 28, 2017, the Treasury Department and the IRS issued IRS Announcement 2017–4 stating that the IRS will not apply § 4975 (which provides excise taxes relating to prohibited transactions) and related reporting obligations with respect to any transaction or agreement to which the Labor Department’s temporary enforcement policy described in FAB 2017–01, or other subsequent related enforcement guidance, would apply. The Treasury Department and the IRS have confirmed that, for purposes of applying IRS Announcement 2017–4, the discussion in this document constitutes “other subsequent related enforcement guidance.”

<sup>38</sup> See Conflict of Interest FAQs (Transition Period), May 2017, p.11. (<https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/coi-transition-period-1.pdf>); see also FAB 2017–02 (“The Department has repeatedly said that its general approach to implementation will be marked by an emphasis on assisting (rather than citing violations and imposing penalties on) plans, plan fiduciaries, financial institutions, and others who are working diligently and in good faith to understand and come into compliance with the fiduciary duty rule and exemptions.”).

<sup>39</sup> Conflict of Interest FAQs (Transition Period), May 2017, p.3.

required of fiduciaries during the Transition Period.

Accordingly, as the Department reviews the compliance efforts of firms and advisers during the Transition Period, it will focus on the affirmative steps that firms have taken to comply with the Impartial Conduct Standards and to reduce the scope and severity of conflicts of interest that could lead to violations of those standards. The Department recognizes that the development of effective, long-term compliance solutions may take time, but it remains critically important that firms take action to ensure that investment recommendations are governed by the best interests of retirement investors, rather than the potentially competing financial incentives of the firm or adviser.

As the Department explained in previous guidance, although firms “retain flexibility to choose precisely how to safeguard compliance with the Impartial Conduct Standards”<sup>40</sup> during the Transition Period, they certainly may look to the specific provisions of the Best Interest Contract Exemption and Principal Transactions Exemption for guidance on ways to comply with the Impartial Conduct Standards. Thus, for example, the Department noted: “Section IV of the BIC Exemption provides a detailed statement of how firms that limit adviser’s investment recommendations to proprietary products or to investments that generate third party payments can comply with the best interest standard.” “If the firm and the adviser meet the terms of Section IV. . . they are ‘deemed’ to satisfy the best interest standard.”<sup>41</sup> Thus, while firms are not required to rely on Section IV during the Transition Period, such reliance would certainly constitute good faith compliance.

The Department also remains “broadly available to discuss compliance approaches and related issues with interested parties, and would invite interested parties to contact the Department”<sup>42</sup> about the compliance approaches they have adopted or plan to adopt. This document accordingly supplements FAB 2017–02.

## F. Regulatory Impact Analysis

The Department expects that the extension of the Transition Period under the BIC and Principal Transactions Exemptions and the delay of the amendments to PTE 84–24 (other than the Impartial Conduct Standards) will

<sup>40</sup> *Id.* at p.6.

<sup>41</sup> *Id.* at p.6 n.4.

<sup>42</sup> *Id.* at p.6.

produce benefits that justify associated costs. These actions will avert the possibility of a costly and disorderly transition from the Impartial Conduct Standards to full compliance with the exemptions' conditions that ultimately could be modified or repealed, and thereby reduce some compliance costs. Similarly, it could avert the possibility of unnecessary costs to consumers as a result of an unnecessarily confusing or disruptive transition. As stated above, the Department currently is engaged in the process of reviewing the Fiduciary Rule and PTEs as directed in the Presidential Memorandum and reviewing comments received in response to the RFI. The delay will allow the Department to reexamine the Fiduciary Rule and PTEs and to update its economic analysis. The Department's objective is to complete its review pursuant to the President's Memorandum, analyze comments received in response to the RFI, determine whether future changes to the Fiduciary Rule and PTEs are necessary, and propose and finalize any changes to the Fiduciary Rule or PTEs sufficiently before July 1, 2019, to provide firms with sufficient time to design and implement an orderly transition to any new requirements.

If the Department revises or repeals some aspects of the Fiduciary Rule and PTEs in the future, the delay will allow affected firms to avoid incurring significant implementation costs now which later might turn out to be unnecessary. Furthermore, the delay will provide firms with more time to develop new products and practices that can provide long-term solutions for mitigating conflicts of interests. For example, a commenter cited numerous logistical obstacles that must be surmounted before using clean share classes in the market.<sup>43</sup> The delay provides firms with additional time to address these issues and successfully launch products that benefit investors. The delay also will provide the Department with time to consult further with other regulators including the NAIC and the SEC. Such consultations may advance the development of a regulatory framework that could promote market efficiency and transparency, while reducing the burden to the financial sector and associated consumer costs.

<sup>43</sup> Comment Letters #229 (Investment Company Institute) (dated July 21, 2017), #442 (Morningstar, Inc.) (dated August 3, 2017), and #594 (Fidelity Investments) (dated August 7, 2017) (responding to RFI).

#### 1. Executive Order 12866 Statement

This final rule is an economically significant action within the meaning of section 3(f)(1) of Executive Order 12866, because it would likely have an effect on the economy of \$100 million in at least one year. Accordingly, the Department has considered the costs and benefits of the final rule, which has been reviewed by the Office of Management and Budget (OMB).

#### a. Investor Gains

Beginning on June 9, 2017, Financial Institutions and Advisers generally were required to (1) make recommendations that are in their client's best interest (*i.e.*, recommendations that are prudent and loyal), (2) avoid misleading statements, and (3) charge no more than reasonable compensation for their services. If they fully adhere to these requirements, the Department expects that affected investors will generally receive impartial advice and accordingly a significant portion of the gains it estimated in the 2016 RIA.<sup>44</sup> However, because the PTE conditions are intended to support and provide accountability mechanisms for such adherence and remedies for lapses thereof (*e.g.*, conditions requiring advisers to provide a written acknowledgement of their fiduciary status and adherence to the Impartial Conduct Standards and enter into enforceable contracts with IRA investors), the Department acknowledges that the delay may result in the loss or deferral of some of the estimated investor gains. On the other hand, potential revisions to PTE conditions may reduce costs and thereby yield additional investor gains.

The Department received many comments on the question of whether the delay would reduce investor gains. One group of commenters argued that the delay would not cause any harms to investors,<sup>45</sup> because the Impartial Conduct Standards already are in place and provide sufficient protection for investors.<sup>46</sup> They asserted that investor gains would be largely preserved during the extended transition period, because the investor gains primarily are derived

<sup>44</sup> The Department's baseline for this RIA includes all current rules and regulations governing investment advice including those that would become applicable on January 1, 2018, absent this delay. The RIA did not quantify incremental gains by each particular aspect of the rule and PTEs.

<sup>45</sup> *See, e.g.*, Comment Letter #11 (Alternative and Direct Securities Investment Association); Comment Letter #38 (Federated Investors, Inc.); Comment Letter #65 (Securities Industry and Financial Markets Association); Comment Letter #79 (Investment Company Institute).

<sup>46</sup> *See, e.g.*, Comment Letter #11 (Alternative and Direct Securities Investment Association).

from the expanded fiduciary status and the Impartial Conduct Standards, which already have taken effect, and this rule simply delays the implementation of some other exemption conditions.<sup>47</sup> Furthermore, these commenters urged the Department to weigh the harms to investors from not delaying the January 1, 2018, applicability date. According to them, there is no evidence that investors would be harmed by this delay, and because the Fiduciary Rule already has negatively affected many investors, they would suffer more harm if the remaining conditions of the PTEs were not delayed.<sup>48</sup>

Another group of commenters argued that the delay would cause significant losses to investors,<sup>49</sup> because they found that many financial services firms have preserved business models that the commenters view as conflict-laden and not made meaningful changes to root out conflicts of interest.<sup>50</sup> They also asserted that many financial services firms could flout the requirements of the Impartial Conduct Standards due to the lack of a strong enforcement mechanism in the retail IRA market and the Department's non-enforcement policy during the extended transition period.<sup>51</sup> To support their claims, these commenters cited media reports that financial services firms are not implementing further changes because they anticipate that the Department will issue a lengthy delay of the transition period<sup>52</sup> and some pockets of industry suspended their implementation.<sup>53</sup> One commenter referenced a market survey of broker-dealers in which many respondents reported that they have not yet made efforts to adhere to the Fiduciary Rule and the Impartial Conduct Standards.<sup>54</sup> For example, about 64 percent of surveyed broker-dealers responded that they have not

<sup>47</sup> *See, e.g.*, Comment Letter #229 (Investment Company Institute) to the RFI; Comment Letter #79 (Investment Company Institute).

<sup>48</sup> *See, e.g.*, Comment Letter #65 (Securities Industry and Financial Markets Association).

<sup>49</sup> *See, e.g.*, Comment Letter #44 (Economic Policy Institute); Comment Letter #68 (AARP); Comment Letter #80 (Consumer Federation of America); Comment Letter #84 (Better Markets); Comment Letter #91 (Public Investors Arbitration Bar Association); Comment Letter #108 (American Association for Justice); Comment Letter #126 (Institute for Policy Integrity at New York University School of Law).

<sup>50</sup> *See, e.g.*, Comment Letter #80 (Consumer Federation of America).

<sup>51</sup> *See, e.g.*, Comment Letter #80 (Consumer Federation of America).

<sup>52</sup> Greg Iacurici, Investment News, August 16, 2017, "Anticipating delay to DOL fiduciary rule, broker-dealers and RIAs change course."

<sup>53</sup> Diana Britton, Wealth Management.com, June 19, 2017, "DOL in the Real World."

<sup>54</sup> Comment Letter #141 (Consumer Federation of America).

made any changes to the product mix; another 64 percent of broker-dealers responded that they have not made changes to their internal compensation arrangements to accommodate the Fiduciary Rule.<sup>55</sup> (It is unclear, however, whether the survey respondents accurately represent the overall industry.) Another commenter urged the Department to consider that the delay would unfairly harm firms that expended resources for timely compliance with the Fiduciary Rule and create an unlevel playing field with non-compliant firms.<sup>56</sup> One commenter estimated that an 18-month delay would cost investors about \$10.9 billion over 30 years assuming a 50 percent compliance rate.<sup>57</sup> Based on this commenter's estimated investor losses, several commenters claimed that the Department cannot justify the delay because investor losses outweigh the estimated compliance cost savings.<sup>58</sup>

The Department carefully reviewed and weighed these comments and the referenced reports on potential investor losses caused by this delay. Steps some firms already have taken toward compliance, if not reversed, may limit investor losses. By some accounts,<sup>59</sup> compliance efforts may be most advanced among the larger firms that account for the majority of the market, so the number of retirement investors potentially benefiting from compliance efforts might be large. Firms may be especially motivated to comply in connection with advice on rollovers from ERISA-covered plans to IRAs, where they may face liability for any fiduciary breaches under ERISA itself. Nonetheless, gaps in compliance may subject investors to some potentially avoidable losses, of uncertain incidence and magnitude.

These potential losses, however, must be weighed against the costs that firms and investors would incur if the January 1, 2018 applicability date were not

delayed. Absent delay, firms would be forced to rush to comply with provisions that the Department may soon revise or rescind. Notwithstanding whatever steps firms already have taken toward compliance, it is likely that for many, such a rush to comply would be costly, disruptive, and/or infeasible. Smaller firms, which may be least prepared to comply fully, might be affected most. The disruption also could adversely affect many investors. Some of the costs incurred could turn out to be wasted if costly provisions are later revised or rescinded—and subsequent implementation of revised provisions might sow confusion and yield additional disruption. This delay will avert such disruption along with the potentially wasted cost of complying with provisions that the Department later revises or rescinds. In addition, the Department notes that some commenters' observations that investor losses from this delay may exceed associated compliance cost savings do not reflect the totality of economic considerations properly at hand. While some investor losses will reflect decreases in overall social welfare, others will reflect transfers from investors to the financial industry, which, while undesirable, are not social costs *per se*. Compliance costs in turn represent only some of the societal costs that may be averted by this delay. Others include those attributable to the potential disruption and confusion that could adversely affect both firms and investors.

The Department acknowledges uncertainty surrounding potential investor losses from this delay. On balance, however, the Department concludes that the delay is justified, insofar as avoiding the market disruption that would occur if regulated parties incur costs to comply quickly with conditions or requirements the Department subsequently revises or repeals and the resultant significant consumer confusion justifies any attendant investor losses.

#### b. Cost Savings

Some firms that are fiduciaries under the Fiduciary Rule may have committed resources to implementing procedures to support compliance with their fiduciary obligations. This may include changing their compensation structures and monitoring the practices and procedures of their advisers to ensure that conflicts of interest do not cause violations of the Fiduciary Rule and Impartial Conduct Standards of the PTEs, and maintaining sufficient records to corroborate that they are complying with the Fiduciary Rule and

PTEs. These firms have considerable flexibility to choose precisely how they will achieve compliance with the PTEs during the extended transition period. According to some commenters, the majority of broker-dealers have not yet made any changes to their internal compensation arrangements and have not fully developed monitoring systems.<sup>60</sup> The Department does not have sufficient data to estimate such costs; therefore, they are not quantified here.

Some commenters have asserted that the delay could result in cost savings for firms compared to the costs that were estimated in the Department's 2016 RIA to the extent that the requirements of the Fiduciary Rule and PTE conditions are modified in a way that would result in less expensive compliance costs. However, the Department generally believes that start-up costs not yet incurred for requirements previously scheduled to become applicable on January 1, 2018, should not be included, at this time, as a cost savings associated with this rule because the rule would merely delay the full implementation of certain conditions in the PTEs until July 1, 2019, while the Department considers whether to propose changes and alternatives to the exemptions. The Department would be required to assume for purposes of this regulatory impact analysis that those start-up costs that have not been incurred generally would be delayed rather than avoided unless or until the Department acts to modify the compliance obligations of firms and advisers to make them more efficient. Nonetheless, even based on that assumption, there may be some cost savings that could be quantified as arising from the delay because some ongoing costs would not be incurred until July 1, 2019. The Department has taken two approaches to quantifying the savings resulting from the delay in incurring such ongoing costs: (1) Quantifying the costs based on a shift in the time horizon of the costs (*i.e.*, comparing the present value of the costs of complying over a ten year period beginning on January 1, 2018, with the costs of complying, instead, over a ten year period beginning on July 1, 2019); and (2) quantifying the reduced costs during the 18-month period of delay from January 1, 2018, to July 1, 2019, during which time regulated parties would otherwise have had to comply with the full conditions of the BIC

<sup>55</sup> John Crabb, International Financial Law Review, October 2017, "The Fiduciary Rule Poll."

<sup>56</sup> Comment Letter #84 (Better Markets).

<sup>57</sup> See Comment Letter #44 (Economic Policy Institute). According to this comment, the investor losses over 30 years would range from \$5.5 billion (75 percent compliance rate) to \$16.3 billion (25 percent compliance rate).

<sup>58</sup> See, e.g., Comment Letter #80 (Consumer Federation of America); Comment Letter #91 (Public Investors Arbitration Bar Association); Comment Letter #120 (AFL-CIO); Comment Letter #126 (Institute for Policy Integrity at New York University School of Law).

<sup>59</sup> John Crabb, International Financial Law Review, October 2017, "The Fiduciary Rule Poll." According to this report, some firms already adopted fiduciary standards for business reasons; therefore, they would continue to comply with the rule using the adopted changes during this transition period.

<sup>60</sup> See, e.g., Comment Letter #80 (Consumer Federation of America); Greg Iacurici, Investment News, August 16, 2017, "Anticipating delay to DOL fiduciary rule, broker-dealers and RIAs change course."

Exemption and Principal Transaction Exemption but for the delay.

The first of the two approaches reflects the time value of money (*i.e.*, the idea that money available at the present time is worth more than the same amount of money in the future, because that money can earn interest). The deferral of ongoing costs by 18 months will allow the regulated community to use money they would have spent on ongoing compliance costs for other purposes during that time period. The Department estimates that the ten-year present value of the cost savings arising from this 18 month deferral of ongoing compliance costs, and the regulated community's resulting ability to use the money for other purposes, is \$551.6 million using a three percent discount rate<sup>61</sup> and \$1.0 billion using a seven percent discount rate.<sup>62</sup>

The second of the two approaches simply estimates the expenses foregone during the period from January 1, 2018, to July 1, 2019, as a result of the delay. When the Department published the Fiduciary Rule and accompanying PTEs, it calculated that the total ongoing compliance costs of the Fiduciary Rule and PTEs were \$1.5 billion annually. Therefore, the Department estimates the ten-year present value of the cost savings of firms not being required to incur ongoing compliance costs during an 18 month delay would be approximately \$2.2 billion using a three percent discount rate<sup>63</sup> and \$2.0 billion using a seven percent discount rate.<sup>64 65</sup>

Based on its progress thus far with the review and reexamination directed by the President, however, the Department believes there may be evidence supporting alternatives that reduce costs and increase benefits to all affected parties, while maintaining protections for retirement investors. The Department anticipates that it will have a clearer sense of the range of such alternatives once it completes a careful

review of the data and evidence submitted in response to the RFI.

The Department also cannot determine at this time the degree to which the infrastructure that affected firms have already established to ensure compliance with the Fiduciary Rule and PTEs exemptions would be sufficient to facilitate compliance with the Fiduciary Rule and PTEs conditions if they are modified in the future.

#### c. Alternatives Considered

While the Department considered several alternatives that were informed by public comments, the Department's chosen alternative in this final rule is likely to yield the most desirable outcome, including avoidance of investor losses otherwise associated with costly market disruptions. In weighing different options, the Department took numerous factors into account. The Department's objective was to facilitate orderly marketplace innovation and avoid unnecessary confusion and uncertainty in the investment advice market and associated expenses for America's workers and retirees.

The Department solicited comments at the proposed rule stage regarding whether it should adopt an extension that would end (1) a specified period after the occurrence of a specific event (a contingent approach) or (2) on the earlier or the later of (a) a time certain and (b) the end of a specified period after the occurrence of a specific event (a tiered approach). Several commenters supported a contingent or tiered approach,<sup>66</sup> while others expressed concern that a potentially indefinite delay might erode compliance with the Impartial Conduct Standards. The Department decided not to adopt these approaches, because they could inject too much uncertainty into the market and cause investor confusion.

As discussed above in this preamble, some commenters urged the Department to require firms to comply with the original transitional requirements of the exemptions, not just the Impartial Conduct Standards.<sup>67</sup> The Department

declines this suggestion for now but agrees to give the matter further consideration during the course of the reexamination. The efficacy and effect of these transitional requirements need to be considered very carefully as the Department considers possible changes to the exemptions and their disclosure requirements. The Department is concerned that after completing its reexamination, it might change the disclosure requirements, the implementation of which would have imposed approximately \$50.4 million of operational costs<sup>68</sup> plus additional start-up costs.

The Department also considered not extending the transition period, which would mean that the remaining conditions in the PTEs would become applicable on January 1, 2018. The Department rejected this alternative because it would not provide sufficient time for the Department to complete its ongoing review of, or propose and finalize any changes to the Fiduciary Rule and PTEs. Moreover, absent the extended transition period, Financial Institutions and Advisers would feel compelled to prepare for full compliance with PTE conditions that become applicable on January 1, 2018, despite the possibility that the Department might identify and adopt more efficient alternatives or other significant changes to the rule. This could lead to unnecessary compliance costs and market disruptions. As compared to a shorter delay with the

BIC Exemption and Section VII of the Principal Transactions Exemption, not just the Impartial Conduct Standards. These include: (1) The minimal transition written disclosure requirements in which firms acknowledge their fiduciary status and that of their advisers with respect to their advice, state the Impartial Conduct Standards and provide a commitment to adhere to them, and describe the firm's material conflicts of interest and any limitations on product offering; (2) the requirement that firms designate a person responsible for addressing material conflicts of interest and monitoring advisers' adherence to the Impartial Conduct Standards; and (3) the requirement that firms maintain records necessary to prove that the conditions of the exemption have been met.”).

<sup>68</sup> Using the same methodology that was used to calculate the burden of the transition disclosure that was originally envisioned in the April 2016 final rule and exemptions, the Department estimates that during the transition period, 34.2 million transition disclosures would be produced to comply with the requirements of the Best Interest Contract Exemption at a cost of \$47.2 million, and 2.7 million transition disclosures would be produced to comply with the requirements of the Principal Transactions Exemption at a cost of \$3.2 million. These estimates assume that all investment advice clients receiving advice covered by the applicable exemptions between January 1, 2018 and December 31, 2018 would receive the transition disclosures and all new investment advice clients receiving advice covered by the applicable exemptions between January 1, 2019 and June 30, 2019 would receive the transition disclosures.

<sup>61</sup> Annualized over ten years to \$64.7 million per year or over a perpetual time horizon, discounted back to 2016, to \$15.6 million per year.

<sup>62</sup> Annualized over ten years to \$143.9 million per year or over a perpetual time horizon, discounted back to 2016, to \$61.8 million per year.

<sup>63</sup> Annualized over ten years to \$252.1 million per year or over a perpetual time horizon, discounted back to 2016, to \$57.3 million per year.

<sup>64</sup> Annualized over ten years to \$291.1 million per year or over a perpetual time horizon, discounted back to 2016, to \$109.2 million per year.

<sup>65</sup> The Department notes that firms may be incurring some costs to comply with the impartial conduct standards; however, it does not have sufficient data to estimate these costs. The Department, as it continues to update its analysis of the rule, solicits comments on the costs of complying with the impartial conduct standards, and how these costs interact with the costs of all other facets of compliance with the conditions of the PTEs.

<sup>66</sup> See, e.g., Comment Letter #48 (American Council of Life Insurers); Comment Letter #51 (Morgan Stanley); Comment Letter #57 (Pacific Life Insurance Company); Comment Letter #73 (Raymond James Financial); Comment Letter #82 (Standard Insurance Company and Standard Retirement Services, Inc.); Comment Letter #112 (Northwestern Mutual Life Insurance Company); Comment Letter #121 (HSBC North America Holdings Inc.); Comment Letter #124 (Morgan, Lewis & Bockius LLP).

<sup>67</sup> See, e.g. Comment Letter #80 (Consumer Federation of America) (“at a bare minimum, the Department must require firms and advisers to comply with the original transitional requirements of the exemptions, as set forth in Section IX of the

possibility of consecutive additional delays, if needed, the 18-month delay provides more certainty for affected stakeholders because it sets a firm date for full compliance, which allows for proper planning and reliance.

## 2. Paperwork Reduction Act

The Paperwork Reduction Act (PRA) (44 U.S.C. 3501, *et seq.*) prohibits federal agencies from conducting or sponsoring a collection of information from the public without first obtaining approval from the Office of Management and Budget (OMB). See 44 U.S.C. 3507. Additionally, members of the public are not required to respond to a collection of information, nor be subject to a penalty for failing to respond, unless such collection displays a valid OMB control number. See 44 U.S.C. 3512.

OMB has previously approved information collections contained in the Fiduciary Rule and PTEs. The Department now is extending the transition period for the full conditions of the PTEs associated with its Fiduciary Rule until July 1, 2019. The Department is not modifying the substance of the information collections at this time; however, the current OMB approval periods of the information collection requests (ICRs) expire before the new applicability date for the full conditions of the PTEs as they currently exist. Therefore, many of the information collections will remain inactive for the remainder of the current ICR approval periods. The ICRs contained in the exemptions are discussed below.

**PTE 2016–01, the Best Interest Contract Exemption:** The information collections in PTE 2016–01, the BIC Exemption, are approved under OMB Control Number 1210–0156 through June 30, 2019. The exemption requires disclosure of material conflicts of interest and basic information relating to those conflicts and the advisory relationship (Sections II and III), contract disclosures, contracts and written policies and procedures (Section II), pre-transaction (or point of sale) disclosures (Section III(a)), web-based disclosures (Section III(b)), documentation regarding recommendations restricted to proprietary products or products that generate third-party payments (Section IV), notice to the Department of a Financial Institution's intent to rely on the PTE, and maintenance of records necessary to prove that the conditions of the PTE have been met (Section V). Although the start-up costs of the information collections as they are set forth in the current PTE may not be incurred prior to June 30, 2019 due to

uncertainty surrounding the Department's ongoing consideration of whether to propose changes and alternatives to the exemptions, they are reflected in the revised burden estimate summary below. The ongoing costs of the information collections will remain inactive through the remainder of the current approval period.

For a more detailed discussion of the information collections and associated burden of this PTE, see the Department's PRA analysis at 81 FR 21002, 21071.

**PTE 2016–02, the Prohibited Transaction Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Principal Transactions Exemption):** The information collections in PTE 2016–02, the Principal Transactions Exemption, are approved under OMB Control Number 1210–0157 through June 30, 2019. The exemption requires Financial Institutions to provide contract disclosures and contracts to Retirement Investors (Section II), adopt written policies and procedures (Section IV), make disclosures to Retirement Investors and on a publicly available Web site (Section IV), maintain records necessary to prove they have met the PTE conditions (Section V). Although the start-up costs of the information collections as they are set forth in the current PTE may not be incurred prior to June 30, 2019, due to uncertainty surrounding the Department's ongoing consideration of whether to propose changes and alternatives to the exemptions, they are reflected in the revised burden estimate summary below. The ongoing costs of the information collections will remain inactive through the remainder of the current approval period.

For a more detailed discussion of the information collections and associated burden of this PTE, see the Department's PRA analysis at 81 FR 21089, 21129.

**Amended PTE 84–24:** The information collections in Amended PTE 84–24 are approved under OMB Control Number 1210–0158 through June 30, 2019. As amended, Section IV(b) of PTE 84–24 requires Financial Institutions to obtain advance written authorization from an independent plan fiduciary or IRA holder and furnish the independent fiduciary or IRA holder with a written disclosure in order to receive commissions in conjunction with the purchase of insurance and annuity contracts. Section IV(c) of PTE 84–24 requires investment company Principal Underwriters to obtain approval from an independent fiduciary

and furnish the independent fiduciary with a written disclosure in order to receive commissions in conjunction with the purchase by a plan of securities issued by an investment company Principal Underwriter. Section V of PTE 84–24, as amended, requires Financial Institutions to maintain records necessary to demonstrate that the conditions of the PTE have been met.

The rule delays the applicability date of amendments to PTE 84–24 until July 1, 2019, except that the Impartial Conduct Standards became applicable on June 9, 2017. The Department does not have sufficient data to estimate that number of respondents that will use PTE 84–24 with the inclusion of Impartial Conduct Standards but delayed applicability date of amendments. Therefore, the Department has not revised its burden estimate.

For a more detailed discussion of the information collections and associated burden of this PTE, see the Department's PRA analysis at 81 FR 21147, 21171.

These paperwork burden estimates, which comprise start-up costs that will be incurred prior to the July 1, 2019, effective date (and the June 30, 2019, expiration date of the current approval periods), are summarized as follows:

**Agency:** Employee Benefits Security Administration, Department of Labor.

**Titles:** (1) Best Interest Contract Exemption and (2) Final Investment Advice Regulation.

**OMB Control Number:** 1210–0156.

**Affected Public:** Businesses or other for-profits; not for profit institutions.

**Estimated Number of Respondents:** 19,890 over the three-year period; annualized to 6,630 per year.

**Estimated Number of Annual Responses:** 34,046,054 over the three-year period; annualized to 11,348,685 per year.

**Frequency of Response:** When engaging in exempted transaction.

**Estimated Total Annual Burden Hours:** 2,125,573 over the three-year period; annualized to 708,524 per year.

**Estimated Total Annual Burden Cost:** \$2,468,487,766 during the three-year period; annualized to \$822,829,255 per year.

**Agency:** Employee Benefits Security Administration, Department of Labor.

**Titles:** (1) Prohibited Transaction Exemption for Principal Transactions in Certain Assets between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs and (2) Final Investment Advice Regulation.

**OMB Control Number:** 1210–0157.

**Affected Public:** Businesses or other for-profits; not for profit institutions.

*Estimated Number of Respondents:* 6,075 over the three-year period; annualized to 2,025 per year.

*Estimated Number of Annual Responses:* 2,463,802 over the three-year period; annualized to 821,267 per year.

*Frequency of Response:* When engaging in exempted transaction; Annually.

*Estimated Total Annual Burden Hours:* 45,872 over the three-year period; annualized to 15,291 per year.

*Estimated Total Annual Burden Cost:* \$1,955,369,661 over the three-year period; annualized to \$651,789,887 per year.

*Agency:* Employee Benefits Security Administration, Department of Labor.

*Titles:* (1) Prohibited Transaction Exemption (PTE) 84–24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters and (2) Final Investment Advice Regulation.

*OMB Control Number:* 1210–0158.

*Affected Public:* Businesses or other for-profits; not for profit institutions.

*Estimated Number of Respondents:* 21,940.

*Estimated Number of Annual Responses:* 3,306,610.

*Frequency of Response:* Initially, Annually, When engaging in exempted transaction.

*Estimated Total Annual Burden Hours:* 172,301 hours.

*Estimated Total Annual Burden Cost:* \$1,319,353.

### 3. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal Rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) or any other laws. Unless the head of an agency certifies that a final rule is not likely to have a significant economic impact on a substantial number of small entities, section 604 of the RFA requires that the agency present a final regulatory flexibility analysis (FRFA) describing the rule's impact on small entities and explaining how the agency made its decisions with respect to the application of the rule to small entities. Small entities include small businesses, organizations and governmental jurisdictions.

The final rule merely extends the transition period for the PTEs associated with the Fiduciary Rule. The impact on small entities will be determined when the Department issues future guidance after concluding its review of the rule

and exemption. Any future guidance will be subject to notice and comment and contain a Regulatory Flexibility Act analysis. Accordingly, pursuant to section 605(b) of the RFA, the Deputy Assistant Secretary of the Employee Benefits Security Administration hereby certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

### 4. Congressional Review Act

This final rule is subject to the Congressional Review Act (CRA) provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and will be transmitted to Congress and the Comptroller General for review. The final rule is a “major rule” as that term is defined in 5 U.S.C. 804, because it is likely to result in an annual effect on the economy of \$100 million or more.

### 5. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of \$100 million or more (adjusted annually for inflation with the base year 1995) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. For purposes of the Unfunded Mandates Reform Act, as well as Executive Order 12875, this final rule does not include any federal mandate that the Department expects would result in such expenditures by State, local, or tribal governments, or the private sector. The Department also does not expect that the delay will have any material economic impacts on State, local or tribal governments, or on health, safety, or the natural environment.

### 6. Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs

The impacts of this final rule are categorized consistently with the analysis of the original Fiduciary Rule and PTEs, and the Department has also concluded that the impacts identified in the RIA accompanying the Fiduciary Rule may still be used as a basis for estimating the potential impacts of this final rule. It has been determined that, for purposes of E.O. 13771, the impacts of the Fiduciary Rule that were identified in the 2016 analysis as costs, and that are presently categorized as cost savings (or negative costs) in this final rule, and impacts of the Fiduciary Rule that were identified in the 2016 analysis as a combination of transfers

and positive benefits are categorized as a combination of (opposite-direction) transfers and negative benefits in this final rule. Accordingly, OMB has determined that this final rule is an E.O. 13771 deregulatory action.

### G. List of Amendments to Prohibited Transaction Exemptions

The Secretary of Labor has discretionary authority to grant administrative exemptions under ERISA and the Code on an individual or class basis, but only if the Secretary first finds that the exemptions are (1) administratively feasible, (2) in the interests of plans and their participants and beneficiaries and IRA owners, and (3) protective of the rights of the participants and beneficiaries of such plans and IRA owners. 29 U.S.C. 1108(a); see also 26 U.S.C. 4975(c)(2). The Secretary of Labor has found that the delay finalized below is: (1) Administratively feasible, (2) in the interests of plans and their participants and beneficiaries and IRA owners, and (3) protective of the rights of participants and beneficiaries of such plans and IRA owners.

Under this authority, and based on the reasons set forth above, the Department is amending the: (1) Best Interest Contract Exemption (PTE 2016–01); (2) Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (PTE 2016–02); and (3) Prohibited Transaction Exemption 84–24 (PTE 84–24) for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters, as set forth below. These amendments are effective on January 1, 2018.

#### 1. The BIC Exemption (PTE 2016–01) is amended as follows:

A. The date “January 1, 2018” is deleted and “July 1, 2019” inserted in its place in the introductory **DATES** section.

B. *Section II(h)(4)—Level Fee Fiduciaries* provides streamlined conditions for “Level Fee Fiduciaries.” The date “January 1, 2018” is deleted and “July 1, 2019” inserted in its place. Thus, for Level Fee Fiduciaries that are robo-advice providers, and therefore not eligible for Section IX (pursuant to Section IX(c)(3)), the Impartial Conduct Standards in Section II(h)(2) are applicable June 9, 2017, but the remaining conditions of Section II(h) are applicable July 1, 2019, rather than January 1, 2018.

C. *Section II(a)(1)(ii)* provides for the amendment of existing contracts by

negative consent. The date “January 1, 2018” is deleted where it appears in this section, including in the definition of “Existing Contract,” and “July 1, 2019” inserted in its place.

D. *Section IX—Transition Period for Exemption.* The date “January 1, 2018” is deleted and “July 1, 2019” inserted in its place. Thus, the Transition Period identified in Section IX(a) is extended from June 9, 2017, to July 1, 2019, rather than June 9, 2017, to January 1, 2018.

2. The Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (PTE 2016–02), is amended as follows:

A. The date “January 1, 2018” is deleted and “July 1, 2019” inserted in its place in the introductory **DATES** section.

B. *Section II(a)(1)(ii)* provides for the amendment of existing contracts by negative consent. The date “January 1, 2018” is deleted where it appears in this section, including in the definition of “Existing Contract,” and “July 1, 2019” inserted in its place.

C. *Section VII—Transition Period for Exemption.* The date “January 1, 2018” is deleted and “July 1, 2019” inserted in its place. Thus, the Transition Period identified in Section VII(a) is extended from June 9, 2017, to July 1, 2019, rather than June 9, 2017, to January 1, 2018.

3. Prohibited Transaction Exemption 84–24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters, is amended as follows:

A. The date “January 1, 2018” is deleted where it appears in the introductory **DATES** section and “July 1, 2019” inserted in its place.

Signed at Washington, DC, this 24th day of November 2017.

**Jeanne Klinefelter Wilson,**

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

[FR Doc. 2017–25760 Filed 11–27–17; 11:15 am]

**BILLING CODE 4510–29–P**

## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

#### 29 CFR Part 2560

**RIN 1210–AB39**

#### Claims Procedure for Plans Providing Disability Benefits; 90-Day Delay of Applicability Date

**AGENCY:** Employee Benefits Security Administration, Department of Labor.

**ACTION:** Final rule; delay of applicability date.

**SUMMARY:** This document delays for ninety (90) days—through April 1, 2018—the applicability of a final rule amending the claims procedure requirements applicable to ERISA-covered employee benefit plans that provide disability benefits (Final Rule). The Final Rule was published in the **Federal Register** on December 19, 2016, became effective on January 18, 2017, and was scheduled to become applicable on January 1, 2018. The delay announced in this document is necessary to enable the Department of Labor to carefully consider comments and data as part of its effort, pursuant to Executive Order 13777, to examine regulatory alternatives that meet its objectives of ensuring the full and fair review of disability benefit claims while not imposing unnecessary costs and adverse consequences.

**DATES:** The amendments are effective on January 1, 2018.

**FOR FURTHER INFORMATION CONTACT:** Frances P. Steen, Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693–8500. This is not a toll free number.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

Section 503 of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), requires that every employee benefit plan shall establish and maintain reasonable procedures governing the filing of benefit claims, notification of benefit determinations, and appeal of adverse benefit determinations. In accordance with its authority under ERISA section 503, and its general regulatory authority under ERISA section 505, the Department of Labor (“Department”) previously established regulations setting forth minimum requirements for employee benefit plan procedures pertaining to claims for benefits by participants and beneficiaries. 29 CFR 2560.503–1.

On December 19, 2016, the Department published a final regulation (“Final Rule”) amending the existing claims procedure regulation; the Final Rule revised the claims procedure rules for ERISA-covered employee benefit plans that provide disability benefits. The Final Rule was made effective January 18, 2017, but the Department delayed its applicability until January 1, 2018, in order to provide adequate time for disability benefit plans and their affected service providers to adjust to it, as well as for consumers and others to understand the changes made.

On February 24, 2017, the President issued Executive Order 13777 (“E.O. 13777”), entitled Enforcing the Regulatory Reform Agenda.<sup>1</sup> E.O. 13777 is intended to reduce the regulatory burdens agencies place on the American people, and directs federal agencies to undertake specified activities to accomplish that objective. As a first step, E.O. 13777 requires the designation of a Regulatory Reform Officer and the establishment of a Regulatory Reform Task Force within each federal agency covered by the Order. The Task Forces were directed to evaluate existing regulations and make recommendations regarding those that can be repealed, replaced, or modified to make them less burdensome. E.O. 13777 also requires that Task Forces seek input from entities significantly affected by regulations, including state, local and tribal governments, small businesses, consumers, non-governmental organizations, and trade associations.

Not long thereafter, certain stakeholders asserted in writing that the Final Rule will drive up disability benefit plan costs, cause an increase in litigation, and consequently impair workers’ access to disability insurance protections.<sup>2</sup> In support of these assertions, the stakeholders said, among

<sup>1</sup> 82 FR 12285 (March 1, 2017).

<sup>2</sup> Some of the stakeholders also asserted a comment that was previously provided with respect to the 2015 proposed amendments, specifically that the Department exceeded its authority and acted contrary to Congressional intent by applying certain ACA protections to disability benefit claims, arguing that if Congress had wanted these protections to apply to disability benefit claims, it would have expressly extended the claims and appeals rules in section 2719 of the Public Health Service Act to plans that provide disability benefits. However, the Department did not take the position that the ACA compelled the changes in the Final Rule. Rather, because disability claims commonly involve medical considerations, the Department was of the view that disability benefit claimants should receive procedural protections similar to those that apply to group health plans, and thus it made sense to model the Final Rule on procedural protections and consumer safeguards that Congress established for group health care claimants under the ACA.

other things, that the right to review and respond to new information or rationales unnecessarily “complicates the processing of disability benefits by imposing new steps and evidentiary burdens in the adjudication of claims.”<sup>3</sup> In addition, the stakeholders said that the new deemed exhaustion provision “explicitly tilts the balance in court cases against plans and insurers” and “creates perverse incentives for plaintiff’s attorneys to side-step established procedures and clog the courts for resolution of benefit claims.”<sup>4</sup> The stakeholders argued that these provisions (and others) collectively “will delay any final decision for the claimant and will significantly increase the administrative burdens on employers and disability insurance carriers, hurting the very employee the rule was purporting to help.”<sup>5</sup> Moreover, according to the stakeholders, these new provisions (and others) are unnecessary in any event because “there are already existing robust consumer protections applicable and available to disability claimants that have worked for well over a decade.”<sup>6</sup> Some members of Congress also presented these same or similar concerns in writing to the Secretary of Labor.<sup>7</sup>

According to the stakeholders, a confidential survey of carriers covering approximately 18 million participants in group long term disability plans (which reflects approximately 45% of the group long-term disability insurance market), conducted by the stakeholders estimated that the Final Rule would

cause average premium increases of 5–8% in 2018 (when the Final Rule is scheduled to take effect) for several survey participants.<sup>8</sup> The stakeholders argued that the demand for disability insurance is highly sensitive to price changes, such that even minor price increases can result in take-up rate reductions. As an example, they reported that when the State of Vermont mandated mental health parity several years ago, there was an approximately 20% increase in premiums, which they asserted resulted in a 20% decrease of covered employees.<sup>9</sup> From this, they conclude that the cost increases caused by the Final Rule will result in employers reducing and/or eliminating disability income benefits, and that some individuals may elect to drop or forego coverage, with the result that fewer people will have adequate income protection in the event of disability. The stakeholders further asserted that loss of access not only may be adverse to individual workers and their families, but also potentially adverse to federal and state public assistance programs more generally.<sup>10</sup>

The stakeholders stated that, while the Final Rule’s Regulatory Impact Analysis (RIA) addressed the limited data sources that were publicly available at that time, the Department’s ability to fully quantify and evaluate costs and benefits was accordingly constrained. But the stakeholders said that such data could be developed by the industry and provided to the Department, and have promised to work with the Department to obtain this data. They asserted that collecting the relevant data is a complex process that will take time and involve an expenditure of resources. For example, because each carrier’s data is proprietary and contains sensitive business information, an independent third party must collect the data in a manner that protects this information. This may include, among other things, negotiating specific non-disclosure, security, and data retention agreements.

They further observed that such a process must also be carefully designed to ensure that there are no violations of relevant federal or state laws, such as antitrust laws. The stakeholders also asserted that each carrier’s existing information technology systems may collect and report data in different ways, so, to be usable, the data must be aggregated into standardized data sets, anonymized to ensure that no data point can be attributed to a single carrier, and reviewed and analyzed to ensure accuracy and reliability (as required for a regulatory impact analysis). The stakeholders made a commitment to provide this data and asked the Department to delay the Final Rule’s applicability date.

In light of the foregoing, and pursuant to E.O. 13777, the Department published in the **Federal Register** on October 12, 2017, at 82 FR 47409, a document seeking comment on a proposed 90-day delay of the applicability date of the Final Rule through April 1, 2018 (NPRM). The comment period on the proposed delay ended on October 27, 2017. In that same document, the Department sought comments and data germane to the examination of the merits of rescinding, modifying, or retaining the Final Rule. This comment period ends on December 11, 2017.

## B. Public Comments and Decision on Delay

The Department received approximately 110 comment letters in response to the proposed delay. As evidenced below, there is no consensus among the commenters regarding whether a delay is appropriate or the length of any such delay. Many commenters strongly support a delay, though much longer than 90 days, but at least as many commenters equally strongly oppose any delay of any length. All of the commenters’ letters, and other related submissions made part of the public record, are available for public inspection on EBSA’s Web site. After carefully considering the record, the proposal is adopted without change.

A significant number of commenters representing employers, plans, insurance carriers, and plan service providers strongly support a delay of the applicability date. Many of these commenters repeated prior assertions that the Final Rule, if not revised or repealed, will drive up disability benefit plan costs, cause an increase in litigation, and in doing so impair workers’ access to disability benefit

<sup>3</sup> Letter from Governor Dirk Kempthorne, President & Chief Executive Officer, American Council of Life Insurers, to The Honorable Alexander Acosta, Secretary, U.S. Department of Labor, “*Department of Labor Disability Claims Regulation*,” (July 17, 2017) (on file with the Employee Benefits Security Administration, U.S. Department of Labor and posted on EBSA’s Web site).

<sup>4</sup> Letter from American Benefits Council, American Council of Life Insurers, America’s Health Insurance Plans, Cigna, The ERISA Industry Committee, Financial Services Roundtable, Sun Life Financial, Unum Group, Inc., to Gary Cohn, Director, National Economic Council, The White House, Andrew P. Bremberg, Director, Domestic Policy Council, The White House, Edward C. Hugler, Acting Secretary, U.S. Department of Labor, “*Department of Labor Disability Claims Regulation*,” (Mar. 14, 2017) (on file with the Employee Benefits Security Administration, U.S. Department of Labor and posted on EBSA’s Web site).

<sup>5</sup> Letter from Governor Dirk Kempthorne, *supra*, note 3.

<sup>6</sup> *Id.*

<sup>7</sup> Letter from David P. Roe, M.D., Member of Congress (and 27 other Members of Congress), to R. Alexander Acosta, Secretary, U.S. Department of Labor, “*Immediate Action Needed on Disability Claims Regulation*,” (July 28, 2017) (on file with the Employee Benefits Security Administration, U.S. Department of Labor and posted on EBSA’s Web site).

<sup>8</sup> Email from Michael Kreps, Principal, Groom Law Group, to John J. Canary and Jeffrey J. Turner, Office of Regulations and Interpretations, Employee Benefits Security Administration (July 13, 2017) (on file with the Employee Benefits Security Administration, U.S. Department of Labor and posted on EBSA’s Web site).

<sup>9</sup> *Id.*

<sup>10</sup> See, e.g., Letter from Matthew Eyles, Executive Vice President, Policy and Regulatory Affairs, America’s Health Insurance Plans, to The Honorable R. Alexander Acosta, Secretary of Labor, U.S. Department of Labor (May 10, 2017) (on file with the Employee Benefits Security Administration, U.S. Department of Labor and posted on EBSA’s Web site). See also Letter from David P. Roe, M.D., Member of Congress (and 27 other Members of Congress), *supra*, note 7.

insurance.<sup>11</sup> In support of these assertions, these commenters say that the right to review and respond to new information or rationales unnecessarily “complicates the processing of disability benefits by imposing new steps and evidentiary burdens in the adjudication of claims,” and that some of the new disclosure requirements “forc[e] plans to consider disability standards and definitions different from those in the plan.”<sup>12</sup> In addition, they say that the new deemed exhaustion provision “explicitly tilts the balance in court cases against plans and insurers” and “creates perverse incentives for plaintiff’s attorneys to side-step established procedures and clog the courts for resolution of benefit claims.”<sup>13</sup> A delay, according to these commenters, will enable the Department to conduct a reexamination of the Final Rule, make changes, and prevent these adverse consequences from ever occurring.

Nearly all of the supporters of a delay requested a delay of longer than 90 days. The majority requested a delay ranging from 6 months to 1 year, with a few commenters requesting an even longer delay. The primary reason offered for a longer delay, according to these commenters, is that a 90-day delay will not provide enough time for the Department to complete a careful review of the public record (including the information and data due on December 11, 2017), to perform a review and analysis of the Final Rule in light of the information and data provided, to propose revisions to the Final Rule and receive comments, to publish a revised

final rule, and to provide plans and their service providers sufficient time to comply with a revised rule.<sup>14</sup> One commenter, for example, noted that historically the Department has taken months, if not years, to review existing regulations, propose changes, and issue final rules.<sup>15</sup>

By contrast, a significant number of commenters representing disability claimants strongly oppose any delay of the applicability date. These commenters firmly believe that disability claimants are in need of the increased procedural protections provided by the Final Rule, and that such protections are promised by section 503 of ERISA. These commenters argue that the Final Rule is the product of a valid and extensive multi-year rulemaking process, completed in December 2016, and that nothing in the public record has changed since then to warrant a delay. These commenters discount industry assertions that the Final Rule will lead to unwarranted price increases and reduced coverage as mere unsubstantiated and undocumented allegations. These commenters maintain that if such assertions were true, industry stakeholders would have proven their case during the rulemaking process that ended in 2016.

Importantly, many of these same commenters raised serious issues under the Administrative Procedures Act (APA) with respect to process surrounding the proposed delay. They argue that the Department has not clearly articulated its reasons for proposing a delay. They argue that the Department is relying on non-public

information, provided exclusively by or on behalf of the industry, as the sole basis for the delay, and that the public has not been given a reasonable opportunity to review and respond to this non-public information. They also argue that the public will not have a reasonable opportunity to review and respond to the data and information, if any, submitted under the December 11, 2017, deadline. Some of these commenters even expressed concern that the delay could result in litigation for violations of the APA.

After carefully considering these comments, the proposal is adopted without change. Pursuant to E.O. 13777, the Department previously determined it was appropriate to seek additional input regarding the regulatory impact analysis in the Final Rule, and to that end publicly solicited comments on October 12, 2017. *See* 82 FR 47409, 47411–12 (Oct. 12, 2017) (explaining reasoning and recognizing that access to disability benefits depends in part on affordability, which is affected by regulatory burdens). The Department expects that data and information will be submitted by December 11, 2017, and that the Department will be able to consider whether such data and information support the assertions made by the stakeholders and commenters arguing for consideration of regulatory alternatives other than those adopted in the Final Rule and possible revision or rescission of the Final Rule. The Department, however, would not reasonably be able to complete this notice and comment process and a reexamination before January 1, 2018. Rather, extending the applicability date past January 1, 2018, allows the Department to complete this public solicitation process and examine regulatory alternatives prior to the Final Rule becoming applicable. At this point, the Department is not prepared to follow the alternative approach of allowing the Final Rule to become applicable and thereafter completing a reexamination and potential proposal of regulatory alternatives for public comment. While that approach is relatively common with respect to reexaminations of existing regulations, in light of the fact that the Final Rule is not yet applicable, the approach taken by the Department allows stakeholders interested in changes to the Final Rule a final opportunity to make their case. It also avoids potential unnecessary disruption of the disability insurance market and frictional costs that, if the stakeholders provide data supporting their allegations regarding adverse consequences of the Final Rule on

<sup>11</sup> *See, e.g.*, Comment Letter #105 (America’s Health Insurance Plans) (“Because demand by employees for private disability income protection is sensitive to the cost of coverage, the Rule would drive down the number of working Americans with private disability income protection, exposing more American families to the financial risk of disabling illness or injury. As a result, not only would more families face financial hardship, the federal government, states, and taxpayers would also face higher costs because, lacking disability income protection benefits, more disabled workers would be forced to rely on public assistance programs.”).

<sup>12</sup> Comment Letter #104 (American Benefits Council, American Council of Life Insurers, America’s Health Plans, Cigna, The ERISA Industry Committee, Financial Services Roundtable, The Guardian Life Insurance Company of America, The Hartford, MetLife, Mutual of Omaha, National Association of Insurance and Financial Advisors, National Business Group on Health, NFL Player Disability and Neurocognitive Benefit Plan, Sun Life Financial, Unum Group, Inc., U.S. Chamber of Commerce).

<sup>13</sup> *Id.* *See also* Comment Letter #105 (America’s Health Insurance Plans) (“Of major concern, the Rule’s provisions would greatly increase disability income claim litigation and litigation costs. The Rule provides, at the claimant’s option, for a short-cut to the federal courts and to de novo court review if a plan does not ‘strictly adhere’ to its provisions.”).

<sup>14</sup> *See, e.g.*, Comment Letter #98 (American Council of Life Insurers); Comment Letter #104 (American Benefits Council, American Council of Life Insurers, America’s Health Plans, Cigna, The ERISA Industry Committee, Financial Services Roundtable, The Guardian Life Insurance Company of America, The Hartford, MetLife, Mutual of Omaha, National Association of Insurance and Financial Advisors, National Business Group on Health, NFL Player Disability and Neurocognitive Benefit Plan, Sun Life Financial, Unum Group, Inc., U.S. Chamber of Commerce); Comment Letter #105 (America’s Health Insurance Plans); Comment Letter #97 (National Business Group on Health); Comment Letter #94 (UNUM Group); Comment Letter #93 (United Healthcare); Comment Letter #96 (Cigna Corporation); Comment Letter #92 (U.S. Chamber of Commerce); Comment Letter #95 (Sun Life Financial).

<sup>15</sup> Comment Letter #104 (American Benefits Council, American Council of Life Insurers, America’s Health Plans, Cigna, The ERISA Industry Committee, Financial Services Roundtable, The Guardian Life Insurance Company of America, The Hartford, MetLife, Mutual of Omaha, National Association of Insurance and Financial Advisors, National Business Group on Health, NFL Player Disability and Neurocognitive Benefit Plan, Sun Life Financial, Unum Group, Inc., U.S. Chamber of Commerce).

access to disability insurance, may not be offset by commensurate benefits (as explained further below in the regulatory impact analysis section of this document).

At this juncture, the Department continues to think that a 90-day delay will be sufficient for it to complete the comment solicitation process, perform a reexamination of the information and data submitted, and take appropriate next steps. It is premature, in the Department's view, to consider a delay of longer than 90 days pending receipt of reliable data and information that reasonably supports the commenters' assertions that the Final Rule will lead to unwarranted cost increases and related diminution in disability coverage benefits. As discussed in the preamble to the NPRM, various stakeholders made a commitment to provide such data and information to the Department. There is little in the public record to date to support a further delay of the Final Rule or subsequent substantive changes. Thus, without data and information that provides sufficient empirical support for the assertions of the commenters and stakeholders seeking a rescission or revision of the Final Rule, it is not possible for the Department to conduct a meaningful reexamination or articulate a reasoned basis for further delaying the procedural protections for disability benefit claimants provided by the Final Rule. If the Department receives such supporting data and information, the Department will provide interested stakeholders with a reasonable opportunity for notice and comment on that data and information. Only at that point would the Department be in a position to seriously consider any further delay of some or all of the requirements of the Final Rule beyond April 1, 2018. Delaying the applicability date of the Final Rule beyond the proposed 90-day delay period is, in the Department's view, unwarranted at this point in time.

Likewise, the Department declines to extend the 60-day comment period for submitting data and information. As already noted, the proposal established this 60-day deadline (December 11, 2017) for submitting data and information germane to the examination of the merits of rescinding, modifying, or retaining the Final Rule. Many commenters who support a delay asserted that 60 days is an insufficient period of time for them to provide the data needed to support their claims of increased costs and litigation and reduced access to coverage. One reason offered in support of extending this deadline is that it is an unprecedented

undertaking for disability carriers to work together to compile data to analyze the impact of rule on anticipated but unknowable consumer behavior.<sup>16</sup> Another reason offered is that data on the disability market, competitive landscape, and employer responses to pricing and new administrative requirements are difficult if not impossible to collect, especially because some plan rates are guaranteed for multiple years.<sup>17</sup> An additional reason offered is that for many plans and service providers fall open enrollment season will interfere with many commenters' ability to gather and analyze the information requested.<sup>18</sup> Those seeking an extension of time to submit data generally requested an additional 60 days (totaling 120 days).

The Department is not persuaded by these comments. The commenters and stakeholders who are arguing for a rescission or revision of the Final Rule made representations, both before the NPRM and again during the NPRM comment period, of unwarranted cost increases and related diminution in disability benefit coverage. Presumably, the commenters and stakeholders had a factual basis for making these representations and assertions to the government at the time they made them. Accordingly, the Department believes it is reasonable to expect those stakeholders to provide reasonably convincing factual support for their representations within a 60-day period. Also, on balance, the Department believes more harm than good would be caused by granting an extension of the 60-day comment period. Primarily this is because extending the 60-day comment period necessarily would require a corresponding delay of the 90-day applicability date, an outcome already rejected by the Department, above, as unwarranted at least at this point. While the Department takes note of the potential complexity involved in collecting relevant data and information, and recognizes that time and care is needed in such matters, the Department notes that not all insurance industry commenters requested an extension of the 60-day comment period. A major insurance trade association representing approximately 290 member insurance companies, for example, commented that it will respond with pertinent data and comments by December 11, 2017.<sup>19</sup> In

light of the impact on claimants of further delaying the applicability of the Final Rule, and the fact that the overall rulemaking project has been ongoing for many years, and the fact that parties have previously indicated the process for collecting this data and information is well underway, the Department believes that a 60-day period to provide reliable data and information is sufficient.

Nor does the Department agree with the commenters that assert violations of the APA with respect to the rulemaking process for the delay. The NPRM was published in the **Federal Register** and the public was given 15 days to comment on the proposed delay and 60 days to comment and provide data on matters germane to the examination of the merits of rescinding, modifying or retaining the Final Rule. Although the Department limited the comment period on the proposed delay to 15 days, the delay issue is straightforward and the Department, in fact, received 110 comment letters on the issue. For complete transparency, all comments were, and continue to be, posted on the Department's Web site promptly after receipt. In addition, other written information (e.g., letters, emails, etc.) relied upon by the Department to issue the NPRM were identified (by name of sender and date) and as explained in the preamble to the NPRM, placed on file with EBSA, and subsequently posted on the Department's Web site for public access. The primary rationale for the 90-day delay—to solicit data and information and reexamine the decisions and impact of the Final Rule in light of newly received data and information, with the objective of ensuring full and fair reviews of disability claims while not imposing unnecessary costs and adverse consequences—was clearly articulated in the NPRM for public consideration and response and is repeated here as the primary basis for this final rule. Further, many commenters were concerned that they would not have an opportunity to review or respond to information submitted under the 60-day deadline in advance of the Department taking further action. The Department does not intend to take further regulatory action, including rescinding, modifying, or further delaying the Final Rule, without first affording the public another opportunity to review and comment on the data and information received under the 60-day comment period ending on December 11, 2017.

### C. Regulatory Impact Analysis

The Department expects that the extension of the applicability date of the

<sup>16</sup> Comment Letter #96 (Cigna Corporation).

<sup>17</sup> *Id.*

<sup>18</sup> Comment Letter #97 (National Business Group on Health).

<sup>19</sup> See Comment Letter #98 (American Council of Life Insurers).

Final Rule will produce benefits that justify associated costs. The Department requested data from stakeholders that provides evidence to support their assertions that the Final Rule will increase disability benefit plan costs and cause a rise in litigation, thereby impairing workers' access to disability insurance protections, and that the Department's regulatory impact analysis for the Final Rule was insufficient. The deadline for the Department to receive such data and information is December 11, 2017. Delaying the applicability date will provide the Department with time to carefully consider the data and information as part of its reexamination of the rule to determine whether there are reasonable and feasible alternatives that will allow the Department to meet its objective of ensuring the disability plan claimants receive a full and fair review of their disability benefit plans without imposing unnecessary costs and adverse consequences on plans.

Delaying the applicability date also will avert the possibility of a costly and disorderly transition if the Department subsequently changes the regulatory requirements as a result of its reexamination of the rule. Similarly, it could avert the possibility of unnecessary costs to consumers as a result of an unnecessarily confusing or disruptive transition if the Final Rule, for example, were to become applicable and then subsequently changed. The Department's objective is to complete its review of the Final Rule in conformance with E.O. 13777, analyze data and comments received in response to the proposed delay, determine whether future changes to the Final Rule are necessary, and propose and finalize any changes to the rule. If the Department revises or repeals some aspects of the rule in the future, the delay will allow affected firms to avoid incurring significant implementation costs now which later might turn out to be unnecessary, as well as to avoid unnecessary confusion to claimants from changing standards (should they change).

#### *1. Executive Order 12866 Statement*

This extension of the applicability date of the Final Rule is a significant regulatory action within the meaning of section 3(f)(4) of Executive Order 12866, because it raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Therefore, the Department has considered the costs and benefits of the extension, and the Office of Management and Budget ("OMB") has

reviewed and approved the applicability date extension.

The Department's regulatory impact analysis of the Final Rule estimated that benefits derived by workers seeking disability benefits justify compliance costs. The 90-day delay of the applicability date would delay these estimated benefits and costs by 90 days.

Data limitations prevented the Department from quantifying benefits the Final Rule would provide to workers and their family members participating in ERISA-covered disability insurance plans. The RIA for the Final Rule includes a qualitative analysis of the benefits. The Department estimated at that time that as a result of the Final Rule:

- Some participants would receive payment for benefits they were entitled to that were improperly denied by the plan;
- There would be greater certainty and consistency in the handling of disability benefit claims and appeals, and improved access to information about the manner in which claims and appeals are adjudicated;
- Fairness and accuracy would increase in the claims adjudication process.

The Department estimated that the requirements of the Final Rule would have modest costs. The Department quantified the costs associated with two provisions of the Final Rule for which it had sufficient data: The requirements to provide: (1) Additional information to claimants in the appeals process (\$14.5 million annually); and (2) information in a non-English language (\$1.3 million annually).

Commenters representing employers, plans, insurance carriers, and plan service providers raised concerns that the Department underestimated the costs of the Final Rule and maintain that if the Department had properly estimated costs, it would have found that the costs exceed the Final Rule's benefits. Specifically, these commenters assert that among other things: (1) Requiring benefit denial notices to include a discussion of the basis for disagreeing with a disability determination made by the SSA will increase costs because SSA's definitions, policies, and procedures may be different from those of private disability plans; (2) providing that claimants are deemed to have exhausted the administrative remedies available if plans do not adhere to all claims processing rules, unless the violation was the result of a minor error and other specified conditions are met, will result in increased litigation and administrative costs to the detriment of

plan participants; and (3) prohibiting plans from denying benefits on appeal based on new or additional evidence or rationales that were not included when the benefit was denied at the claims stage, unless the claimant is provided notice and an opportunity to respond to the new or additional information or rationales, will lead to protracted exchanges between plans and claimants that will cause delays, lead to higher costs, and have an adverse impact on plan participants. They also argue that participants in disability plans are very sensitive to price increases and predict that the cost increases associated with the Final Rule will cause some individuals to elect to drop or forego coverage, meaning that fewer people will have adequate income protection in the event of disability.

Other commenters on the 90-day proposed delay asserted that claims that the Final Rule would increase premiums 5 percent to 9 percent were excessive, and another commenter said that disability benefit plans with which it is associated had not experienced any cost increase due to the Final Rule. Commenters also asserted that an increase in litigation would be the result, not of excessive litigation, but of valid challenges to wrongly denied claims as the result of fairer claims processes that are implemented in response to the requirements of the Final Rule.

During the 90-day delay, the Department will reassess the impacts of the Final Rule. To ensure a robust assessment, the Department will closely analyze and utilize the information and data received in response to the Department's NPRM to help appropriately quantify the payments for plan benefits that plan participants would receive and any cost increases, or reductions in access to coverage that could result if the existing provisions of the Final Rule take effect. As the Department stated in the proposed rule, if any data submitted by stakeholders is not publicly available, the Department will work with stakeholders to ensure that any trade secrets and proprietary business information are protected from public disclosure and that the data collection process is designed to ensure that no violations of antitrust or other federal or state laws occur. This will help ensure that the Department reaches an optimal outcome and that full transparency is provided to the public.

#### *2. Alternatives Considered*

While the Department considered several alternatives, the Department's chosen alternative in this final rule is likely to yield the most desirable

outcome including avoidance of market disruptions. In weighing different alternatives, the Department's objective was to avoid unnecessary confusion and uncertainty in the disability claims market and avoid unnecessary costs and adverse consequences, such as reduced access to disability insurance for America's workers and retirees.

The Department considered having certain provisions of the Final Rule go into effect on January 1, 2018, while delaying others. The Department, however, ultimately decided not to adopt this approach because it has not yet received sufficient provision-specific data from commenters with respect to any aspect of the Final Rule, which would enable the Department to single out particular provisions for special treatment. The Department considered extending the delay by more than 90 days, but as discussed in the response to public comments above, it is premature, in the Department's view, even to consider a delay of longer than 90 days pending receipt of reliable data and information supporting the commenters' assertions that the Final Rule will lead to unwarranted cost increases and related diminution in disability coverage benefits. The Department also considered not extending the applicability date, which would have meant that the rule would become applicable on January 1, 2018. The Department rejected this alternative, because it would not provide sufficient time for the Department to receive and review data submitted in response to the request in the proposal, complete its ongoing review of the rule, and propose and finalize any changes to the rule. Moreover, absent the extended applicability date, disability plans would feel compelled to come into full compliance with the rule despite the possibility that the Department might identify and adopt more efficient alternatives. This could lead to unnecessary compliance costs to industry that are also passed on to consumers and market disruptions that could reduce consumer access to these products.

### 3. Paperwork Reduction Act

The Paperwork Reduction Act ("PRA") prohibits federal agencies from conducting or sponsoring a collection of information from the public without first obtaining approval from OMB. *See* 44 U.S.C. 3507. Additionally, members of the public are not required to respond to a collection of information, nor be subject to a penalty for failing to respond, unless such collection displays

a valid OMB control number. *See* 44 U.S.C. 3512.

OMB approved information collections contained in the Final Rule under OMB Control Number 1210-0053. The Department is not modifying the substance of the Information Collection Requests at this time; therefore, no action under the PRA is required. The information collections will become applicable at the same time the rule becomes applicable. The information collection requirements contained in the Final Rule are discussed below.

This rule delays the applicability date of the Department's amendments to the disability claims procedure rule for 90 days, through April 1, 2018. The Final Rule revised the rules applicable to ERISA-covered plans providing disability benefits. Some of these amendments revise disclosure requirements under the claims procedure rule that are information collections covered by the PRA. For example, benefit denial notices must contain a full discussion of why the plan denied the claim, and to the extent the plan did not follow or agree with the views presented by the claimant to the plan or health care professional treating the claimant or vocational professionals who evaluated the claimant, or a disability determination regarding the claimant presented by the claimant to the plan made by the SSA, the discussion must include an explanation of the basis for disagreeing with the views or disability determination. The notices also must include either: (1) The specific internal rules, guidelines, protocols, standards or other similar criteria of the plan relied upon in making the adverse determination or, alternatively, (2) a statement that such rules, guidelines, protocols, standards or other similar criteria of the plan do not exist. Plan administrators also must provide (1) claimants with any new or additional evidence considered free of charge, and (2) notices of adverse benefit determination potentially in a non-English language.

The burdens associated with the disability claims procedure revisions are summarized below and discussed in detail in the regulatory impact analysis contained in the preamble to the Final Rule (81 FR 92317, 92340 (Dec. 19, 2016)). It should be noted that this rule only affects the requirements applicable to disability benefit claims, which are a small subset of the total burden associated with the ERISA claims procedure information collection.

*Type of Review:* Revised collection.  
*Agencies:* Employee Benefits Security Administration, Department of Labor.  
*Title:* ERISA Claims Procedures.

*OMB Number:* 1210-0053.  
*Affected Public:* Business or other for-profit; not-for-profit institutions.  
*Total Respondents:* 5,808,000.  
*Total Responses:* 311,790,000.  
*Frequency of Response:* Occasionally.  
*Estimated Total Annual Burden Hours:* 516,000.  
*Estimated Total Annual Burden Cost:* \$814,450,000.

### 4. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and which are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a rule is not likely to have a significant economic impact on a substantial number of small entities, section 604 of the RFA requires the agency to present a final regulatory flexibility analysis (FRFA) of the rule describing the rule's impact on small entities and explaining how the agency made its decisions with respect to the application of the rule to small entities. Pursuant to section 605(b) of the RFA, the Department certified that the Final Rule did not have a significant economic impact on a substantial number of small entities and provided an analysis of the rationale for that certification. Similarly, the Department hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities because it merely delays the applicability date of the Final Rule.

### 5. Congressional Review Act

The final rule is subject to the Congressional Review Act (CRA) provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and, upon publication, will be transmitted to Congress and the Comptroller General for review.

### 6. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) requires each federal agency to prepare a written statement assessing the effects of any federal mandate in a final agency rule that may result in an expenditure of \$100 million or more (adjusted annually for inflation with the base year 1995) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. For purposes of the Unfunded Mandates Reform Act, as well as Executive Order 12875, this final

rule does not include any federal mandate that we expect would result in such expenditures by state, local, or tribal governments, or the private sector. The Department also does not expect that the final rule will have any material economic impacts on State, local or tribal governments, or on health, safety, or the natural environment.

#### 7. Federalism Statement

Executive Order 13132 outlines fundamental principles of federalism, and requires the adherence to specific criteria by federal agencies in the process of their formulation and implementation of policies that have “substantial direct effects” on the States, the relationship between the national government and States, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have federalism implications must consult with State and local officials and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to the Final Rule.

This final rule does not have federalism implications because it merely delays the applicability date of the rule. Therefore, the final rule has no substantial direct effect on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. In compliance with the requirement of Executive Order 13132 that agencies examine closely any policies that may have federalism implications or limit the policy making discretion of the States, the Department welcomes input from States regarding this assessment.

#### 8. Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs

Executive Order 13771, titled Reducing Regulation and Controlling Regulatory Costs, was issued on January 30, 2017. Section 2(a) of E.O. 13771 requires an agency, unless prohibited by law, to identify at least two existing regulations to be repealed when the agency publicly proposes for notice and comment, or otherwise promulgates, a new regulation. In furtherance of this requirement, section 2(c) of E.O. 13771 requires that the new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations. This final rule is considered an E.O. 13771 deregulatory action.

Details on the estimated cost savings can be found in the rule’s economic analysis. The action is deregulatory as it merely delays the effective date, hence stakeholders do not have to comply with the regulation until April 1, 2018.

#### List of Subjects in 29 CFR Part 2560

Claims, Employee benefit plans.

For the reasons stated above, the Department amends 29 CFR part 2560 as follows:

#### PART 2560—RULES AND REGULATIONS FOR ADMINISTRATION AND ENFORCEMENT

■ 1. The authority citation for part 2560 continues to read as follows:

**Authority:** 29 U.S.C. 1132, 1135, and Secretary of Labor’s Order 1–2011, 77 FR 1088 (Jan. 9, 2012). Section 2560.503–1 also issued under 29 U.S.C. 1133. Section 2560.502c–7 also issued under 29 U.S.C. 1132(c)(7). Section 2560.502c–4 also issued under 29 U.S.C. 1132(c)(4). Section 2560.502c–8 also issued under 29 U.S.C. 1132(c)(8).

#### § 2560.503–1 [Amended]

■ 2. Section 2560.503–1 is amended by removing “on or after January 1, 2018” and adding in its place “after April 1, 2018” in paragraph (p)(3) and by removing the date “December 31, 2017” and adding in its place “April 1, 2018” in paragraph (p)(4).

Signed at Washington, DC, this 22nd day of November 2017.

**Jeanne Klinefelter Wilson,**

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

[FR Doc. 2017–25729 Filed 11–24–17; 11:15 am]

**BILLING CODE 4510–29–P**

#### DEPARTMENT OF HOMELAND SECURITY

##### Coast Guard

#### 33 CFR Part 165

[Docket Number USCG–2017–0935]

**RIN 1625–AA00**

#### Safety Zone; Delaware River, Marcus Hook, PA

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing a temporary safety zone on the waters of the Delaware River between Marcus Hook Range and Tinicum Range. The safety zone will temporarily restrict vessel traffic from transiting or anchoring in portions of

the Delaware River while rock blasting, dredging, and rock removal operations are being conducted to facilitate the Main Channel Deepening project for the Delaware River. The safety zone is needed to protect personnel, vessels, and the marine environment from hazards created by rock blasting, dredging, and rock removal operations. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the COTP or his designated representatives.

**DATES:** This rule is effective from November 30, 2017 through March 15, 2018.

**ADDRESSES:** To view documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov>, type USCG–2017–0935 in the “SEARCH” box and click “SEARCH.” Click on Open Docket Folder on the line associated with this rule.

**FOR FURTHER INFORMATION CONTACT:** If you have questions about this rulemaking, call or email Petty Officer Amanda Boone, Waterways Management Branch, U.S. Coast Guard Sector Delaware Bay; telephone (215) 271–4889, email [Amanda.N.Boone@uscg.mil](mailto:Amanda.N.Boone@uscg.mil).

#### SUPPLEMENTARY INFORMATION:

##### I. Table of Abbreviations

CFR Code of Federal Regulations  
COTP Captain of the Port  
DHS Department of Homeland Security  
FR Federal Register  
NPRM Notice of proposed rulemaking  
§ Section  
U.S.C. United States Code

##### II. Background Information and Regulatory History

The Army Corps of Engineers notified the Coast Guard that Great Lakes Dredging and Dock Company will be conducting rock blasting, dredging, and rock removal operations, beginning November 30, 2017 through March 15, 2018, to facilitate the deepening of the main navigational channel to the new project depth of 45 feet. The Captain of the Port (COTP) has determined that potential hazards associated with rock blasting, dredging, and rock removal operations will be a safety concern for anyone within 500 yards of the drill boat APACHE or dredges TEXAS and NEW YORK. In response, on November 14, 2017, the Coast Guard published a notice of proposed rulemaking (NPRM) titled Safety Zone; Delaware River, Marcus Hook, PA (82 FR 52680.) There we stated why we issued the NPRM, and invited comments on our proposed regulatory action related to this safety

zone. During the comment period that ended November 21, 2017, we received one comment.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable because immediate action is needed to respond to the potential safety hazards associated with rock blasting and dredging operations in the Delaware River.

### III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 33 U.S.C. 1231. The COTP has determined that there are potential hazards associated with the rock blasting and dredging operations. The purpose of this rulemaking is to ensure the safety of personnel, vessels, and the marine environment within a 500-yard radius of rock blasting, dredging, and rock removal operations

### IV. Discussion of Comments, Changes, and the Rule

As noted above, we received one comment on our NPRM published November 14, 2017. The comment stated that the proposed safety zone would be helpful to protect personnel while rock blasting is occurring. The Coast thanks the commenter for their support. There are no changes in the regulatory text of this rule from the proposed rule in the NPRM, other than a correction of the beginning of the enforcement date in paragraph (e). While the preamble of the NPRM correctly stated that enforcement would begin on November 30, 2017, the draft regulatory text incorrectly stated that enforcement would begin on December 1, 2017.

This rule establishes a safety zone from November 30, 2017 through March 15, 2018. The safety zone covers all navigable waters in the Delaware River within 500 yards of vessels and machinery being used to conduct rock blasting, dredging, and rock removal operations between Marcus Hook Range and Tinicum Range. The safety zone will be enforced in an area and in a manner that does not conflict with transiting commercial and recreational traffic, except for the short periods of time when explosive detonations are being conducted and shortly thereafter, when the channel is being surveyed to ensure the navigational channel is clear for vessels to transit. These detonations will not occur more than three times a day. At all other times, at least one side of the main navigational channel will be open for vessels to transit. This rule

describes communications for notifying waterway users of upcoming detonations and provides means for waterway users to request entry into the safety zone.

### V. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders, and we discuss First Amendment rights of protestors.

#### A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This rule has not been designated a “significant regulatory action,” under Executive Order 12866. Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB), and pursuant to OMB guidance it is exempt from the requirements of Executive Order 13771.

This regulatory action determination is based on the size, location, duration, and traffic management of the safety zone. The Coast Guard does not anticipate a significant economic impact because the safety zone will be enforced in an area and in a manner that does not conflict with transiting commercial and recreational traffic, except for the short periods of time when explosive detonations are being conducted. The blasting detonations will not occur more than three times a day. At all other times, at least one side of the main navigational channel will be open for vessels to transit. Moreover, the Coast Guard will work in coordination with the pilots to ensure vessel traffic is limited during the times of detonation and Broadcast Notice to Mariners are made via VHF-FM marine channel 13 and 16 when blasting operations will occur.

#### B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard received no comments from the Small Business Administration on this rulemaking. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the safety zone may be small entities, for the reasons stated in section V.A above, this rule will not have a significant economic impact on any vessel owner or operator.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency’s responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

#### C. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

#### D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination

with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

#### *E. Unfunded Mandates Reform Act*

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

#### *F. Environment*

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.1D, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone to protect waterway users that would prohibit entry within 500 yards of rock blasting, dredging, and rock removal. It is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. A Record of Environmental Consideration supporting this determination is available in the docket where indicated under **ADDRESSES**.

#### *G. Protest Activities*

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

#### **List of Subjects 33 CFR Part 165**

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

### **PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS**

■ 1. The authority citation for part 165 continues to read as follows:

**Authority:** 33 U.S.C 1231; 50 U.S.C. 191; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T05–0935 to read as follows:

#### **§ 165.T05–0935 Safety Zone, Delaware River; Marcus Hook, PA.**

(a) *Location.* The following area is a safety zone: all the navigable waters of the Delaware River within 500 yards of vessels and machinery performing rock blasting, rock removal, and dredging operations, between Marcus Hook Range and Tinicum Range.

(b) *Definitions.* As used in this section, *designated representative* means any Coast Guard commissioned, warrant, or petty officer who has been authorized by the Captain of the Port to assist with enforcement of the safety zone described in paragraph (a) of this section.

(c) *Regulations.* (1) Vessels wishing to transit the safety zone in the main navigational channel may do so if they can make satisfactory passing arrangements with the drill boat APACHE or the dredges TEXAS and NEW YORK, as applicable, in accordance with the Navigational Rules in 33 CFR subchapter E via VHF–FM channel 13 at least 30 minutes prior to arrival. If vessels are unable to make satisfactory passing arrangements with the drill boat APACHE or the dredges TEXAS and NEW YORK, they may request permission from the Captain of the Port, or his designated representative, on VHF–FM channel 16.

(2) The operator of any vessel requesting to transit through the safety zone shall proceed as directed by the drill boat APACHE, the dredges TEXAS and NEW YORK, or the designated representative of the Captain of the Port and must operate at the minimum safe speed necessary to maintain steerage and reduce wake.

(3) No vessels may transit through the safety zone during times of explosive detonation. During explosive detonation, vessels will be required to maintain a 500 yard distance from the drill boat APACHE. The drill boat APACHE will make broadcasts, via VHF–FM Channel 13 and 16, at 15 minutes, 5 minutes, and 1 minute prior

to detonation, as well as a countdown to detonation on VHF–FM Channel 16.

(4) After every explosive detonation a survey will be conducted by the dredging contractor to ensure the navigational channel is clear for vessels to transit. The drill boat APACHE will broadcast, via VHF–FM channel 13 and 16, when the survey has been completed and the channel is clear to transit. Vessels requesting to transit through the safety zone shall proceed as directed by the Captain of the Port and contact the drill boat APACHE on VHF–FM channel 13 to make safe passing arrangements.

(d) *Enforcement.* The U.S. Coast Guard may be assisted by federal, state and local agencies in the patrol and enforcement of the zone.

(e) *Enforcement period.* This rule will be enforced from November 30, 2017, through March 15, 2018, unless cancelled earlier by the Captain of the Port.

Dated: November 22, 2017.

**Scott E. Anderson,**  
Captain, U.S. Coast Guard, Captain of the Port, Delaware Bay.

[FR Doc. 2017–25749 Filed 11–28–17; 8:45 am]

**BILLING CODE 9110–04–P**

### **DEPARTMENT OF HOMELAND SECURITY**

#### **Coast Guard**

#### **33 CFR Part 165**

[Docket Number USCG–2017–0977]

**RIN 1625–AA00**

#### **Safety Zone, Savannah River, Savannah, GA**

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing a temporary safety zone for navigable waters around the M/V SWAN during its transit from the Savannah River entry point to Garden City Terminal in Savannah, GA and during cargo operations. The safety zone is needed to protect personnel, vessels, and the marine environment from potential hazards created by the transport and offloading of oversized cranes. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port (COTP) Savannah or a designated representative.

**DATES:** This rule is effective without actual notice from November 29, 2017, through December 2, 2017. For the purposes of enforcement, actual notice

will be used from November 21, 2017, through November 29, 2017.

**ADDRESSES:** To view documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov>, type USCG–2017–0977 in the “SEARCH” box and click “SEARCH.” Click on Open Docket Folder on the line associated with this rule.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, call or email MST2 Adam White, Marine Safety Unit Savannah Office of Waterways Management, Coast Guard; telephone 912–652–4353, extension 233, or email [Adam.C.White@uscg.mil](mailto:Adam.C.White@uscg.mil).

**SUPPLEMENTARY INFORMATION:**

**I. Table of Abbreviations**

CFR Code of Federal Regulations  
DHS Department of Homeland Security  
FR Federal Register  
NPRM Notice of proposed rulemaking  
§ Section  
U.S.C. United States Code

**II. Background Information and Regulatory History**

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are “impracticable, unnecessary, or contrary to the public interest.” Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because doing so would be impracticable and contrary to the public interest. Immediate action is needed to respond to the potential safety hazards created by the transport and offloading of oversized cranes. The Coast Guard received information on October 12, 2017 regarding the operations beginning on November 21, 2017. The operation would begin before the rulemaking process would be completed. Because of the dangers posed by the cranes, the safety zone is necessary to provide for the safety of persons, vessels, and the marine environment in the event area. Therefore, it is impracticable and contrary to the public interest to delay promulgating this rule, as it is necessary to protect the safety of waterway users.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of

this rule would be impracticable because immediate action is needed to respond to the potential safety hazards associated with the transport and offloading of oversized cranes.

**III. Legal Authority and Need for Rule**

The Coast Guard is issuing this rule under authority in 33 U.S.C. 1231. The COTP Savannah has determined that potential hazards associated with the transport and offloading of oversized cranes starting November 21, 2017, will be a safety concern for anyone on the Savannah River from the Savannah River entry point to Garden City Terminal in Savannah, GA. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone during the M/V SWAN transit and cargo operations.

**IV. Discussion of the Rule**

This rule establishes a safety zone from November 21, 2017 through December 2, 2017. The safety zone will cover all navigable waters within 500 yards of the M/V SWAN during cargo operations, and 1 mile ahead and astern of the M/V SWAN during inbound transit. The duration of the zone is intended to protect personnel, vessels, and the marine environment in these navigable waters during transit and cargo operations. No vessel or person will be permitted to enter, transit through, anchor in, or remain within the safety zone without obtaining permission from the COTP or a designated representative.

**V. Regulatory Analyses**

We developed this rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders, and we discuss First Amendment rights of protestors.

**A. Regulatory Planning and Review**

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This rule has not been designated a “significant regulatory action,” under Executive Order 12866. Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB), and pursuant to OMB guidance it is exempt from the requirements of Executive Order 13771.

This regulatory action determination is based on the size, location, duration, and time-of-day of the safety zone. The safety zone is only in effect within a small area around the M/V SWAN and only for less than two weeks during operations. Vessels and persons seeking to enter, transit through, anchor in, or remain within the regulated area may seek authority from the COTP or a designated representative. The Coast Guard will provide notification of the regulated area to the local maritime community by Local Notice to Mariners, Broadcast Notice to Mariners via VHF–FM marine channel 16, and Marine Safety Security Bulletin release.

**B. Impact on Small Entities**

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the safety zone may be small entities, for the reasons stated in section V.A above, this rule will not have a significant economic impact on any vessel owner or operator.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency’s responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain

about this rule or any policy or action of the Coast Guard.

### C. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

### D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section above.

### E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

### F. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.1D, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human

environment. This rule involves a safety zone lasting only during inbound transit and cargo operations of the M/V SWAN. It is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. A Record of Environmental Consideration supporting this determination is available in the docket where indicated under **ADDRESSES**.

### G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

### List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

## PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

**Authority:** 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegations No. 0170.1.

■ 2. Add § 165.T07–0977 to read as follows:

### § 165.T07–0977 Safety Zone; Crane Transit and Unloading from M/V SWAN, Savannah River, Savannah, GA.

(a) *Regulated area.* The following areas are established as safety zones:

(1) All waters of the Savannah River within one nautical mile ahead and astern of the M/V SWAN as it transits from the Savannah River entrance to Garden City Terminal.

(2) All waters within a 500-yard radius around the M/V SWAN while conducting cargo operations at Garden City Terminal.

(b) *Definition.* As used in this section, “designated representative” means Coast Guard Patrol Commanders, including Coast Guard coxswains, petty officers, and other officers operating Coast Guard vessels or aircraft, and federal, state, and local officers designated by or assisting the Captain of the Port (COTP) Savannah in the enforcement of the regulated areas.

(c) *Regulations.* (1) All persons and vessels are prohibited from entering,

transiting through, anchoring in, or remaining within the regulated area of the safety zone unless authorized by the COTP Savannah or a designated representative.

(2) Persons or vessels desiring to enter, transit through, anchor in, or remain within the safety zone may contact COTP Savannah by telephone at (912) 652–4353, or a designated representative via VHF radio on channel 16, to request authorization. If authorization to enter, transit through, anchor in, or remain within the regulated area is granted by the COTP Savannah or a designated representative, all persons and vessels receiving such authorization must comply with the instructions of the COTP Savannah or a designated representative.

(3) The Coast Guard will provide notice of the regulated areas by Local Notice to Mariners, Broadcast Notice to Mariners, Marine Safety Security Bulletins, and on-scene designated representatives.

(d) *Enforcement period.* This rule will be enforced from November 21, 2017 through December 2, 2017.

Dated: November 17, 2017.

Norm C. Witt,

Commander, U.S. Coast Guard, Captain of the Port Savannah.

[FR Doc. 2017–25751 Filed 11–28–17; 8:45 am]

**BILLING CODE 9110–04–P**

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Parts 1 and 69

[WC Docket Nos. 16–143, 05–25, GN Docket No. 13–5 and RM–10593; FCC 17–43]

### Sunset Order; Access Charge Reform; Business Data Services

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule; announcement of effective date.

**SUMMARY:** In this document, the Commission announces that the Office of Management and Budget (OMB) has approved, for a period of three years, an information collection associated with the Commission’s *Business Data Services Report and Order*, FCC 17–43, which reformed the business data services/special access regulations for incumbent and competitive LECs. The Commission’s reforms included replacing the application-based pricing flexibility rules with a new framework for determining the circumstances under which business data services will

be subject to ex ante pricing regulation. The Commission amended its rules to specify that its pricing flexibility rules no longer apply to business data services. The Commission also limited the circumstances under which price cap LECs must file their business data services contracts as contract-based tariffs. This document is consistent with the *Order*, which stated that the Commission would publish a document in the **Federal Register** announcing the effective date of this rule.

**DATES:** The amendments to §§ 1.776 and 69.701 of the Commission's rules, published at June 2, 2017, 82 FR 25660, are effective November 29, 2017.

**FOR FURTHER INFORMATION CONTACT:** William Kehoe, Pricing Policy Division, Wireline Competition Bureau, at (202) 418-7122, or email: [william.kehoe@fcc.gov](mailto:william.kehoe@fcc.gov).

**SUPPLEMENTARY INFORMATION:** This document announces that, on November 7, 2017, OMB approved, for a period of three years, the changes in information collection requirements relating to §§ 1.774, 1.776 and 69.701 of the Commission's rules, as contained in the Commission's *Business Data Services Report and Order*, FCC 17-43, published at 82 FR 25660, June 2, 2017. The OMB Control Number is 3060-0760. The Commission publishes this document as an announcement of the effective date of §§ 1.776 and 69.701 of the Commission's rules. If you have any comments on the burden estimates listed below, or how the Commission can improve the collections and reduce any burdens caused thereby, please contact Nicole Ongele, Federal Communications Commission, Room 1-A620, 445 12th Street SW., Washington, DC 20554. Please include the OMB Control Number, 3060-0760, in your correspondence. The Commission will also accept your comments via email at [PRA@fcc.gov](mailto:PRA@fcc.gov). To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

#### Synopsis

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), the FCC is notifying the public that it received final OMB approval on November 7, 2017, for the information collection requirements contained in the modifications to §§ 1.774, 1.776, and 69.701 of the Commission's rules. Under 5 CFR part 1320, an agency may not conduct or sponsor a collection of

information unless it displays a current, valid OMB Control Number.

No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a current, valid OMB Control Number. The OMB Control Number is 3060-0760.

The foregoing notice is required by the Paperwork Reduction Act of 1995, Public Law 104-13, October 1, 1995, and 44 U.S.C. 3507.

The total annual reporting burdens and costs for the respondents are as follows:

*OMB Control Number:* 3060-0760.

*OMB Approval Date:* November 7, 2017.

*OMB Expiration Date:* November 30, 2020.

*Title:* 272 Sunset Order, WC Docket No. 06-120; Access Charge Reform, CC Docket No. 96-262, First Report and Order; Second Order on Reconsideration and Memorandum Opinion and Order; and Fifth Report and Order; Business Data Services Report and Order, WC Docket No. 16-143 et al.

*Form Number:* N/A.

*Respondents:* Business or other for-profit.

*Number of Respondents and Responses:* 13 respondents; 66 responses.

*Estimated Time per Response:* 3-80 hours.

*Frequency of Response:* One-time reporting requirement; on-occasion reporting requirement; third-party disclosure requirement.

*Obligation to Respond:* Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 1, 4(i) through (j), 201 through 205, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i) through (j), 201 through 205, and 303(r).

*Total Annual Burden:* 1,256 hours.

*Total Annual Cost:* \$61,050.

*Privacy Act Impact Assessment:* No impact(s).

*Nature and Extent of Confidentiality:* The information requested is not of a confidential nature. However, respondents may request materials or information submitted to the Commission be withheld from public inspection under 47 CFR 0.459 of the Commission's rules.

*Needs and Uses:* On April 28, 2017, the Commission released the *Business Data Services Order*, WC Docket No. 16-143 et al., FCC 17-43, reforming the business data services/special access regulations for incumbent and competitive LECs. The Commission's

reforms included replacing the application-based pricing flexibility rules with a new framework under which: (a) Packet-based services, time division multiplexing (TDM) services with bandwidth greater than 45 mbps, and TDM transport services are not subject to ex ante pricing regulation; (b) a new standard is applied to determine the extent to which the Commission regulates price cap LECs' TDM end user channel terminations with bandwidth less than 45 mbps and certain other low bandwidth business data services. Under this standard, a price cap LEC is not subject to ex ante pricing regulation in the provision of these services in counties deemed competitive under the Commission's competitive market test or for which the price cap LEC previously obtained Phase II pricing flexibility; (c) the price cap LEC is subject to ex ante pricing regulation in other counties where it is the incumbent LEC, but in these counties the price cap LEC has downward pricing flexibility (*i.e.*, the equivalent of Phase I pricing flexibility under the prior rules); and (d) the Commission will update the competitive market test results every three years using data already collected in FCC Form 477.

Among other rules changes, the *Business Data Services Order* repealed § 1.774, which set forth requirements for pricing flexibility applications, and added § 1.776, which limits the circumstances under which price cap LECs must file their business data services contracts as contract-based tariffs. The Commission also amended § 69.701 of its rules to specify that its pricing flexibility rules no longer apply to business data services.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary, Office of the Secretary.*

[FR Doc. 2017-25674 Filed 11-28-17; 8:45 am]

**BILLING CODE 6712-01-P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 679

[Docket No. 161020985-7181-02]

**RIN 0648-XF702**

### Fisheries of the Exclusive Economic Zone Off Alaska; Several Groundfish Species in the Bering Sea and Aleutian Islands Management Area

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

**ACTION:** Temporary rule; apportionment of reserves; request for comments.

**SUMMARY:** NMFS apportions amounts of the non-specified reserve to the initial total allowable catch (ITAC) of Aleutian Islands (AI) Greenland turbot, AI “other rockfish,” Bering Sea (BS) sablefish, Bering Sea and Aleutian Islands (BSAI) Alaska plaice, BSAI northern rockfish, BSAI “other flatfish,” BSAI shortraker rockfish, BSAI sculpin, BSAI skates, and Central and Western Aleutian Islands (CAI/WAI) blackspotted/rougheye rockfish in the BSAI management area. This action is necessary to allow the fisheries to continue operating. It is intended to promote the goals and objectives of the fishery management plan for the BSAI management area.

**DATES:** Effective November 24, 2017, through 2400 hrs, Alaska local time, December 31, 2017. Comments must be received at the following address no later than 4:30 p.m., Alaska local time, December 11, 2017.

**ADDRESSES:** Submit your comments, identified by NOAA–NMFS–2016–0140, by either of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to <http://www.regulations.gov/docket?D=NOAA-NMFS-2016-0140>, click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.

- *Mail:* Submit written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Mail comments to P.O. Box 21668, Juneau, AK 99802–1668.

*Instructions:* NMFS may not consider comments if they are sent by any other method, to any other address or individual, or received after the comment period ends. All comments received are a part of the public record and NMFS will post the comments for public viewing on [www.regulations.gov](http://www.regulations.gov) without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender is publicly accessible. NMFS will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous).

**FOR FURTHER INFORMATION CONTACT:** Steve Whitney, 907–586–7228.

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

The 2017 ITAC of AI Greenland turbot was established as 106 metric tons (mt), the 2017 ITAC of AI “other rockfish” was established as 550 mt, the 2017 ITAC of BS sablefish was established as 1,051 mt, the 2017 ITAC of BSAI Alaska plaice was established as 11,050 mt, the 2017 ITAC of BSAI northern rockfish was established as 4,250 mt, the 2017 ITAC of BSAI “other flatfish” was established as 2,125 mt, the 2017 TAC of BSAI shortraker rockfish was established as 125 mt, the 2017 ITAC of BSAI sculpins was established as 3,825 mt, the 2017 ITAC of BSAI skates was established as 22,100 mt, and the 2017 TAC of CAI/WAI blackspotted/rougheye rockfish was established as 125 mt by the final 2017 and 2018 harvest specifications for groundfish of the BSAI (82 FR 11826, February 27, 2017). In accordance with § 679.20(a)(3) the Regional Administrator, Alaska Region, NMFS, has reviewed the most current available data and finds that the ITACs for AI Greenland turbot, AI “other rockfish,” BS sablefish, BSAI Alaska plaice, BSAI northern rockfish, BSAI “other flatfish,” BSAI shortraker rockfish, BSAI sculpin, BSAI skates, and CAI/WAI blackspotted/rougheye rockfish need to be supplemented from the non-specified reserve to promote efficiency in the utilization of fishery resources in the BSAI and allow fishing operations to continue.

Therefore, in accordance with § 679.20(b)(3), NMFS apportions from the non-specified reserve of groundfish 19 mt to AI Greenland turbot, 21 mt to AI “other rockfish,” 48 mt to BS sablefish, 5,500 mt to BSAI Alaska plaice ITAC, 475 mt to BSAI northern rockfish ITAC, 2,050 mt to BSAI “other flatfish” ITAC, 30 mt to BSAI shortraker rockfish ITAC, 1,500 mt to BSAI sculpin ITAC, 1,487 mt to BSAI skates ITAC, and 10 mt to the CAI/WAI blackspotted/rougheye rockfish TAC in the BSAI management area. These

apportionments are consistent with § 679.20(b)(1)(i) and do not result in overfishing of any target species because the revised ITACs and total allowable catch (TAC) are equal to or less than the specifications of the acceptable biological catch in the final 2017 and 2018 harvest specifications for groundfish in the BSAI (82 FR 11826, February 27, 2017).

The harvest specification for the 2017 ITACs and TACs included in the harvest specifications for groundfish in the BSAI are revised as follows: 125 mt for AI Greenland turbot, 571 mt for AI “other rockfish,” 16,550 mt for Alaska plaice, 4,175 mt for “other flatfish”, 155 mt for BSAI shortraker rockfish, 5,325 mt for BSAI sculpins, and 135 mt for CAI/WAI blackspotted/rougheye rockfish. The harvest specification for the 2017 ITAC included in the harvest specifications for groundfish in the BSAI is revised as follows: 1,099 mt for BS sablefish, 4,725 mt for BSAI northern rockfish, and 23,587 mt for BSAI skates.

### Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, (AA) finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) and § 679.20(b)(3)(iii)(A) as such a requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the apportionment of the non-specified reserves of groundfish to the AI Greenland turbot, AI “other rockfish,” BS sablefish, BSAI Alaska plaice, BSAI northern rockfish, BSAI “other flatfish,” BSAI shortraker rockfish, BSAI sculpin, BSAI skates, and CAI/WAI blackspotted/rougheye rockfish in the BSAI. Immediate notification is necessary to allow for the orderly conduct and efficient operation of this fishery, to allow the industry to plan for the fishing season, and to avoid potential disruption to the fishing fleet and processors. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of November 21, 2017.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

Under § 679.20(b)(3)(iii), interested persons are invited to submit written comments on this action (see **ADDRESSES**) until December 11, 2017. This action is required by § 679.20 and is exempt from review under Executive Order 12866.

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

Dated: November 24, 2017.

**Alan D. Risenhoover,**

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

[FR Doc. 2017-25759 Filed 11-24-17; 4:15 pm]

**BILLING CODE 3510-22-P**

# Proposed Rules

Federal Register

Vol. 82, No. 228

Wednesday, November 29, 2017

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 73

[MB Docket No. 17–264; FCC 17–138]

#### Amendment of Section 73.624(g) of the Commission's Rules Regarding Submission of FCC Form 2100, Schedule G, Used To Report TV Stations' Ancillary or Supplementary Services

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** In this document, the Federal Communications Commission (Commission) seeks comment on how to modernize two provisions in Part 73 of its rules governing broadcast licensees: Section 73.624(g), which establishes certain reporting obligations relating to the provision of ancillary or supplementary services, and Section 73.3580, which sets forth requirements concerning public notice of the filing of broadcast applications.

**DATES:** Comments are due on or before December 29, 2017; reply comments are due on or before January 16, 2018.

**ADDRESSES:** You may submit comments, identified by MB Docket No. 17–264, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Federal Communications Commission's Web site:* <http://fjallfoss.fcc.gov/ecfs2/>. Follow the instructions for submitting comments.

- *Mail:* Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

*People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters,

CART, etc.) by Email: [FCC504@fcc.gov](mailto:FCC504@fcc.gov) or phone: (202) 418–0530 or TTY: (202) 418–0432.

**FOR FURTHER INFORMATION CONTACT:** For additional information on this proceeding, contact Raelynn Remy of the Policy Division, Media Bureau at [Raelynn.Remy@fcc.gov](mailto:Raelynn.Remy@fcc.gov), or (202) 418–2120.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Notice of Proposed Rulemaking, FCC 17–138, adopted and released on October 24, 2017. The full text is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street SW., Room CY–A257, Washington, DC 20554. This document will also be available via ECFS at <https://ecfsapi.fcc.gov/file/1024026626522/FCC-17-138A1.pdf>. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat. The complete text may be purchased from the Commission's copy contractor, 445 12th Street SW., Room CY–B402, Washington, DC 20554. Alternative formats are available for people with disabilities (Braille, large print, electronic files, audio format), by sending an Email to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or calling the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

#### Synopsis

1. In this Notice of Proposed Rulemaking (NPRM), we seek comment on how to modernize two provisions in Part 73 of the Commission's rules governing broadcast licensees: Section 73.624(g), which establishes certain reporting obligations relating to the provision of ancillary or supplementary services, and Section 73.3580, which sets forth requirements concerning public notice of the filing of broadcast applications. First, we propose amendments to Section 73.624(g)(2) that would relieve certain television broadcasters of the obligation to submit FCC Form 2100, Schedule G,<sup>1</sup> which is

<sup>1</sup> This form previously was known as FCC Form 317. The Commission changed the name of this form with the introduction of its Licensing and Management System (LMS) in 2015. Although some commenters in MB Docket No. 17–105 have referred to this form as Form 317, we will refer to the relevant form as Form 2100, Schedule G.

used to report information about the provision of ancillary or supplementary services.<sup>2</sup> Second, we seek comment on whether to update or repeal Section 73.3580 of our rules, which requires broadcast applicants to provide public notice of the filing of various license applications, to afford such applicants more flexibility in how they provide that notice. As part of this inquiry, we seek comment on whether to permit broadcast applicants that currently provide written notice in a local newspaper, instead to provide that notice online. Similarly, in cases where an applicant is required to broadcast announcements regarding the filing of a broadcast application, we seek comment on whether to permit the applicant to refer the public to an Internet Web site that contains the text of such announcements. We also seek comment on whether there is a comparable way for broadcasters to inform consumers of various license applications, if not done through on-air announcements. With this proceeding, we continue our efforts to modernize our regulations and reduce unnecessary requirements that can impede competition and innovation in the media marketplace.

#### I. Background

2. *Ancillary or Supplementary Services Reporting Form.* In the 1990s, the advent of digital television technology led Congress, as part of the Telecommunications Act of 1996, to adopt Section 336 of the Communications Act (Act) governing the provision of advanced television services, also known as digital television (DTV).<sup>3</sup> The technological advancements in broadcast transmissions brought about by the analog-to-digital transition gave broadcasters the capacity to use their existing spectrum to offer a range of new services to consumers. In recognition of this potential, Congress in Section 336 established a framework for authorizing broadcast licensees to offer certain

<sup>2</sup> *Ancillary or Supplementary Services Report and Order*, 14 FCC Rcd 19931 (1999).

<sup>3</sup> “Advanced television services” are defined in the Act as “television services provided using digital or other advanced technology as further defined in the opinion, report, and order of the Commission entitled ‘Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service,’ MM Docket 87–268, adopted September 17, 1992, and successor proceedings.” 47 U.S.C. 336(i).

services in addition to their free, over the air television service, consistent with the public interest. Section 336 refers to such services as “ancillary or supplementary services.”<sup>4</sup>

3. Pursuant to Congress’s directives in Section 336, the Commission in 1998 developed a program to assess fees on revenues derived from the provision of ancillary or supplementary services by DTV licensees. The Commission adopted Section 73.624(g) of its rules, which set the fee for feeable ancillary or supplementary services at five percent of the gross revenues received from the provision of such services. And consistent with Section 336(e)(4), it required all commercial full power DTV licensees to file annual reports regarding their use of the DTV bitstream to provide such services.<sup>5</sup> The following year, the Commission created a new form (currently Form 2100, Schedule G) for the purpose of reporting information about the provision of ancillary or supplementary services.<sup>6</sup> Under Section 73.624(g), DTV stations<sup>7</sup> are required to report, among other things, “whether they provided ancillary or

supplementary services in the twelve-month period ending on the preceding September 30.” Such stations must submit Form 2100, Schedule G, by December 1 every year even if they did not provide ancillary or supplementary services during the relevant reporting period. Failure to file the form “regardless of revenues from ancillary or supplementary services or provision of such services may result in appropriate sanctions.”

4. *Public Notice of Filing of Broadcast Applications.* Section 73.3580 of the Commission’s rules requires applicants for broadcast licenses and other authorizations to provide public notice of the filing of broadcast applications, with certain exceptions. Section 73.3580 covers a broad range of applications, including applications for a new construction permit; applications to transfer or assign broadcast licenses; applications to renew licenses; and applications for major modification of licenses, among others. The public notice requirements set forth in Section 73.3580 differ depending on the nature of the broadcast application or the kind of service for which authorization is sought. Various provisions in Section 73.3580 obligate applicants to provide written public notice in a local newspaper, and establish requirements governing the frequency, duration, and content of that notice, and the type of newspaper in which such notice must be published. In certain circumstances, Section 73.3580 requires applicants to broadcast messages that announce the filing of an application in addition to, or in lieu of, publication of notice in a local newspaper. Similar to the provisions requiring public notice in a newspaper, the provisions in Section 73.3580 requiring public notice through broadcast announcements prescribe the timing, frequency, duration, and content of such announcements. The Commission adopted its public notice requirements over half a century ago to ensure that members of the public were made aware of broadcast applications, thereby affording them a meaningful opportunity to participate in the broadcast licensing process.<sup>8</sup>

5. *Modernization of Media Regulation Initiative.* In May 2017, the Commission issued a Public Notice launching a review of its media regulations to eliminate or modify those that are outdated, unnecessary or unduly burdensome. In response to that Public Notice, a number of commenters in the

media modernization proceeding have asserted that the Commission should amend Section 73.624(g) of its rules to require the filing of Form 2100, Schedule G, only by DTV stations that have provided feeable ancillary or supplementary services during the relevant reporting period and thus must pay the five percent fee on gross revenues derived from such services. In addition, a number of commenters have urged the Commission to update Section 73.3580 of its rules by giving broadcast license applicants the flexibility to provide public notice of the filing of broadcast applications through the Internet.

## II. Discussion

6. *Ancillary or Supplementary Services Reporting Form.* We propose to modify Section 73.624(g)(2) of our rules to require only those DTV stations that actually provide feeable ancillary or supplementary services to submit Form 2100, Schedule G, on an annual basis.<sup>9</sup> As noted above, Section 73.624(g)(2) currently requires all DTV stations to file Form 2100, Schedule G, with the Commission regardless of whether they have provided ancillary or supplementary services or received revenue from those services during the relevant reporting period. We tentatively conclude that eliminating this reporting obligation for DTV stations that have received no feeable revenues from ancillary or supplementary services during the reporting period would serve the public interest by reducing unnecessary regulation and regulatory burdens that can impede competition and innovation in the video marketplace. Affiliates Associations contends that “[b]ecause only a small fraction of television stations actually offer DTV ancillary or supplementary services, filing these annual reports requires the expenditure of resources for nearly every television station in the country with no countervailing benefit to the Commission or public.” Regardless of how many stations provide feeable ancillary or supplementary services, we tentatively conclude, based on the comments filed to date in MB Docket No. 17–105, that the costs imposed by applying Section 73.624(g)(2) to all DTV stations outweigh any associated public interest benefits. No commenter has articulated a compelling rationale for

<sup>4</sup> In implementing Section 336, the Commission defined ancillary or supplementary services to include, among other things, computer software distribution, data transmissions, teletext, interactive materials, aural messages, paging services, audio signals, subscription video, and any other services that do not derogate DTV broadcast stations’ obligations. Such services may be provided on a broadcast, point-to-point or point-to-multipoint basis, provided, however, that any video broadcast signal provided at no direct charge to viewers shall not be considered ancillary or supplementary. Section 336(e) of the Act directs the Commission to establish a fee program for any ancillary or supplementary services for which the payment of a subscription fee is required, or for which the licensee receives compensation from a third party in return for transmitting material furnished by that party (feeable ancillary or supplementary services).

<sup>5</sup> In applying the reporting obligation to such licensees, the Commission reasoned that “requir[ing] all commercial DTV licensees to report . . . on their use of the DTV bitstream” was needed in order for the agency “to report to Congress on the [fee] program established . . . and in order that [it] have the information necessary to adjust the fee program as appropriate consistent with the use of the spectrum.”

<sup>6</sup> For the first report due on December 1, 1999, the Commission required DTV licensees to report on services provided from the effective date of the *Ancillary or Supplementary Services Report and Order* through September 30, 1999. The Commission thereafter required licensees to report such information (for the twelve-month period ending on September 30) by December 1 every year. The Commission further required that licensees providing feeable ancillary or supplementary services during the relevant twelve-month period submit, on an annual basis, a standard remittance form (FCC Form 159) certifying the amount of gross revenues received from such services and remitting payment of the required fee.

<sup>7</sup> Since the Commission adopted Section 73.624(g), it has expanded the category of DTV stations required to file these reports to include Class A television, low power television (LPTV) and television translator stations.

<sup>8</sup> See *Revision of the Public Notice Requirements of Section 73.3580*, Notice of Proposed Rulemaking, MB Docket No. 05–6, 20 FCC Rcd 5420, 5421, para. 3 (2005) (2005 Public Notice NPRM).

<sup>9</sup> We also propose to revise Form 2100, Schedule G, to conform to the rule amendments proposed herein. In particular, we propose to revise the form to eliminate the question “whether a fee was charged for the provision of [ancillary or supplementary] service” and the subsequent question “[f]eeable—yes or no?”.

imposing the reporting obligation on all DTV licensees, and we tentatively find no such rationale. Indeed, we note that no commenter in the media modernization proceeding has asserted that the Commission should continue to apply the Section 73.624(g)(2) reporting obligation to all DTV stations irrespective of whether they provide feeable ancillary or supplementary services.

7. To the extent the Commission applied the annual reporting obligation to all DTV licensees so that it could “report to Congress on the [fee] program . . . and [give the agency] the information necessary to adjust the fee program as appropriate consistent with the use of the spectrum,” we tentatively conclude that such a broad application of the reporting obligation no longer is needed to carry out these objectives because the obligation would continue to apply to DTV stations that derive revenue from feeable services. We seek comment on our proposal and tentative conclusions.<sup>10</sup> Parties opposing the proposed amendments to Section 73.624(g)(2) should explain how the benefits derived from such rules, if any, outweigh the costs.

8. *Public Notice of Filing of Broadcast Applications.* We seek comment on whether to update Section 73.3580 of our rules to provide broadcast licensees with more flexibility as to how they inform the public about the filing of certain applications.<sup>11</sup> When the Commission adopted its public notice requirements decades ago, Americans obtained information in ways that are vastly different from how they do today. The Internet has become a major part of consumers’ daily lives and now represents a widely used medium to obtain information.<sup>12</sup> Given that Americans today are accustomed to using the Internet to obtain a wide array of information, we believe that viewers and listeners may be more likely to

expect to obtain information about broadcast applications online.

9. We therefore seek comment on whether we should update Section 73.3580 to permit applicants to provide public notice of the filing of broadcast applications either by publishing such notice in a newspaper, or by posting such notice on an Internet Web site, as some commenters have suggested. In particular, we seek comment on whether to allow applicants that currently are required under Section 73.3580 to publish notice of the filing of an application in a local newspaper, to provide such notice instead on an Internet Web site. We also seek comment on whether, in cases where an applicant is required to provide notice of the filing of an application through broadcast announcements (whether or not in conjunction with written notice in a local newspaper), the applicant should be permitted instead to post at least a portion of the content of those announcements online, together with a link to the applicant’s online public file containing the relevant application, and to broadcast the address of the Internet Web site containing such information. We also ask for comment on whether there is a comparable way for broadcasters to inform consumers of various license applications, if not done through on-air announcements.

10. In the alternative, we seek comment on whether there is a need to impose any public notice obligations on certain applicants, given the ready availability of many license applications on the Commission’s and stations’ Web sites today. In particular, we note that the Commission’s rules generally require that broadcast applicants place their license applications and related materials in the Commission-hosted online public inspection file and provide a link to that file on the home page of their Web sites, if they have Web sites. In addition, pursuant to Section 309 of the Act and its implementing rules, the Commission routinely gives public notice of the filing of broadcast applications. Members of the public also can be notified of the filing of broadcast applications by signing up to receive Commission-generated RSS feeds. In light of these various means of receiving notice of pending broadcast applications, we seek comment on whether the public interest would be served by repealing Section 73.3580 in its entirety.

11. Given the questions above regarding updating or repealing the rule, we tentatively conclude not to move forward with the proposals in the 2005 *Public Notice NPRM* regarding this rule. Specifically, twelve years ago, the

Commission proposed: (1) To eliminate the exemption of certain stations from the newspaper publication requirement; and (2) to establish specific text for the required broadcast and newspaper notifications in cases of assignments and transfers of control, based on concerns that such notice is often confusing. Instead of expanding the public notice requirements in the manner discussed in 2005, we now seek to streamline them in a manner consistent with how the public currently accesses and consumes information. We seek comment on our tentative conclusion.

12. Based on the record, we tentatively find that, at a minimum, updating Section 73.3580 would advance the public interest by affording applicants more flexibility in the means by which they provide notice of prospective and pending broadcast applications, while giving consumers improved access to information enabling them to participate in the licensing process. We seek comment on this tentative finding. We seek to modernize our rules to better reflect how broadcast audiences consume information today.

13. We seek comment on whether we should continue to impose different notice obligations based on the kind of service for which an applicant is seeking authorization (e.g., Class A, low power, booster, translator, etc.) or the nature of the application at issue (e.g., construction permit, modification, renewal, assignment, transfer of control, etc.). Are there justifications for applying different public notice requirements to these kinds of applicants and applications that remain valid today? Are there certain types of applications that merit broader announcement than others, such as transfers of control or renewals? If we were to deem online posting of notifications regarding the filing of broadcast applications an adequate form of public notice, how should we treat applications for a new construction permit?

14. As suggested by some commenters, should we craft requirements similar to those we adopted in updating Section 73.1216 of our rules (otherwise known as the Contest Rule), which similarly contemplate that public notice of certain information will be provided by broadcasters through both the Internet and broadcast announcements? If so, what aspects of the Contest Rule should guide our revisions to Section 73.3580? Parties urging us to adopt rules that deviate from, or are similar to, the rules

<sup>10</sup> Pending final action on our proposal, we direct the Media Bureau to consider whether to waive the December 1, 2017 deadline for the submission of FCC Form 2100, Schedule G, by stations that have provided no feeable ancillary or supplementary services during the reporting period ending September 30, 2017.

<sup>11</sup> Although the Commission in 2005 proposed to expand the Section 73.3580 newspaper notice requirements by eliminating the exemption applicable to certain stations, see 2005 *Public Notice NPRM*, we tentatively find that expanding those requirements would be unreasonable in the current media environment, and propose to terminate that proceeding.

<sup>12</sup> *Amendment of Section 73.1216 of the Commission’s Rules Related to Broadcast Licensee-Conducted Contests*, Report and Order, MB Docket No. 14–226, 30 FCC Rcd 10468 (2015).

governing contest disclosures should explain the basis for their assertions.

15. How, if at all, could the Commission streamline or simplify the public notice requirements of Section 73.3580 further to reduce costs and regulatory burdens for broadcasters, while ensuring that notice of pending or prospective applications is sufficient to enable robust public participation in the licensing process? Several commenters have asserted, for example, that Section 73.3580 as written is needlessly complex and confusing. As noted above, could the online public inspection file, which contains information about pending broadcast license applications, serve as an adequate substitute for newspaper publication (or other forms of notice) in certain cases, and thereby permit elimination of Section 73.3580 in its entirety? If so, would it be necessary to require stations to broadcast announcements regarding the filing of applications and the location of the online public file?

16. Finally, we note that Part 73 of the Commission's rules contains other provisions that require public notice through newspaper publication, broadcast announcements, or a combination of the two.<sup>13</sup> Although no party in the media modernization proceeding has asserted that we should update these provisions, we seek comment on whether any revisions to these rules are justified. To the extent parties support revising Section 73.3580, we seek comment on whether we should make similar revisions to these other rules. We also seek comment on what, if any, other Commission rules would be affected by potential rule amendments discussed herein and what, if any, additional conforming edits to other rule sections would be necessary.

#### Initial Paperwork Reduction Act Analysis

17. This document contains proposed modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of

1995, Public Law 104–13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

#### Ex Parte Rules

18. Permit-But-Disclose. This proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

#### Filing Requirements

19. Comments and Replies. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or

before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.

- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

20. Availability of Documents. Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street SW., CY–A257, Washington, DC 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

21. People with Disabilities. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

#### Additional Information

22. For additional information on this proceeding, contact Raelynn Remy of the Policy Division, Media Bureau, at [raelynn.remy@fcc.gov](mailto:raelynn.remy@fcc.gov), or (202) 418–2120.

#### Initial Regulatory Flexibility Act Analysis

23. As required by the Regulatory Flexibility Act of 1980, as amended (RFA) the Commission has prepared this Initial Regulatory Flexibility Act Analysis (IRFA) concerning the possible significant economic impact on small entities by the rules proposed in this Notice of Proposed Rulemaking (NPRM). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA

<sup>13</sup> 47 CFR 73.3594(a)–(c) (requiring public notice, through newspaper publication or broadcast announcements that meet specified requirements, of the designation for hearing of certain broadcast applications); 73.3525(b)(2) (requiring that a broadcast applicant who withdraws its application pursuant to an agreement with a competing applicant must give public notice of such withdrawal in a newspaper that meets specified requirements).

and must be filed by the deadlines for comments provided on the first page of the NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the NPRM and IRFA (or summaries thereof) will be published in the **Federal Register**.

#### *A. Need for, and Objectives of, the Proposed Rules*

24. The potential rule changes discussed in the NPRM stem from a Public Notice issued by the Commission in May 2017 launching an initiative to modernize the Commission's media regulations. Several commenters in the proceeding have argued that the Commission should amend Section 73.624(g) of its rules to require the filing of Form 2100, Schedule G, only by digital television (DTV) stations that have provided feeable ancillary or supplementary services during the relevant reporting period and thus must pay the five percent fee on gross revenues derived from those services. In addition, a number of commenters have urged the Commission to update Section 73.3580 of its rules by giving broadcast license applicants the flexibility to provide public notice of the filing of broadcast applications through the Internet.

25. The NPRM proposes amendments to Section 73.624(g)(2) that would relieve DTV stations that have provided no feeable ancillary or supplementary services of the obligation to file Form 2100, Schedule G, annually.<sup>14</sup> The NPRM also seeks comment on whether to amend or repeal Section 73.3580 of its rules to give broadcast applicants flexibility to provide public notice of the filing of a license application through the Internet.<sup>15</sup> The rule revisions on which the NPRM seeks comment are intended to reduce unnecessary regulation and regulatory burdens that can impede competition and innovation in the media marketplace.

<sup>14</sup> Under the current rule, all DTV stations must file this form annually regardless of whether they have provided ancillary or supplementary services or received revenue from those services during the relevant reporting period. The failure to file the form could subject a DTV station to enforcement sanctions.

<sup>15</sup> The public notice requirements in the current rule differ depending on the nature of the broadcast application or the kind of service for which authorization is sought. In some cases, broadcast applicants must provide written public notice in a local newspaper. In other cases, the rule requires applicants to broadcast messages that announce the filing of an application in addition to, or in lieu of, publication of notice in a local newspaper.

#### *B. Legal Basis*

26. The proposed action is authorized pursuant to Sections 1, 4(i), 4(j), 303(r), 309, and 336 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 303(r), 309, and 336.

#### *C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply*

27. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA. The rules proposed herein will directly affect small television and radio broadcast stations. Below, we provide a list of such small entities.

- Television Broadcasting
- Radio Stations

#### *D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements*

28. In this section, we identify the reporting, recordkeeping, and other compliance requirements proposed in the NPRM and consider whether small entities are affected disproportionately by any such requirements.

29. *Reporting Requirements.* The NPRM does not propose to adopt reporting requirements.

30. *Recordkeeping Requirements.* The NPRM does not propose to adopt recordkeeping requirements.

31. *Other Compliance Requirements.* The NPRM does not propose to adopt other compliance requirements. The NPRM, however, seeks public input on commenters' proposals to modify Section 73.3580 to permit public notice of the filing of broadcast applications through the Internet. The NPRM also seeks comment on whether to repeal Section 73.3580 in its entirety, which could affect how broadcasters provide public notice of broadcast applications.

32. Because no commenter provided information specifically quantifying the costs and administrative burdens of complying with the existing Section 73.624(g) reporting requirements, we cannot precisely estimate the impact on

small entities of eliminating those requirements for certain broadcast stations. The proposed revisions to Section 73.624(g) would relieve affected digital broadcast stations, including smaller stations, of the obligation to file certain information with the Commission on an annual basis. These revisions, if adopted, would require only those few stations that provide feeable ancillary or supplementary services to submit Form 2100, Schedule G, annually. We note similarly that no commenter has provided information specifically quantifying the costs and burdens of complying with the existing Section 73.3580 public notice requirements. Therefore, we cannot precisely estimate the impact on small entities of eliminating or changing those requirements. No party in the Media Modernization proceeding, including smaller entities, has opposed the proposals discussed in the NPRM. We thus find it reasonable to conclude that the benefits of adopting the proposals discussed therein would outweigh any costs.

#### *E. Steps Taken To Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered*

33. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

34. The NPRM proposes to amend Section 73.624(g) to require only those DTV stations that receive feeable revenues from their provision of ancillary or supplementary services to submit Form 2100, Schedule G, on an annual basis. The record reflects that only a small number of DTV stations actually offer ancillary or supplementary services. Accordingly, if adopted, this proposal would eliminate an annual reporting obligation and the expenditure of resources associated with filing the annual reports for a substantial number of broadcast stations, including small entities. Because the revisions to Section 73.624(g) proposed by commenters are unopposed, we anticipate that DTV

stations, including affected small entities, would benefit from such revisions.

35. The NPRM also seeks input on whether to adopt commenters' proposals to modify Section 73.3580 to permit public notice of the filing of broadcast applications through online postings on the Internet, as an alternative to publishing such notice in a newspaper, or to repeal Section 73.3580 in its entirety. Commenters' proposals, if adopted, would give all broadcast license applicants, including small entities, more flexibility in how they meet their obligation to notify the public of pending or prospective license applications, while improving the public's access to information enabling it to participate in the licensing process. Commenters assert that permitting public notice through the Internet would be less costly and administratively burdensome than the existing requirement and thus the proposal would provide a less burdensome compliance option for all applicants, including small entities. Because the revisions to Section 73.3580 proposed by commenters are unopposed, we anticipate that affected broadcasters, including small entities, would benefit from them.

*F. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rule*

36. None.

37. We adopt this NPRM pursuant to the authority found in Sections 1, 4(i), 4(j), 303(r), 309, and 336 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 303(r), 309, and 336.

Federal Communications Commission.

**Marlene H. Dortch,**  
*Secretary.*

**Proposed Rules**

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend Part 73 of Title 47 of the Code of Federal Regulations (CFR) as set forth below:

**PART 73—RADIO BROADCAST SERVICES**

■ 1. The authority citation for Part 73 continues to read as follows:

**Authority:** 47 U.S.C. 154, 303, 309, 310, 334, 336, and 339.

■ 2. Amend § 73.624 by revising paragraph (g)(2) to read as follows:

**§ 73.624 Digital television broadcast stations.**

\* \* \* \* \*

(g) \* \* \*

(2) *Payment of fees* (i) Each December 1, all commercial and noncommercial DTV licensees and permittees that provided feeable ancillary or supplementary services as defined in this section in the 12-month period

ending on the preceding September 30 will electronically report, for the applicable period:

(A) A brief description of the feeable ancillary or supplementary services provided;

(B) Gross revenues received from all feeable ancillary and supplementary services provided during the applicable period; and

(C) The amount of bitstream used to provide feeable ancillary or supplementary services during the applicable period. Licensees and permittees will certify under penalty of perjury the accuracy of the information reported. Failure to file information required by this section may result in appropriate sanctions.

(ii) A DTV licensee or permittee that has provided feeable ancillary or supplementary services at any point during a 12-month period ending on September 30 must additionally file the FCC's standard remittance form (Form 159) on the subsequent December 1. Licensees and permittees will certify the amount of gross revenues received from feeable ancillary or supplementary services for the applicable 12-month period and will remit the payment of the required fee.

\* \* \* \* \*

[FR Doc. 2017-25405 Filed 11-28-17; 8:45 am]

**BILLING CODE 6712-01-P**

# Notices

Federal Register

Vol. 82, No. 228

Wednesday, November 29, 2017

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.

## COMMISSION ON CIVIL RIGHTS

### Notice of Public Meeting of the Arizona Advisory Committee

**AGENCY:** U.S. Commission on Civil Rights.

**ACTION:** Announcement of meeting.

**SUMMARY:** Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act (FACA) that a meeting of the Arizona Advisory Committee (Committee) to the Commission will be held at 12:00 p.m. (Mountain Time) Friday, December 1, 2017. The purpose of the meeting is for the Committee to discuss logistics for March briefing on voting rights.

**DATES:** The meeting will be held on Friday, December 1, 2017, at 12:00 p.m. MT.

*Public Call Information:*

*Dial:* 800-474-8920.

*Conference ID:* 2072412.

**FOR FURTHER INFORMATION CONTACT:** Ana Victoria Fortes (DFO) at [afortes@usccr.gov](mailto:afortes@usccr.gov) or (213) 894-3437.

**SUPPLEMENTARY INFORMATION:** This meeting is available to the public through the following toll-free call-in number: 800-474-8920, conference ID number: 2072412. Any interested member of the public may call this number and listen to the meeting. Callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1-800-877-8339 and providing the Service with the conference call number and conference ID number.

Members of the public are entitled to make comments during the open period

at the end of the meeting. Members of the public may also submit written comments; the comments must be received in the Regional Programs Unit within 30 days following the meeting. Written comments may be mailed to the Western Regional Office, U.S. Commission on Civil Rights, 300 North Los Angeles Street, Suite 2010, Los Angeles, CA 90012. They may be faxed to the Commission at (213) 894-0508, or emailed Ana Victoria Fortes at [afortes@usccr.gov](mailto:afortes@usccr.gov). Persons who desire additional information may contact the Regional Programs Unit at (213) 894-3437.

Records and documents discussed during the meeting will be available for public viewing prior to and after the meeting at <https://facadatabase.gov/committee/meetings.aspx?cid=235>. Please click on the "Meeting Details" and "Documents" links. Records generated from this meeting may also be inspected and reproduced at the Regional Programs Unit, as they become available, both before and after the meeting. Persons interested in the work of this Committee are directed to the Commission's Web site, <http://www.usccr.gov>, or may contact the Regional Programs Unit at the above email or street address.

### Agenda

- I. Welcome
- II. Approval of minutes from November 17, 2017 meeting
- III. Discuss Briefing Logistics
  - a. Update on briefing location
- IV. Discuss Potential Speakers
- V. Next Steps
- VI. Adjournment

*Exceptional Circumstance:* Pursuant to 41 CFR 102-3.150, the notice for this meeting is given less than 15 calendar days prior to the meeting because of the exceptional circumstance of the committee needing to plan a briefing on voting rights to satisfy the U.S. Commission on Civil Rights' 2018 Statutory Enforcement report timeline.

Dated: November 24, 2017.

**David Mussatt,**

*Supervisory Chief, Regional Programs Unit.*

[FR Doc. 2017-25754 Filed 11-28-17; 8:45 am]

**BILLING CODE 6335-01-P**

## COMMISSION ON CIVIL RIGHTS

### Notice of Public Meeting of the Indiana Advisory Committee to the U.S. Commission on Civil Rights

**AGENCY:** U.S. Commission on Civil Rights.

**ACTION:** Announcement of meeting.

**SUMMARY:** Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the Indiana Advisory Committee (Committee) will hold a meeting on Wednesday December 13, 2017, at 2:00 p.m. EST for the purpose of preparing for its public meeting on voting rights issues in the state.

**DATES:** The meeting will be held on Wednesday, December 13, 2017, at 2:00 p.m. EST.

*Public Call Information:* Dial: 888-556-4997, Conference ID: 6272038.

### FOR FURTHER INFORMATION CONTACT:

Melissa Wojnaroski, DFO, at [mwojnaroski@usccr.gov](mailto:mwojnaroski@usccr.gov) or 312-353-8311.

**SUPPLEMENTARY INFORMATION:** Members of the public can listen to the discussion. This meeting is available to the public through the following toll-free call-in number: 888-556-4997, conference ID: 6272038. Any interested member of the public may call this number and listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. The conference call operator will ask callers to identify themselves, the organization they are affiliated with (if any), and an email address prior to placing callers into the conference room. Callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1-800-877-8339 and providing the Service with the conference call number and conference ID number.

Members of the public are also entitled to submit written comments;

the comments must be received in the regional office within 30 days following the meeting. Written comments may be mailed to the Regional Programs Unit Office, U.S. Commission on Civil Rights, 55 W. Monroe St., Suite 410, Chicago, IL 60615. They may also be faxed to the Commission at (312) 353-8324, or emailed to Carolyn Allen at [callen@usccr.gov](mailto:callen@usccr.gov). Persons who desire additional information may contact the Regional Programs Unit Office at (312) 353-8311.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Unit Office, as they become available, both before and after the meeting. Records of the meeting will be available via [www.facadatabase.gov](http://www.facadatabase.gov) under the Commission on Civil Rights, Indiana Advisory Committee link (<http://www.facadatabase.gov/committee/meetings.aspx?cid=247>). Persons interested in the work of this Committee are directed to the Commission's Web site, <http://www.usccr.gov>, or may contact the Regional Programs Unit Office at the above email or street address.

### Agenda

Welcome and Roll Call  
Discussion: Voting Rights in Indiana  
Public Comment  
Future Plans and Actions  
Adjournment

Dated: November 23, 2017.

**David Mussatt,**

*Supervisory Chief, Regional Programs Unit.*

[FR Doc. 2017-25746 Filed 11-28-17; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF COMMERCE

### Bureau of Industry and Security

[Docket No. 171025999-7999-01]

#### Impact of the Implementation of the Chemical Weapons Convention (CWC) on Legitimate Commercial Chemical, Biotechnology, and Pharmaceutical Activities Involving "Schedule 1" Chemicals (Including Schedule 1 Chemicals Produced as Intermediates) Through Calendar Year 2017

**AGENCY:** Bureau of Industry and Security, Commerce.

**ACTION:** Notice of inquiry.

**SUMMARY:** The Bureau of Industry and Security (BIS) is seeking public comments on the impact that implementation of the Chemical Weapons Convention (CWC), through the Chemical Weapons Convention Implementation Act (CWCIA) and the

Chemical Weapons Convention Regulations (CWCRC), has had on commercial activities involving "Schedule 1" chemicals during calendar year 2017. The purpose of this notice of inquiry is to collect information to assist BIS in its preparation of the annual certification to Congress on whether the legitimate commercial activities and interests of chemical, biotechnology, and pharmaceutical firms are being harmed by such implementation. This certification is required under Condition 9 of Senate Resolution 75, April 24, 1997, in which the Senate gave its advice and consent to the ratification of the CWC.

**DATES:** Comments must be received by December 29, 2017.

**ADDRESSES:** You may submit comments by any of the following methods (please refer to RIN 0694-XC041 in all comments and in the subject line of email comments):

- *Federal rulemaking portal* (<http://www.regulations.gov>)—you can find this notice by searching on its [regulations.gov](http://www.regulations.gov) docket number, which is BIS-2017-0029;
- *Email:* [willard.fisher@bis.doc.gov](mailto:willard.fisher@bis.doc.gov)—include the phrase "Schedule 1 Notice of Inquiry" in the subject line;
- *Fax:* (202) 482-3355 (Attn: Willard Fisher);
- By mail or delivery to Regulatory Policy Division, Bureau of Industry and Security, U.S. Department of Commerce, Room 2099B, 14th Street and Pennsylvania Avenue NW., Washington, DC 20230.

**FOR FURTHER INFORMATION CONTACT:** For questions on the Chemical Weapons Convention requirements for "Schedule 1" chemicals, contact Douglas Brown, Treaty Compliance Division, Office of Nonproliferation and Treaty Compliance, Bureau of Industry and Security, U.S. Department of Commerce, Phone: (202) 482-1001. For questions on the submission of comments, contact Willard Fisher, Regulatory Policy Division, Office of Exporter Services, Bureau of Industry and Security, U.S. Department of Commerce, Phone: (202) 482-2440.

#### SUPPLEMENTARY INFORMATION:

##### Background

In providing its advice and consent to the ratification of the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and Their Destruction, commonly called the Chemical Weapons Convention (CWC or "the Convention"), the Senate included, in Senate Resolution 75 (S. Res. 75, April 24, 1997), several conditions to its

ratification. Condition 9, titled "Protection of Advanced Biotechnology," calls for the President to certify to Congress on an annual basis that "the legitimate commercial activities and interests of chemical, biotechnology, and pharmaceutical firms in the United States are not being significantly harmed by the limitations of the Convention on access to, and production of, those chemicals and toxins listed in Schedule 1." On July 8, 2004, President Bush, by Executive Order 13346, delegated his authority to make the annual certification to the Secretary of Commerce.

The CWC is an international arms control treaty that contains certain verification provisions. In order to implement these verification provisions, the CWC established the Organization for the Prohibition of Chemical Weapons (OPCW). The CWC imposes certain obligations on countries that have ratified the Convention (*i.e.*, States Parties), among which are the enactment of legislation to prohibit the production, storage, and use of chemical weapons, and the establishment of a National Authority to serve as the national focal point for effective liaison with the OPCW and other States Parties in order to achieve the object and purpose of the Convention and the implementation of its provisions. The CWC also requires each State Party to implement a comprehensive data declaration and inspection regime to provide transparency and to verify that both the public and private sectors of the State Party are not engaged in activities prohibited under the CWC.

"Schedule 1" chemicals consist of those toxic chemicals and precursors set forth in the CWC "Annex on Chemicals" and in Supplement No. 1 to part 712 of the Chemical Weapons Convention Regulations (CWCRC) (15 CFR parts 710-722). The CWC identified these toxic chemicals and precursors as posing a high risk to the object and purpose of the Convention.

The CWC (Part VI of the "Verification Annex") restricts the production of "Schedule 1" chemicals for protective purposes to two facilities per State Party: A single small-scale facility (SSSF) and a facility for production in quantities not exceeding 10 kg per year. The CWC Article-by-Article Analysis submitted to the Senate in Treaty Doc. 103-21 defined the term "protective purposes" to mean "used for determining the adequacy of defense equipment and measures." Consistent with this definition and as authorized by Presidential Decision Directive (PDD) 70 (December 17, 1999), which specifies agency and departmental

responsibilities as part of the U.S. implementation of the CWC, the Department of Defense (DOD) was assigned the responsibility to operate these two facilities. Although this assignment of responsibility to DOD under PDD-70 effectively precluded commercial production of "Schedule 1" chemicals for protective purposes in the United States, it did not establish any limitations on "Schedule 1" chemical activities that are not prohibited by the CWC. However, DOD does maintain strict controls on "Schedule 1" chemicals produced at its facilities in order to ensure accountability for such chemicals, as well as their proper use, consistent with the object and purpose of the Convention.

The provisions of the CWC that affect commercial activities involving "Schedule 1" chemicals are implemented in the CWCR (see 15 CFR 712) and in the Export Administration Regulations (EAR) (see 15 CFR 742.18 and 15 CFR 745), both of which are administered by the Bureau of Industry and Security (BIS). Pursuant to CWC requirements, the CWCR restrict commercial production of "Schedule 1" chemicals to research, medical, or pharmaceutical purposes (the CWCR prohibit commercial production of "Schedule 1" chemicals for "protective purposes" because such production is effectively precluded per PDD-70, as described above—see 15 CFR 712.2(a)). The CWCR also contain other requirements and prohibitions that apply to "Schedule 1" chemicals and/or "Schedule 1" facilities. Specifically, the CWCR:

(1) Prohibit the import of "Schedule 1" chemicals from States not Party to the Convention (15 CFR 712.2(b));

(2) Require annual declarations by certain facilities engaged in the production of "Schedule 1" chemicals in excess of 100 grams aggregate per calendar year (*i.e.*, declared "Schedule 1" facilities) for purposes not prohibited by the Convention (15 CFR 712.5(a)(1) and (a)(2));

(3) Provide for government approval of "declared Schedule 1" facilities (15 CFR 712.5(f));

(4) Provide that "declared Schedule 1" facilities are subject to initial and routine inspection by the Organization for the Prohibition of Chemical Weapons (15 CFR 712.5(e) and 716.1(b)(1));

(5) Require 200 days advance notification of establishment of new "Schedule 1" production facilities producing greater than 100 grams aggregate of "Schedule 1" chemicals per calendar year (15 CFR 712.4);

(6) Require advance notification and annual reporting of all imports and exports of "Schedule 1" chemicals to, or from, other States Parties to the Convention (15 CFR 712.6, 742.18(a)(1) and 745.1); and

(7) Prohibit the export of "Schedule 1" chemicals to States not Party to the Convention (15 CFR 742.18(a)(1) and (b)(1)(ii)).

For purposes of the CWCR (see 15 CFR 710.1), "production of a Schedule 1 chemical" means the formation of "Schedule 1" chemicals through chemical synthesis, as well as processing to extract and isolate "Schedule 1" chemicals produced biologically. Such production is understood, for CWCR declaration purposes, to include intermediates, by-products, or waste products that are produced and consumed within a defined chemical manufacturing sequence, where such intermediates, by-products, or waste products are chemically stable and therefore exist for a sufficient time to make isolation from the manufacturing stream possible, but where, under normal or design operating conditions, isolation does not occur.

#### Request for Comments

In order to assist in determining whether the legitimate commercial activities and interests of chemical, biotechnology, and pharmaceutical firms in the United States are significantly harmed by the limitations of the Convention on access to, and production of, "Schedule 1" chemicals as described in this notice, BIS is seeking public comments on any effects that implementation of the Chemical Weapons Convention, through the Chemical Weapons Convention Implementation Act and the Chemical Weapons Convention Regulations, has had on commercial activities involving "Schedule 1" chemicals during calendar year 2017. To allow BIS to properly evaluate the significance of any harm to commercial activities involving "Schedule 1" chemicals, public comments submitted in response to this notice of inquiry should include both a quantitative and qualitative assessment of the impact of the CWC on such activities.

#### Submission of Comments

All comments must be submitted to one of the addresses indicated in this notice. The Department requires that all comments be submitted in written form.

The Department encourages interested persons who wish to comment to do so at the earliest possible time. The period for submission of comments will close

on December 29, 2017. The Department will consider all comments received before the close of the comment period. Comments received after the end of the comment period may not be considered. The Department will not accept comments accompanied by a request that a part or all of the material be treated confidentially because of its business proprietary nature or for any other reason. The Department will return such comments and materials to the persons submitting the comments and will not consider them. All comments submitted in response to this notice will be a matter of public record and will be available for public inspection and copying.

The Office of Administration, Bureau of Industry and Security, U.S. Department of Commerce, displays public comments on the BIS Freedom of Information Act (FOIA) Web site at <http://www.bis.doc.gov/foia>. This office does not maintain a separate public inspection facility. If you have technical difficulties accessing this Web site, please call BIS's Office of Administration, at (202) 482-1093, for assistance.

Dated: November 22, 2017.

**Matthew S. Borman,**

*Deputy Assistant Secretary for Export Administration.*

[FR Doc. 2017-25742 Filed 11-28-17; 8:45 am]

**BILLING CODE 3510-33-P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

[C-570-057]

#### **Certain Tool Chests and Cabinets From the People's Republic of China: Final Affirmative Countervailing Duty Determination**

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (the Department) determines that countervailable subsidies are being provided to producers and exporters of certain tool chests and cabinets (tool chests) from the People's Republic of China (PRC). The period of investigation is January 1, 2016, through December 31, 2016. For information on the estimated subsidy rates, *see* the "Final Determination" section of this notice.

**DATES:** Applicable November 29, 2017.

**FOR FURTHER INFORMATION CONTACT:** Hermes Pinilla or Thomas Schauer, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of

Commerce, 1401 Constitution Avenue NW., Washington, DC 20230; telephone (202) 482-3477 or (202) 482-0410, respectively.

### Background

The Department published its affirmative *Preliminary Determination* on September 15, 2017.<sup>1</sup> A summary of the events that occurred since the publication of the *Preliminary Determination*, as well as a full discussion of the issues raised by parties for this final determination, may be found in the Issues and Decision Memorandum.<sup>2</sup> The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty (CVD) Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at <http://access.trade.gov>, and is available to all parties in the Central Records Unit, Room B8024 of the main Department of Commerce building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at <http://enforcement.trade.gov/frn/>. The signed Issues and Decision Memorandum and the electronic version are identical in content.

### Scope of the Investigation

The products covered by this investigation are tool chests from the PRC. For a complete description of the scope of the investigation, see Appendix I to this notice.

### Scope Comments

Since the *Preliminary Determination*, the Department received comments on the scope of this investigation from interested parties in this proceeding. See Issues and Decision Memorandum for further details. The scope in Appendix I reflects the final scope language.

### Analysis of Subsidy Programs and Comments Received

The subsidy programs under investigation and the issues raised in the case and rebuttal briefs submitted by interested parties in this proceeding are discussed in the Issues and Decision Memorandum. A list of the issues raised by parties, and to which we responded in the Issues and Decision Memorandum, is attached to this notice at Appendix II.

### Verification

As provided in section 782(i) of the Tariff Act of 1930, as amended (the Act), in September 2017, the Department verified the subsidy information reported by the Government of China (GOC) and the respondents. We used standard verification procedures, including an examination of relevant accounting and production records, and original source documents provided by the GOC and the respondents.<sup>3</sup>

### Use of Adverse Facts Available

In making this final determination, the Department relied, in part, on facts available. As discussed in the Issues and Decision Memorandum, because the GOC and companies that did not respond to our quantity-and-value questionnaire did not act to the best of their abilities in responding to the Department's requests for information, we drew an adverse inference where appropriate in selecting from among the facts otherwise available, pursuant to section 776(a) and (b) of the Act.<sup>4</sup> For further information, see the section "Use of Facts Otherwise Available and Adverse Inferences" in the accompanying Issues and Decision Memorandum.

### Changes Since the Preliminary Determination

Based on our analysis of the information requested and received

from the GOC and the company respondents since the *Preliminary Determination*, the results of verification, and the comments received from parties, we made certain changes to the subsidy rate calculations since the *Preliminary Determination*. For a discussion of these changes, see the Issues and Decision Memorandum.

### All-Others Rate

In accordance with section 705(c)(1)(B)(i)(I) of the Act, we calculated a CVD rate for each individually-investigated producer/exporter of the subject merchandise. Consistent with section 705(c)(5)(A)(i) of the Act, we calculated an estimated "all-others" rate for exporters/producers not individually examined. Section 705(c)(5)(A)(i) of the Act provides that the "all-others" rate shall be an amount equal to the weighted-average of the countervailable subsidy rates established for individually investigated exporters/producers, excluding any rates that are zero or *de minimis* or any rates determined entirely under section 776 of the Act. Neither of the mandatory respondents' rates in this final determination was zero or *de minimis* or based entirely on facts otherwise available. Accordingly, in order to ensure that business proprietary information is not disclosed, we calculated the all-others rate using a weighted average of the individual countervailable subsidy rates calculated for the examined respondents using each company's publicly-ranged values for the merchandise under consideration.<sup>5</sup>

### Final Determination

We determine the total estimated countervailable subsidy rates to be:<sup>6</sup>

| Company                                             | Subsidy rate (percent) |
|-----------------------------------------------------|------------------------|
| Jiangsu Tongrun Equipment Technology Co., Ltd ..... | 15.09                  |
| Zhongshan Geelong Manufacturing Co., Ltd .....      | 14.03                  |
| Allround Hardware Co., Ltd .....                    | 95.96                  |

<sup>1</sup> See *Certain Tool Chests and Cabinets from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination*, 82 FR 43331 (September 15, 2017) (*Preliminary Determination*) and accompanying Preliminary Decision Memorandum.

<sup>2</sup> See Memorandum, "Issues and Decision Memorandum for the Final Determination: Countervailing Duty Investigation of Certain Tool Chests and Cabinets from the People's Republic of China," dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

<sup>3</sup> See Memorandum to the File, "Verification of the Questionnaire Responses Submitted by Jiangsu Tongrun Equipment Technology Ltd.," dated October 10, 2017; Memorandum to the File, "Verification Report: Zhongshan Geelong Manufacturing Co. Ltd.," dated October 10, 2017; and Memorandum to the File, "Verification Report: the Government of the People's Republic of China," dated October 10, 2017.

<sup>4</sup> See Issues and Decision Memorandum at "USE OF FACTS OTHERWISE AVAILABLE AND ADVERSE INFERENCES" section.

<sup>5</sup> See Memorandum to the File, "Calculation of the All-Others Rate," dated concurrently with this final determination.

<sup>6</sup> As discussed in the Issues and Decision Memorandum, the Department found the following companies to be cross-owned with Jiangsu Tongrun Equipment Technology Co., Ltd.: Changshu Jack Factory, Changshu Tongrun Taron Import and Export Co., Ltd., (also known as Changshu Tongrun Equipment Co., Ltd.), Changshu Tongrun Mechanical & Electrical Equipment Manufacture Co., Ltd., Changshu Taron Machinery Equipment Manufacturing Co., Ltd., and Changshu General Electrical Factory Co., Ltd.

| Company                                                               | Subsidy rate<br>(percent) |
|-----------------------------------------------------------------------|---------------------------|
| Beijing Kang Jie Kong International Cargo Agent Co., Ltd .....        | 95.96                     |
| Changshu Zhongcheng Tool Box Co., Ltd .....                           | 14.39                     |
| Changzhou City Hongfei Metalwork Corporation .....                    | 95.96                     |
| Changzhou Machan Steel Furniture Co., Ltd .....                       | 14.39                     |
| China National Electronics Import and Export Ningbo Co .....          | 95.96                     |
| Foshan Lishida Metal Products Co., Ltd .....                          | 95.96                     |
| Gem-Year Industrial Co., Ltd .....                                    | 95.96                     |
| Guangdong Hisense Home Appliances Co., Ltd .....                      | 14.39                     |
| Guerjie Enterprise Co., Ltd .....                                     | 95.96                     |
| Haiyan Dingfeng Fasteners Ltd .....                                   | 95.96                     |
| Hangzhou Xiaoshan Import and Export Trading Co., Ltd .....            | 95.96                     |
| Hyxion Metal Industry .....                                           | 14.39                     |
| Jiaxing Pinyou Import & Export Co., Ltd .....                         | 95.96                     |
| Jin Rong Hua Le Metal Manufactures Co., Ltd .....                     | 14.39                     |
| Jinhua JG Tools Manufacturing Co .....                                | 14.39                     |
| Jinhua Yahu Tools Co., Ltd .....                                      | 14.39                     |
| Keesung Manufacturing Co., Ltd .....                                  | 14.39                     |
| Kingstar Tools Co., Ltd .....                                         | 95.96                     |
| Liyang Flying Industry Co., Ltd .....                                 | 95.96                     |
| Meridian International Co., Ltd .....                                 | 14.39                     |
| Ningbo Better Design Industry Co., Ltd .....                          | 95.96                     |
| Ningbo Hualei Tool Co., Ltd .....                                     | 95.96                     |
| Ningbo Jiufeng Electronic Tools .....                                 | 95.96                     |
| Ningbo Safewell International Holding Corp .....                      | 14.39                     |
| Ningbo Xiunan International Co., Ltd .....                            | 95.96                     |
| Pinghu Chenda Storage Office Equipment Co., Ltd .....                 | 14.39                     |
| Pooke Technology Co., Ltd .....                                       | 14.39                     |
| Shanghai All-Fast International Trade Co., Ltd .....                  | 14.39                     |
| Shanghai All-Hop Industry Co., Ltd .....                              | 14.39                     |
| Shanghai Delta International Trading .....                            | 95.96                     |
| Shanghai Fairlong International Trading Co., Ltd .....                | 95.96                     |
| Shanghai ITPC Hardware Co., Ltd .....                                 | 14.39                     |
| Shanghai Legsteel Metal Products Co., Ltd .....                       | 95.96                     |
| Shanghai Tung Hsing Technology Inc .....                              | 95.96                     |
| Shining Golden Yida Welding & Cutting Machinery Manufacture Ltd ..... | 95.96                     |
| Suzhou Aomeijia Metallic Products Co., Ltd .....                      | 95.96                     |
| Suzhou Goldenline Machinery Co., Ltd .....                            | 95.96                     |
| Suzhou Xindadi Hardware Co., Ltd .....                                | 14.39                     |
| Taixing Hutchin Mfg. Co., Ltd .....                                   | 14.39                     |
| Tong Ming Enterprise (Jiaxing) Co., Ltd .....                         | 95.96                     |
| Trantex Product (Zhong Shan) Co., Ltd .....                           | 14.39                     |
| Wuyi Yunlin Steel Products Co., Ltd .....                             | 95.96                     |
| Yangzhou Huayu Pipe Fitting Co., Ltd .....                            | 95.96                     |
| Yangzhou Triple Harvest Power Tools Limited .....                     | 14.39                     |
| Zhangjiagang Houfeng Machinery Co., Ltd .....                         | 95.96                     |
| Zhejiang KC Mechanical & Electrical .....                             | 95.96                     |
| Zhejiang Zhenglian Corp .....                                         | 95.96                     |
| Zhuhai Shichang Metals Ltd .....                                      | 95.96                     |
| All-Others .....                                                      | 14.39                     |

### Disclosure

We intend to disclose the calculations performed to interested parties within five days of the public announcement of this final determination in accordance with 19 CFR 351.224(b).

### Continuation of Suspension of Liquidation

In accordance with section 703(d) of the Act, we will instruct U.S. Customs and Border Protection (CBP) to continue to suspend liquidation of all appropriate entries of tool chests from the PRC, as described in Appendix I of this notice, which were entered, or withdrawn from warehouse, for consumption on or after September 15, 2017, the date of the publication of the *Preliminary*

### Determination in the Federal Register.

Furthermore, we will instruct CBP to require a cash deposit for such entries of merchandise in the amounts indicated above, pursuant to section 705(c)(1)(B)(ii) of the Act.

### U.S. International Trade Commission (ITC) Notification

In accordance with section 705(d) of the Act, we will notify the ITC of our final affirmative CVD determination. In addition, we are making available to the ITC all non-privileged and non-proprietary information relating to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms that it will

not disclose such information, either publicly or under an administrative protective order (APO), without the written consent of the Assistant Secretary for Enforcement and Compliance.

If the ITC determines that material injury, or threat of material injury, does not exist, this proceeding will be terminated and all cash deposits will be refunded. If the ITC determines that such injury does exist, we will issue a CVD order directing CBP to assess, upon further instruction by the Department, CVDs on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation, as discussed above in the

“Continuation of Suspension of Liquidation” section.

### Notification Regarding Administrative Protective Orders (APOs)

In the event that the ITC issues a final negative injury determination, this notice will serve as the only reminder to parties subject to an APO of their responsibility concerning the destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation that is subject to sanction.

This determination is issued and published pursuant to sections 705(d) and 777(i) of the Act.

Dated: November 22, 2017.

**Carole Showers,**

*Executive Director, Office of Policy performing the duties of the Deputy Assistant Secretary for Enforcement and Compliance.*

### Appendix I

#### Scope of the Investigation

The scope of this investigation covers certain metal tool chests and tool cabinets, with drawers, (tool chests and cabinets), from the People's Republic of China (the PRC) and the Socialist Republic of Vietnam (Vietnam). The scope covers all metal tool chests and cabinets, including top chests, intermediate chests, tool cabinets and side cabinets, storage units, mobile work benches, and work stations and that have the following physical characteristics:

- (1) A body made of carbon, alloy, or stainless steel and/or other metals;
- (2) two or more drawers for storage in each individual unit;
- (3) a width (side to side) exceeding 15 inches for side cabinets and exceeding 21 inches for all other individual units but not exceeding 60 inches;
- (4) a body depth (front to back) exceeding 10 inches but not exceeding 24 inches; and
- (5) prepackaged for retail sale.

For purposes of this scope, the width parameter applies to each individual unit, i.e., each individual top chest, intermediate top chest, tool cabinet, side cabinet, storage unit, mobile work bench, and work station.

Prepackaged for retail sale means the units may, for example, be packaged in a cardboard box, other type of container or packaging, and may bear a Universal Product Code, along with photographs, pictures, images, features, artwork, and/or product specifications. Subject tool chests and cabinets are covered whether imported in assembled or unassembled form. Subject merchandise includes tool chests and cabinets produced in the PRC or Vietnam but assembled, prepackaged for retail sale, or subject to other minor processing in a third country prior to importation into the United

States. Similarly, it would include tool chests and cabinets produced in the PRC or Vietnam that are assembled, prepackaged for retail sale, or subject to other minor processing after importation into the United States.

Subject tool chests and cabinets may also have doors and shelves in addition to drawers, may have handles (typically mounted on the sides), and may have a work surface on the top. Subject tool chests and cabinets may be uncoated (e.g., stainless steel), painted, powder coated, galvanized, or otherwise coated for corrosion protection or aesthetic appearance.

Subject tool chests and cabinets may be packaged as individual units or in sets. When packaged in sets, they typically include a cabinet with one or more chests that stack on top of the cabinet. Tool cabinets act as a base tool storage unit and typically have rollers, casters, or wheels to permit them to be moved more easily when loaded with tools. Work stations and mobile work benches are tool cabinets with a work surface on the top that may be made of rubber, plastic, metal, wood, or other materials.

Top chests are designed to be used with a tool cabinet to form a tool storage unit. The top chests may be mounted on top of the base tool cabinet or onto an intermediate chest. They are often packaged as a set with tool cabinets or intermediate chests, but may also be packaged separately. They may be packaged with mounting hardware (e.g., bolts) and instructions for assembling them onto the base tool cabinet or onto an intermediate tool chest which rests on the base tool cabinet. Smaller top chests typically have handles on the sides, while the larger top chests typically lack handles. Intermediate tool chests are designed to fit on top of the floor standing tool cabinet and to be used underneath the top tool chest. Although they may be packaged or used separately from the tool cabinet, intermediate chests are designed to be used in conjunction with tool cabinets. The intermediate chests typically do not have handles. The intermediate and top chests may have the capability of being bolted together.

Side cabinets are designed to be bolted or otherwise attached to the side of the base storage cabinet to expand the storage capacity of the base tool cabinet.

Subject tool chests and cabinets also may be packaged with a tool set included. Packaging a subject tool chest and cabinet with a tool set does not remove an otherwise covered subject tool chest and cabinet from the scope. When this occurs, the tools are not part of the subject merchandise.

All tool chests and cabinets that meet the above definition are included in the scope unless otherwise specifically excluded.

Excluded from the scope of the investigation are tool boxes, chests, and cabinets with bodies made of plastic, carbon fiber, wood, or other non-metallic substances.

Also excluded from the scope of the investigation are industrial grade steel tool chests and cabinets. The excluded industrial grade steel tool chests and cabinets are those:

- (1) Having a body that is over 60 inches in width; or
- (2) having each of the following physical characteristics:

- (a) A body made of steel that is 0.047 inches or more in thickness;
- (b) a body depth (front to back) exceeding 21 inches; and
- (c) a unit weight that exceeds the maximum unit weight shown below for each width range:

| Weight to width ratio<br>tool chests |                        | Weight to width ratio<br>tool cabinets |                        |
|--------------------------------------|------------------------|----------------------------------------|------------------------|
| Inches                               | Max-<br>imum<br>pounds | Inches                                 | Max-<br>imum<br>pounds |
| 21> ≤25 .....                        | 90                     | 21> ≤25 .....                          | 155                    |
| 25> ≤28 .....                        | 115                    | 25> ≤28 .....                          | 170                    |
| 28> ≤30 .....                        | 120                    | 28> ≤30 .....                          | 185                    |
| 30> ≤32 .....                        | 130                    | 30> ≤32 .....                          | 200                    |
| 32> ≤34 .....                        | 140                    | 32> ≤34 .....                          | 215                    |
| 34> ≤36 .....                        | 150                    | 34> ≤36 .....                          | 230                    |
| 36> ≤38 .....                        | 160                    | 36> ≤38 .....                          | 245                    |
| 38> ≤40 .....                        | 170                    | 38> ≤40 .....                          | 260                    |
| 40> ≤42 .....                        | 180                    | 40> ≤42 .....                          | 280                    |
| 42> ≤44 .....                        | 190                    | 42> ≤44 .....                          | 290                    |
| 44> ≤46 .....                        | 200                    | 44> ≤46 .....                          | 300                    |
| 46> ≤48 .....                        | 210                    | 46> ≤48 .....                          | 310                    |
| 48> ≤50 .....                        | 220                    | 48> ≤50 .....                          | 320                    |
| 50> ≤52 .....                        | 230                    | 50> ≤52 .....                          | 330                    |
| 52> ≤54 .....                        | 240                    | 52> ≤54 .....                          | 340                    |
| 54> ≤56 .....                        | 250                    | 54> ≤56 .....                          | 350                    |
| 56> ≤58 .....                        | 260                    | 56> ≤58 .....                          | 360                    |
| 58> ≤60 .....                        | 270                    | 58> ≤60 .....                          | 370                    |

Also excluded from the scope of the investigation are service carts. The excluded service carts have all of the following characteristics:

- (1) Casters, wheels, or other similar devices which allow the service cart to be rolled from place to place;
- (2) an open top for storage, a flat top or flat lid on top of the unit that opens;
- (3) a space or gap between the casters, wheels, or other similar devices, and the bottom of the enclosed storage space (e.g., drawers) of at least 10 inches; and
- (4) a total unit height, including casters, of less than 48 inches.

Also excluded from the scope of the investigation are non-mobile work benches. The excluded non-mobile work benches have all of the following characteristics:

- (1) A solid top working surface;
- (2) no drawers, one drawer, or two drawers in a side-by-side configuration; and
- (3) the unit is supported by legs and has no solid front, side, or back panels enclosing the body of the unit.

Also excluded from the scope of the investigation are metal filing cabinets that are configured to hold hanging file folders and are classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheading 9403.10.0020.

Merchandise subject to the investigation is classified under HTSUS categories 9403.20.0021, 9403.20.0026, 9403.20.0030 and 7326.90.8688, but may also be classified under HTSUS category 7326.90.3500. While HTSUS subheadings are provided for convenience and Customs purposes, the written description of the scope of this investigation is dispositive.

### Appendix II

#### List of Topics Discussed in the Issues and Decision Memorandum

##### I. Summary

- II. Background
- III. Scope Comments
- IV. Scope of the Investigation
- V. Application of the Countervailing Duty Law to Imports from the PRC
- VI. Use of Facts Otherwise Available and Adverse Inferences
- VII. Subsidies Valuation
- VIII. Benchmarks and Interest Rates
- IX. Analysis of Programs
- X. Analysis of Comments
  - Comment 1: Whether to Countervail Steel Inputs Not Purchased in Coils
  - Comment 2: Whether Certain Steel Producers Are Authorities
  - Comment 3: Whether Steel Suppliers That Are Trading Companies Are Authorities
  - Comment 4: Whether the Provision of Steel Coils is Specific
  - Comment 5: Whether to Use Certain Sources as Benchmarks for Steel Inputs
  - Comment 6: What to Use as Benchmark for Certain of Geelong's Steel Purchases
  - Comment 7: Whether to Use a Certain Source as a Benchmark for Ocean Freight
  - Comment 8: Whether to Countervail Export Buyer's Credits
  - Comment 9: Whether to Apply Adverse Facts Available With Respect to the Government of China's Response Regarding Electricity
  - Comment 10: Whether the Department's Selection of Electricity Rates Was Proper
  - Comment 11: Whether to Countervail Certain Tongrun "Other Subsidies"
- XI. Recommendation

[FR Doc. 2017-25768 Filed 11-28-17; 8:45 am]

BILLING CODE 3510-DS-P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

RIN 0648-XF858

#### New England Fishery Management Council; Public Meeting

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

**ACTION:** Notice of public meeting via webinar.

**SUMMARY:** The New England Fishery Management Council's *Scientific and Statistical Committee* will hold a webinar to review the 2017 Plan B Operational Assessment for Atlantic Halibut. Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

**DATES:** This webinar will be held on Monday, December 18, 2017, beginning at 1:30 p.m. Webinar registration URL information: <https://attendee.gotowebinar.com/register/1474214582272609539>; Call in information: +1 (213) 929-4212, Attendee Access Code: 823-584-672.

**ADDRESSES:** 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 Scientific and Statistical Committee will review the 2017 Plan B Operational Assessment for Atlantic Halibut, and the work provided by the SSC sub-panel review and the Groundfish Plan Development Team. Taking into account the Council's Risk Policy Statement, the SSC will recommend an OFL and an ABC for each fishing year 2018-2020 that will prevent overfishing, and achieve rebuilding if needed, consistent with the Council's ABC control rule for groundfish stocks. Other business will be discussed as needed.

Although non-emergency issues not contained on the agenda may come before this Council for discussion, those issues may not be the subject of formal action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency. The public also should be aware that the meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

##### Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies, Executive Director, at 978-465-0492, at least 5 days prior to the meeting date.

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

Dated: November 24, 2017.

**Tracey L. Thompson,**

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

[FR Doc. 2017-25766 Filed 11-28-17; 8:45 am]

BILLING CODE 3510-22-P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

RIN 0648-XF813

#### Pacific Fishery Management Council; Public Meeting (Webinar)

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

**ACTION:** Notice of public meeting (webinar).

**SUMMARY:** The Pacific Fishery Management Council's (Pacific Council) Ad hoc Ecosystem Workgroup (EWG) will hold a meeting via webinar to discuss the work associated with the Climate Change and Communities Initiative. The meeting is open to the public.

**DATES:** The webinar meeting will be held on Monday, December 18, 2017, from 11 a.m. to 3 p.m. (Pacific Standard Time) or until business for the day has been completed.

**ADDRESSES:** The meeting will be held via webinar. A public listening station is available at the Pacific Council office (address below). To attend the webinar (1) join the meeting by visiting this link <https://www.gotomeeting.com/webinar>, (2) enter the Webinar ID: 781-215-411, and (3) enter your name and email address (required). After logging in to the webinar, please (1) dial this TOLL number 1-631-992-3221 (not a toll-free number), (2) enter the attendee phone audio access code 562-890-447, and (3) then enter your audio phone pin (shown after joining the webinar). *Note:* We have disabled Mic/Speakers as an option and require all participants to use a telephone or cell phone to participate. Technical Information and system requirements: PC-based attendees are required to use Windows® 7, Vista, or XP; Mac®-based attendees are required to use Mac OS® X 10.5 or newer; Mobile attendees are required to use iPhone®, iPad®, Android™ phone or Android tablet (See the <https://www.gotomeeting.com/webinar/ipad-iphone-android-webinar-apps>). You may send an email to Mr. Kris Kleinschmidt at [Kris.Kleinschmidt@noaa.gov](mailto:Kris.Kleinschmidt@noaa.gov) or contact him at (503) 820-2280, extension 411 for technical assistance. A public listening station will also be available at the Pacific Council office.

*Council address:* Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220.

**FOR FURTHER INFORMATION CONTACT:** Dr. Kit Dahl, Pacific Council; telephone: (503) 820-2422.

**SUPPLEMENTARY INFORMATION:** The purpose of this webinar is for the EWG to discuss work associated with the Climate Change and Communities Initiative, which the Council has decided to embark upon. Two tasks have been assigned to the EWG as initial steps in this initiative. First, the EWG is organizing a series of briefings for the Council family on the potential effects of climate change on the California Current Ecosystem including fishing communities. Second, the EWG will draft a report on major Council decision types that may benefit from information on climate change impacts. This webinar is an opportunity for the EWG to discuss progress on these tasks and plan their completion. Public comments during the webinar will be received from attendees at the discretion of the EWG chair.

Although non-emergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

### Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt (503) 820-2411 at least 10 business days prior to the meeting date.

Dated: November 24, 2017.

**Tracey L. Thompson,**

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

[FR Doc. 2017-25765 Filed 11-28-17; 8:45 am]

**BILLING CODE 3510-22-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. CP17-441-001]

#### **Northwest Pipeline, LLC; Supplemental Notice of Intent To Prepare an Environmental Assessment for the Amended North Seattle Lateral Upgrade Project and Request for Comments on Environmental Issues**

As previously noticed on June 21, 2017, the staff of the Federal Energy Regulatory Commission (FERC or Commission) announced that it will prepare an environmental assessment (EA) to evaluate and discuss the environmental impacts of the North Seattle Lateral Upgrade Project involving construction and operation of facilities by Northwest Pipeline, LLC (Northwest) in Snohomish County, Washington. The Commission will use this EA in its decision-making process to determine whether the project is in the public convenience and necessity.

On October 23, 2017, Northwest filed an amendment to its current FERC application that proposes changes to the project facilities. Northwest now proposes to reduce the length of the upgraded pipeline facilities from 6.8 miles to 5.8 miles and to reroute a portion of its system off its existing right-of-way to avoid construction on the Fritch Forest Products mill site. This reroute was presented as a possible alternative to the originally filed project in the Commission's June 21, 2017 *Notice of Intent to Prepare an Environmental Assessment for the Proposed North Seattle Lateral Upgrade Project, Request for Comments on Environmental Issues, and Notice of Public Scoping Session*, which was mailed to the environmental mailing list at that time.

This supplemental notice announces the re-opening of the scoping process the Commission will use to gather input from the public and interested agencies on the project (see appendix 1). You can make a difference by providing us with your specific comments or concerns about the project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. Your input will help the Commission staff determine what issues they need to evaluate in the EA. To ensure that your comments are timely and properly recorded, please send your comments so that the Commission receives them in Washington, DC on or before December 21, 2017.

This notice is being sent to the Commission's current environmental mailing list for this project. State and local government representatives should notify their constituents of this proposed project and encourage them to comment on their areas of concern.

If you are a landowner receiving this notice, a pipeline company representative may contact you about the acquisition of an easement to construct, operate, and maintain the proposed facilities. The company would seek to negotiate a mutually acceptable agreement. However, if the Commission approves the project, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail to produce an agreement, the pipeline company could initiate condemnation proceedings where compensation would be determined in accordance with state law.

Northwest provided landowners with a fact sheet prepared by the FERC entitled *An Interstate Natural Gas Facility On My Land? What Do I Need To Know?* This fact sheet addresses a number of typically asked questions, including the use of eminent domain and how to participate in the Commission's proceedings. It is also available for viewing on the FERC Web site ([www.ferc.gov](http://www.ferc.gov)).

### Public Participation

For your convenience, there are three methods you can use to submit your comments to the Commission. The Commission will provide equal consideration to all comments received. The Commission encourages electronic filing of comments and has expert staff available to assist you at (202) 502-8258 or [FercOnlineSupport@ferc.gov](mailto:FercOnlineSupport@ferc.gov). Please carefully follow these instructions so that your comments are properly recorded.

(1) You can file your comments electronically using the *eComment* feature on the Commission's Web site ([www.ferc.gov](http://www.ferc.gov)) under the link to *Documents and Filings*. This is an easy method for submitting brief, text-only comments on a project; or

(2) You can file your comments electronically by using the *eFiling* feature on the Commission's Web site ([www.ferc.gov](http://www.ferc.gov)) under the link to *Documents and Filings*. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on *eRegister*. If you are filing a comment on a particular project, please select Comment on a Filing as the filing type; or

(3) You can file a paper copy of your comments by mailing them to the following address. Be sure to reference the project docket number (CP17-441-001) with your submission: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Room 1A, Washington, DC 20426.

### Summary of the Proposed Project

Northwest proposes to remove approximately 5.8 miles of the 8-inch-diameter North Seattle Lateral pipeline and replace it with 20-inch-diameter pipeline, primarily in the same trench. The project is in Snohomish County, Washington. According to Northwest, the proposed facilities would increase service reliability and enable Northwest to provide an incremental approximate 160 million cubic feet of natural gas per day of firm capacity to serve Puget Sound Energy.

The amended North Seattle Lateral Upgrade Project would consist of the following facilities:

- Replace 5.8-miles of 8-inch-diameter pipeline with 20-inch-diameter pipeline;
- rebuild the existing North Seattle/Everett meter station in order to accommodate the increased delivery capacity of the North Seattle Lateral;
- abandon and relocate approximately 0.1 mile of 16-inch-diameter pipeline;
- relocate an existing 8-inch pig launcher and a 20-inch pig receiver <sup>1</sup> to project milepost 7.76; and
- replace an existing 8-inch mainline valve with a 20-inch valve.

The general location of the project facilities is shown in appendix 2, and the reroute around the Fritch Mill is shown in appendix 3.

### Land Requirements for Construction

Construction activities related to the Upgrade Project would disturb about 88 acres of land for the pipeline replacement and aboveground facilities. With the exception of the proposed 0.15 mile reroute around the Fritch Mill, the new pipeline would be installed within Northwest's existing easement. Following construction, Northwest would maintain 43 acres of easement area for permanent operation of the project facilities; the remaining 45 acres of construction work space would be restored and revert to former uses. The entire existing right-of-way in which the replacements would be made parallels existing pipeline, utility, or road rights-of-way.

<sup>1</sup> A pig is a tool that the pipeline company inserts into and pushes through the pipeline for cleaning the pipeline, conducting internal inspections, or other purposes.

### The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us <sup>2</sup> to discover and address concerns the public may have about proposals. This process is referred to as "scoping." The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this notice, the Commission requests public comments on the scope of the issues to address in the EA. We will consider all filed comments during the preparation of the EA.

In the EA we will discuss impacts that could occur as a result of the construction and operation of the proposed project under these general headings:

- Geology and soils;
- land use;
- water resources, fisheries, and wetlands;
- vegetation and wildlife;
- endangered and threatened species;
- cultural resources;
- air quality and noise;
- public safety; and
- cumulative impacts.

We will also evaluate reasonable alternatives to the proposed project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

The EA will present our independent analysis of the issues. The EA will be available in the public record through eLibrary. Depending on the comments received during the scoping process, we may also publish and distribute the EA to the public for an allotted comment period. We will consider all comments on the EA before making our recommendations to the Commission. To ensure we have the opportunity to consider and address your comments, please carefully follow the instructions in the Public Participation section, beginning on page 2 of this Notice.

With this notice, we are asking agencies with jurisdiction by law and/or special expertise with respect to the environmental issues of this project to formally cooperate with us in the preparation of the EA.<sup>3</sup> Agencies that would like to request cooperating

<sup>2</sup> We, us, and our refer to the environmental staff of the Commission's Office of Energy Projects.

<sup>3</sup> The Council on Environmental Quality regulations addressing cooperating agency responsibilities are at Title 40, Code of Federal Regulations, Part 1501.6.

agency status should follow the instructions for filing comments provided under the Public Participation section of this notice.

### Consultations Under Section 106 of the National Historic Preservation Act

In accordance with the Advisory Council on Historic Preservation's implementing regulations for section 106 of the National Historic Preservation Act, we are using this notice to initiate consultation with the applicable State Historic Preservation Office (SHPO), and to solicit their views and those of other government agencies, interested Indian tribes, and the public on the project's potential effects on historic properties.<sup>4</sup> We will define the project-specific Area of Potential Effects (APE) in consultation with the SHPO as the project develops. On natural gas facility projects, the APE at a minimum encompasses all areas subject to ground disturbance (examples include construction right-of-way, contractor/pipe storage yards, compressor stations, and access roads). Our EA for this project will document our findings on the impacts on historic properties and summarize the status of consultations under section 106.

### Currently Identified Environmental Issues

We have already identified two issues that we think deserve attention based on a preliminary review of the proposed facilities and the environmental information provided by Northwest. This preliminary list of issues may be changed based on your comments and our analysis.

- Effects of construction on residential properties
- Impacts on sensitive fish species during in-stream construction activities

### Environmental Mailing List

The environmental mailing list includes federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American Tribes; other interested parties; and local libraries and newspapers. This list also includes all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes

<sup>4</sup> The Advisory Council on Historic Preservation's regulations are at Title 36, Code of Federal Regulations, Part 800. Those regulations define historic properties as any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places.

within certain distances of aboveground facilities, and anyone who submits comments on the project. We will update the environmental mailing list as the analysis proceeds to ensure that we send the information related to this environmental review to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project.

If we publish and distribute the EA, copies of the EA will be sent to the environmental mailing list for public review and comment. If you would prefer to receive a paper copy of the document instead of the CD version or would like to remove your name from the mailing list, please return the attached Information Request (appendix 4).

#### **Becoming an Intervenor**

In addition to involvement in the EA scoping process, you may want to become an “intervenor” which is an official party to the Commission’s proceeding. Intervenor play a more formal role in the process and are able

to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission’s final ruling. An intervenor formally participates in the proceeding by filing a request to intervene. Instructions for becoming an intervenor are in the Document-less Intervention Guide under the e-filing link on the Commission’s Web site. Motions to intervene are more fully described at <http://www.ferc.gov/resources/guides/how-to/intervene.asp>.

#### **Additional Information**

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 at [www.ferc.gov](http://www.ferc.gov) using the eLibrary link. Click on the eLibrary link, click on General Search and enter the docket number, excluding the last three digits in the Docket Number field (*i.e.*, CP17–441). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at [FercOnlineSupport@ferc.gov](mailto:FercOnlineSupport@ferc.gov) or toll free at (866) 208–3676, or for TTY, contact

(202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. 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](http://www.ferc.gov/docs-filing/esubscription.asp).

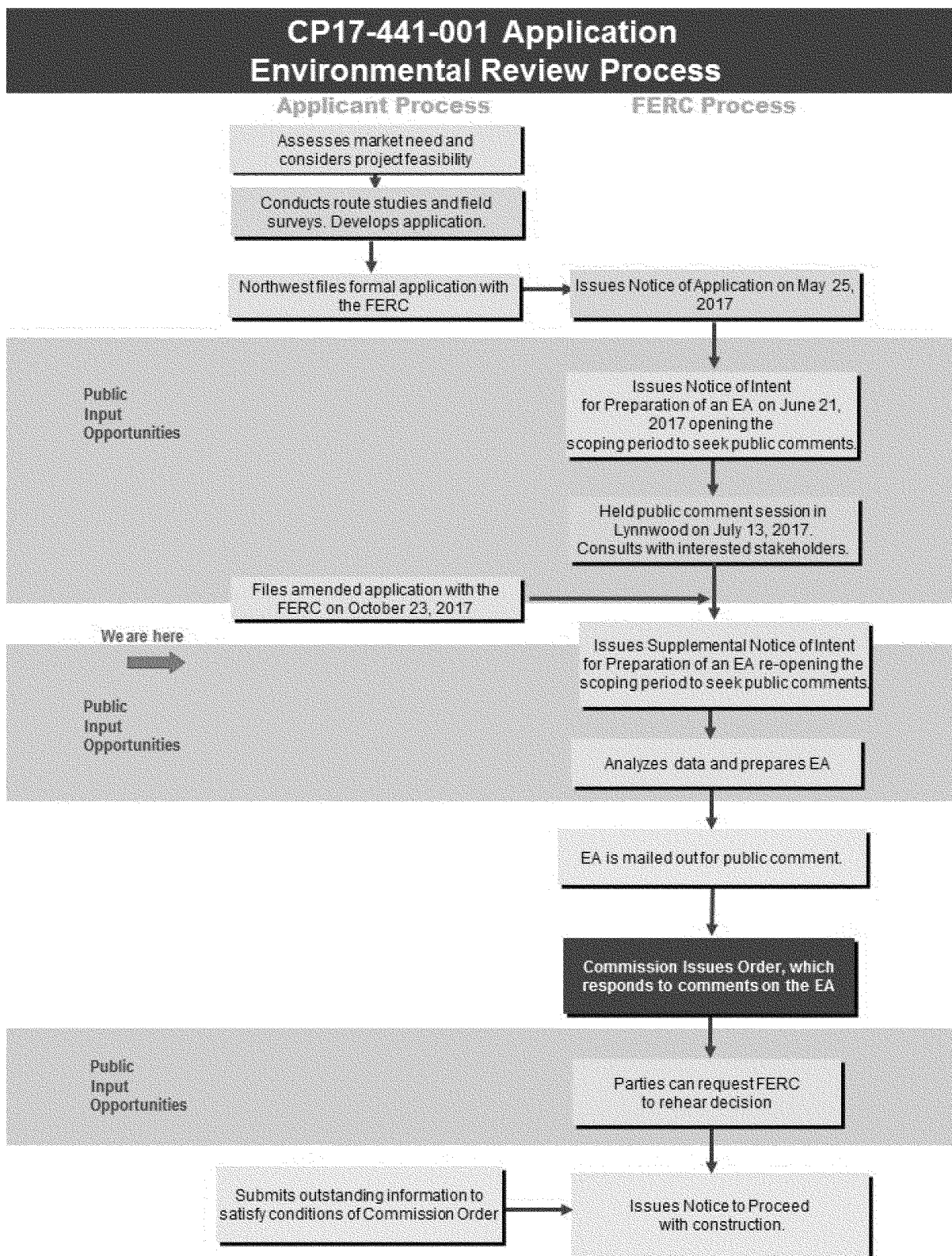
Finally, public sessions or site visits will be posted on the Commission’s calendar located at [www.ferc.gov/EventCalendar/EventsList.aspx](http://www.ferc.gov/EventCalendar/EventsList.aspx) along with other related information.

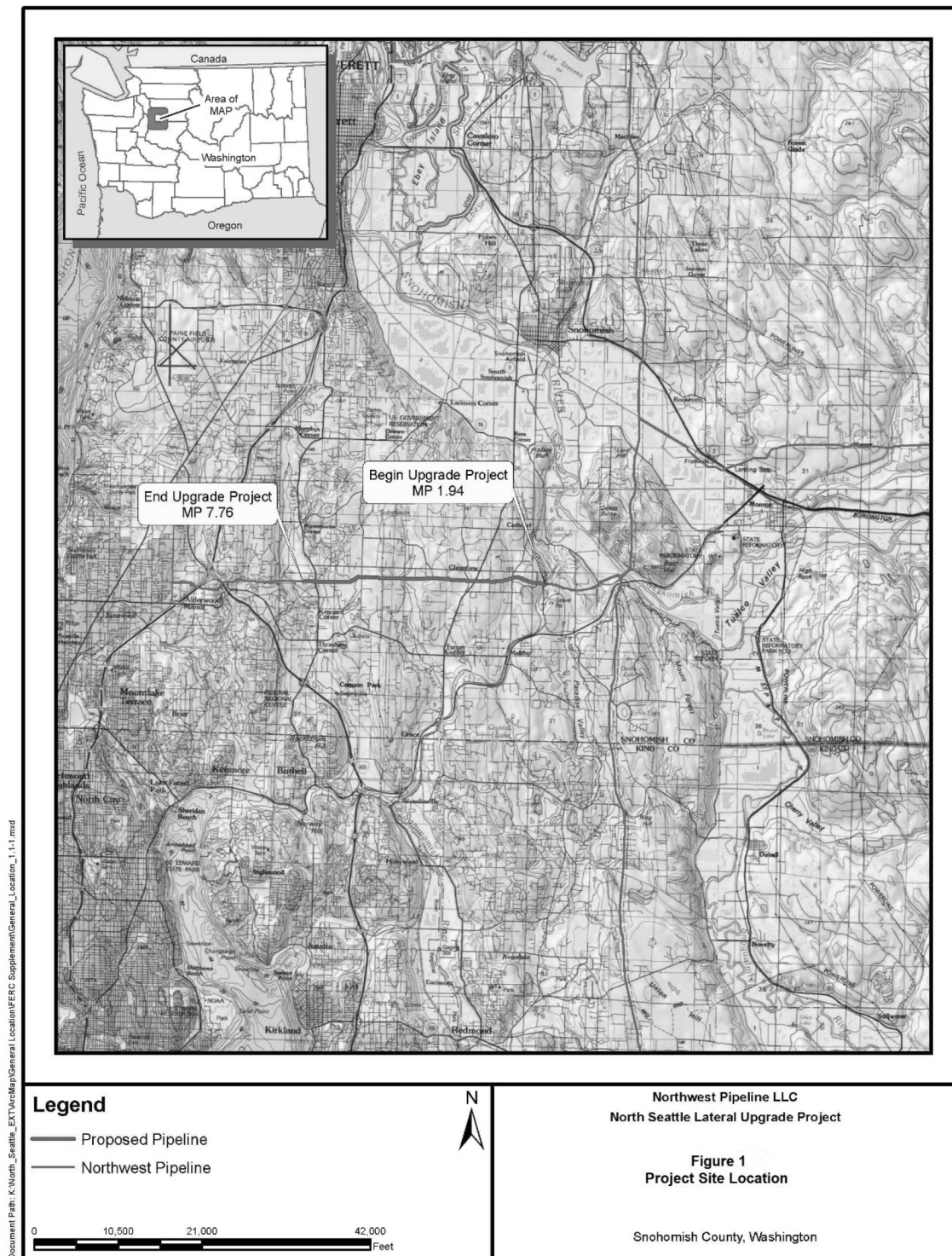
Dated: November 21, 2017.

**Kimberly D. Bose,**  
Secretary.

**BILLING CODE 6717–01–P**

## Appendix 1







**Proposed Realignment Around Fritch Mill**

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**INFORMATION REQUEST**

**North Seattle Lateral Upgrade Project**

**CP17-441-001**

**Name**\_\_\_\_\_

**Agency**\_\_\_\_\_

**Address**\_\_\_\_\_

**City**\_\_\_\_\_ **State**\_\_\_\_\_ **Zip Code**\_\_\_\_\_

☐ **Please send me a paper copy of the published NEPA document**

☐ **Please remove my name from the mailing list**

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**FROM**\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**ATTN: OEP - Gas Branch 4; PJ - 11.4**  
**Federal Energy Regulatory Commission**  
**888 First Street NE**  
**Washington, DC 20426**

*CP17-441-001 North Seattle Lateral Upgrade Project*

**Staple or Tape Here**

[FR Doc. 2017-25727 Filed 11-28-17; 8:45 am]

BILLING CODE 6717-01-C

**DEPARTMENT OF ENERGY****Federal Energy Regulatory Commission****Notice of Electric Quarterly Report Users Group Meeting**

|                                                                                     | Docket Nos.   |
|-------------------------------------------------------------------------------------|---------------|
| Electric Quarterly Report User Group Meeting.                                       | AD18-4-000    |
| Filing Requirements for Electric Utility Service Agreements.                        | RM01-8-000    |
| Electricity Market Transparency Provisions of Section 220 of the Federal Power Act. | RM10-12-000   |
| Revisions to Electric Quarterly Report Filing Process.                              | RM12-3-000    |
| Electric Quarterly Reports                                                          | ER02-2001-000 |

On October 17, 2017, the Federal Energy Regulatory Commission (Commission) issued a notice that Commission staff will hold an Electric Quarterly Report (EQR) Users Group meeting on December 5, 2017. The meeting will take place from 1:00 p.m. to 5:00 p.m. (EST) in the Commission Meeting Room at 888 First Street NE., Washington, DC 20426. All interested persons are invited to attend. For those unable to attend in person, access to the meeting will be available via webcast.

Staff is hereby supplementing the October 17, 2017, notice with the agenda for discussion. During the meeting, Commission staff and the EQR users will discuss potential improvements to the EQR program and EQR filing process, including: (1) Progress since the last user group meeting; (2) EQR resources and Web site updates; (3) EQR validations and error messages; and (4) use of "Other" as a Product Name and Product Type Name. Please note that matters pending before the Commission and subject to ex parte limitations cannot be discussed at this meeting. An agenda of the meeting is attached.

Those interested in participating in the discussion are encouraged to attend in person. All interested persons (whether attending in person or via webcast) are asked to register online at <http://www.ferc.gov/whats-new/registration/12-05-17-form.asp>. There is no registration fee. Anyone with Internet access can listen to the meeting by navigating to <https://www.ferc.gov/EventCalendar/EventsList.aspx?View=listview> for FERC Calendar of Events, locating the EQR

Users Group Meeting on the Calendar, and clicking on the link to the webcast.

The webcast will allow persons to view and listen to the meeting. Questions during the meeting can be sent to [EQRUsersGroup@ferc.gov](mailto:EQRUsersGroup@ferc.gov).

Commission conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations, please send an email to [accessibility@ferc.gov](mailto:accessibility@ferc.gov) or call toll free 1-866-208-3372 (voice) or 202-208-1659 (TTY), or send a FAX to 202-208-2106 with the required accommodations.

To increase administrative efficiency, issuances related to future EQR user group meetings will not be assigned to Docket Nos. RM01-8-000, RM10-12-000, RM12-3-000 and ER02-2001-000. For more information about the EQR Users Group meeting, please contact Jeff Sanders of the Commission's Office of Enforcement at (202) 502-6455, or send an email to [EQRUsersGroup@ferc.gov](mailto:EQRUsersGroup@ferc.gov).

Dated: November 21, 2017.

**Kimberly D. Bose,**  
Secretary.

[FR Doc. 2017-25726 Filed 11-28-17; 8:45 am]

BILLING CODE 6717-01-P

**DEPARTMENT OF ENERGY****Federal Energy Regulatory Commission****[Docket No. CP18-17-000]****Southern Star Central Gas Pipeline, Inc.; Notice of Request Under Blanket Authorization**

Take notice that on November 14, 2017, Southern Star Central Gas Pipeline, Inc. (Southern Star), 4700 State Highway 56, Owensboro, Kentucky 42301, filed a prior notice application pursuant to sections 157.205, and 157.216(b) of the Federal Energy Regulatory Commission's (Commission) regulations under the Natural Gas Act (NGA), and Columbia's blanket certificate issued in Docket No. CP82-479-000. Southern Star requests authorization to construct, own and operate the Blue Mountain Chisholm Trail Project located in Grady and Carter Counties, Oklahoma. The proposed project consists of approximately 4.67 miles of 12-inch diameter pipeline, associated above-ground facilities, a booster compression site utilizing rental compressor units and a lateral to the delivery point, at a cost of \$20,881,158, all as more fully set forth in the application which is open to the public for inspection.

Blue Mountain Midstream LLC (Blue Mountain) has proposed construction of

a new cryogenic gas processing plant in Grady County,<sup>1</sup> Oklahoma, with an approximate inlet capacity of 250,000 dekatherms per day (Dth/d). Southern Star's proposed project will receive up to 150,000 Dth/d of gas processed by this production facility for transport on its system. Of this volume, Southern Star has contractual commitments for firm transportation with Blue Mountain for a minimum delivery of 45,000 Dth/d to a proposed delivery point on Natural Gas Pipeline Company of America (NGPL) in Carter County, Oklahoma. The remaining capacity will enhance gas supply for existing customers on Southern Star's system. Southern Star and Blue Mountain have entered into a precedent agreement, interconnect agreement and will enter into an FTS Agreement, and Southern Star and NGPL have entered into an interconnect agreement.

The filing may also be viewed on the web at <http://www.ferc.gov> using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov) or call toll-free, (866) 208-3676 or TTY, (202) 502-8659.

Any questions regarding this application should be directed to Cindy C. Thompson, Manager, Regulatory, Southern Star Central Gas Pipeline, Inc., 4700 Highway 56, Owensboro, Kentucky 42301 or call (270) 852-4655, or email to [Cindy.C.Thompson@sscgpc.com](mailto:Cindy.C.Thompson@sscgpc.com).

Any person or the Commission's staff may, within 60 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the regulations under the NGA (18 CFR 157.205), a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the allowed time for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: complete its environmental assessment (EA) and place it into the Commission's public

<sup>1</sup> See application filed November 9, 2017, in Docket No. CP18-14-000.

record (eLibrary) for this proceeding, or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenter will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the eFiling link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

**Comment Date:** 5:00 p.m. Eastern Time on January 22, 2018.

Dated: November 22, 2017.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2017-25756 Filed 11-28-17; 8:45 am]

**BILLING CODE 6717-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Project No. 1510-018]

#### **City of Kaukauna, Wisconsin; Notice of Application Accepted for Filing, Soliciting Motions To Intervene and Protests, Ready for Environmental Analysis, and Soliciting Comments, Recommendations, Terms and Conditions, and Prescriptions**

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Major License.

b. *Project No.:* 1510-018.

c. *Date filed:* March 24, 2017.

d. *Applicant:* City of Kaukauna, Wisconsin (Kaukauna).

e. *Name of Project:* Kaukauna Project.  
f. *Location:* On the Fox River in the City of Kaukauna, Outagamie County, Wisconsin. There are no federal or tribal lands within the project boundary.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)-825(r).

h. *Applicant Contact:* Mr. Mike Pedersen, Kaukauna Utilities, 777 Island Street, P.O. Box 1777, Kaukauna, WI 54130-7077; (920) 766-5721.

i. *FERC Contact:* Erin Kimsey, (202) 502-8621 or [erin.kimsey@ferc.gov](mailto:erin.kimsey@ferc.gov).

j. *Deadline for filing motions to intervene and protests, comments, recommendations, terms and conditions, and prescriptions:* 60 days from the issuance date of this notice; reply comments are due 105 days from the issuance date of this notice.

The Commission strongly encourages electronic filing. Please file motions to intervene and protests, comments, recommendations, terms and conditions, and prescriptions using the Commission's eFiling system at <http://www.ferc.gov/docs-filing/efiling.asp>. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at <http://www.ferc.gov/docs-filing/ecomment.asp>. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at [FERCOnlineSupport@ferc.gov](mailto: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-1510-018.

The Commission's Rules of Practice require all intervenors filing documents

with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application has been accepted for filing and is now ready for environmental analysis.

l. *The existing Kaukauna City Plant Hydroelectric Project consists of:* (1) An approximately 3,842-foot-long dam that includes: (a) A 930-foot-long, 14-foot-high masonry retaining wall section (left forebay dam) with a 4-foot-wide trash sluice; (b) a 92-foot-long, 25-foot-high concrete intake and powerhouse section; (c) a 292-foot-long, 26- to 30-foot-high masonry and concrete retaining wall section (right forebay dam); (d) a 34-foot-long, 11-foot-high trash sluice; (e) a 66-foot-long, 18-foot-high gated spillway section with two 30-foot-wide, 8.8-foot-high spillway gates; and (f) a 2,428-foot-long, 0.5- to 10-foot-high concrete and natural rock spillway section; (2) a 19-acre, 1.5-mile-long impoundment with a normal maximum elevation of 629.0 feet above mean sea level (msl); (3) a 25-foot-high, 88-foot-wide intake structure with seven 11-foot-high, 7-foot-wide head gates and a continuous 25-foot-high, 88-foot-wide trashrack with 5-inch clear-bar spacing; (4) a 92-foot-long, 47.5-foot-high concrete and brick powerhouse containing two 2.4-megawatt turbine-generator units for a total installed capacity of 4.8 megawatts; (5) a 440-foot-wide, 49-foot-deep, 1,200-foot-long excavated tailrace; (6) two 68-foot-long, 2.4-kilovolt generator leads that connect the turbine-generator units to the licensee's local distribution system; and (7) appurtenant facilities. Kaukauna operates the project in a run-of-river mode with an average annual generation of approximately 29,704 megawatt-hours.

Kaukauna is not proposing any new project facilities, and proposes to continue operating the project in a run-of-river mode, with a minimum impoundment elevation of 628.5 feet msl (0.5 foot less than the spillway crest elevation). Kaukauna also proposes to develop resource plans for mitigating the effects of reservoir drawdowns, woody debris removal, and erosion on aquatic resources; and mitigating the spread of invasive species.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at

<http://www.ferc.gov> using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support. A copy is also available for inspection and reproduction at the address in item h above.

n. Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, and .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

All filings must (1) bear in all capital letters the title PROTEST, MOTION TO INTERVENE, COMMENTS, REPLY COMMENTS, RECOMMENDATIONS, TERMS AND CONDITIONS, or PRESCRIPTIONS; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

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, contact FERC Online Support.

o. A license applicant must file no later than 60 days following the date of issuance of this notice: (1) A copy of the water quality certification; (2) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (3)

evidence of waiver of water quality certification.

Dated: November 21, 2017.

**Kimberly D. Bose,**  
Secretary.

[FR Doc. 2017-25725 Filed 11-28-17; 8:45 am]

BILLING CODE 6717-01-P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. EL18-36-000]

#### City Water and Light Plant of the City of Jonesboro; Notice of Filing

Take notice that on November 21, 2017, City Water and Light Plant of the City of Jonesboro submitted a proposed revenue requirement under Schedule 2 of the Midcontinent Independent Transmission System Operator Tariff.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the eFiling link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the eLibrary link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Comment Date: 5:00 p.m. Eastern Time on December 12, 2017.

Dated: November 22, 2017.

**Nathaniel J. Davis, Sr.,**  
Deputy Secretary.

[FR Doc. 2017-25758 Filed 11-28-17; 8:45 am]

BILLING CODE 6717-01-P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. CP18-14-000]

#### Blue Mountain Midstream LLC; Notice of Application

Take notice that on November 9, 2017, Blue Mountain Midstream LLC (Blue Mountain), 14701 Hertz Quail Springs Pkwy, Oklahoma City, Oklahoma 73134, filed in Docket No. CP18-14-000 an application under section 7(c) of the Natural Gas Act (NGA) and Part 157 of the Commission's regulations, seeking a certificate of limited jurisdiction for the Blue Mountain Delivery Line located in Grady County, Oklahoma, all as more fully set forth in the application which is on file with the Commission and open to public inspection. Blue Mountain also requests a blanket certificate under Subpart F of Part 157 of the Commission's regulations. Blue Mountain further requests waivers of certain Commission regulatory requirements as set forth in the application.

Questions regarding this application should be directed to William F. Demarest, Jr., Husch Blackwell LLP, 750 17th Street NW., Suite 900, Washington, DC 20006, or by telephone at (202) 378-2310, or by email at [william.demarest@huschblackwell.com](mailto:william.demarest@huschblackwell.com).

This filing is available for review at the Commission's Washington, DC offices, or may be viewed on the Commission's Web site at <http://www.ferc.gov> using the e-Library link. Enter the docket number, excluding the last three digits, in the docket number field to access the document. For assistance, please contact FERC Online Support at [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), or call toll-free at (866) 208-3676, or for TTY, contact (202) 502-8659.

Blue Mountain seeks authority to construct, own and operate the Blue Mountain Delivery Line downstream from the Chisolm Trail Plant which will entail the construction of two natural gas pipelines totaling 9.57 miles and a metering and pigging facility. The two natural gas pipelines would be constructed in two stages. The first stage would be a 20-inch diameter steel pipeline approximately 4.35 miles in

length from the Chisolm Trail Plant tailgate to a metering and pigging facility or central delivery point, at which the flow of the gas may be directed to one or the other of two interstate pipeline receipt points located at or downstream of the central delivery point.

Contemporaneously with Blue Mountain's construction of the first stage of the Blue Mountain Delivery Line, Southern Star Central Gas Pipeline, Inc. Southern Star will construct an approximately 5.5 mile pipeline from Southern Star's certificated interstate natural gas pipeline facilities in Grady County, Oklahoma, to the metering and pigging facility/CDP. Southern Star's construction activity will be performed pursuant to Southern Star's blanket certificate authority.

The second stage of the project will involve construction by Blue Mountain of a 12-inch diameter from the metering and pigging facility/CDP approximately 5.20 miles to an interconnect with the interstate natural gas pipeline facilities of Enable Gas Transmission, LLC, located in Grady County, Oklahoma.

Blue Mountain Midstream also requests general waiver of the Commission's rate schedule and tariff filing requirements, Part 154 of the Commission's regulations. Blue Mountain does not propose to charge any fee for transportation of gas, all of which will be owned by itself.

There are two ways to become involved in the Commission's review of this Project. First, any person wishing to obtain legal status by becoming a party to the proceeding for this project should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure, 18 CFR 385.214, 385.211 (2016), by the comment date below. A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission, and will receive copies of all documents filed by the applicant and by all other parties. A party must submit filings made with the Commission by mail, hand delivery, or Internet, in accordance with Rule 2001 of the Commission's Rules of Practice and Procedure, id. 385.2001. A copy must be served on every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene to have comments considered. The second way to participate is by filing with the Secretary of the

Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Protests and interventions may be filed electronically via the Internet in lieu of paper; see 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the e-filing link. The Commission strongly encourages electronic filings.

If the Commission decides to set the application for a formal hearing before an Administrative Law Judge, the Commission will issue another notice describing that process. At the end of the Commission's review process, a final Commission order approving or denying the requested authorization will be issued.

*Comment Date:* 5:00 p.m. Eastern Time, December 12, 2017.

Dated: November 21, 2017.

**Kimberly D. Bose,**  
*Secretary.*

[FR Doc. 2017-25723 Filed 11-28-17; 8:45 am]

**BILLING CODE 6717-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. OR18-6-000]

#### Occidental Energy Marketing, Inc. v. BridgeTex Pipeline Company, LLC; Notice of Complaint

Take notice that on November 21, 2017, pursuant to sections 1(4), 3(1), and 13(1) of the Interstate Commerce Act (ICA), 49 U.S.C. app. 1(4), 3(1), and 13(1) (1988), and Rule 206 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.206 (2017), and sections 343.1(a) and 343.2(c)(3) of the Commission's Procedural Rules Applicable to Oil Pipeline Proceedings, 18 CFR 343.1(a) and 343.2(c)(3), Occidental Energy Marketing, Inc., (Complainant) filed a formal complaint against BridgeTex Pipeline Company, LLC, (Respondent) alleging that, Respondent has unlawfully refused to provide service to Complainant under FERC Tariff Nos. 1.2.0 and 2.5.0, in violation of its duties

as a common carrier under ICA section 1(4), all as more fully explained in the complaint.

Complainant certifies that copies of the complaint were served on the corporate representatives identified in Respondent's September 1, 2017 transmittal letter regarding the filing of BridgeTex FERC Tariff Nos. 4.0.0 and 5.0.0, as Respondent has not designated a person on the Commission's Corporate Officials List as representing Respondent in this action.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the eFiling link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the eLibrary link and is available for 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](mailto:FERCOnlineSupport@ferc.gov), or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

*Comment Date:* 5:00 p.m. Eastern Time on December 11, 2017.

Dated: November 21, 2017.

**Kimberly D. Bose,**  
*Secretary.*

[FR Doc. 2017-25724 Filed 11-28-17; 8:45 am]

**BILLING CODE 6717-01-P**

**DEPARTMENT OF ENERGY****Federal Energy Regulatory Commission****Combined Notice of Filings #1**

Take notice that the Commission received the following electric corporate filings:

*Docket Numbers:* EC13-91-001.

*Applicants:* Florida Power & Light Company.

*Description:* Notice of Non-Material Change in Circumstances of Florida Power & Light Company.

*Filed Date:* 11/21/17.

*Accession Number:* 20171121-5173.

*Comments Due:* 5 p.m. ET 12/12/17.

Take notice that the Commission received the following electric rate filings:

*Docket Numbers:* ER15-2594-006; ER17-953-002.

*Applicants:* South Central MCN LLC.

*Description:* Compliance Filing of South Central MCN, LLC.

*Filed Date:* 11/20/17.

*Accession Number:* 20171120-5186.

*Comments Due:* 5 p.m. ET 12/11/17.

*Docket Numbers:* ER17-568-001.

*Applicants:* Midcontinent

Independent System Operator, Inc.

*Description:* Compliance filing: 2017-11-22 Attachment X Compliance for Quarterly Operating Limits to be effective 2/15/2017.

*Filed Date:* 11/22/17.

*Accession Number:* 20171122-5032.

*Comments Due:* 5 p.m. ET 12/13/17.

*Docket Numbers:* ER17-723-001.

*Applicants:* NRG Power Marketing LLC.

*Description:* Report Filing: Refund Report—Informational Filing (Docket No. EL17-49-000) to be effective N/A.

*Filed Date:* 11/22/17.

*Accession Number:* 20171122-5056.

*Comments Due:* 5 p.m. ET 12/13/17.

*Docket Numbers:* ER18-326-000.

*Applicants:* Midcontinent

Independent System Operator, Inc.

*Description:* § 205(d) Rate Filing: 2017-11-22 SA 3061 MidAmerican-MidAmerican GIA (J475 J555) to be effective 11/7/2017.

*Filed Date:* 11/22/17.

*Accession Number:* 20171122-5002.

*Comments Due:* 5 p.m. ET 12/13/17.

*Docket Numbers:* ER18-327-000.

*Applicants:* PJM Interconnection, L.L.C.

*Description:* § 205(d) Rate Filing: Original Service Agreement No. 4847, Queue Position No. AB2-084 to be effective 10/25/2017.

*Filed Date:* 11/22/17.

*Accession Number:* 20171122-5064.

*Comments Due:* 5 p.m. ET 12/13/17.

Take notice that the Commission received the following PURPA 210(m)(3) filings:

*Docket Numbers:* QM18-3-000.

*Applicants:* Nebraska Public Power District, Nebraska Electric Generation and Transmission Cooperative, Inc.

*Description:* Joint Request of Nebraska Public Power District, et al. for Partial Waiver of PURPA Obligations of Electric Utilities.

*Filed Date:* 11/20/17.

*Accession Number:* 20171120-5184.

*Comments Due:* 5 p.m. ET 12/18/17.

*Docket Numbers:* QM18-4-000.

*Applicants:* Nebraska Public Power District, Nebraska Electric Generation and Transmission Cooperative, Inc.

*Description:* Joint Request of Nebraska Public Power District, et al. to Terminate Mandatory Purchase Obligation under PURPA.

*Filed Date:* 11/20/17.

*Accession Number:* 20171120-5185.

*Comments Due:* 5 p.m. ET 12/18/17.

Take notice that the Commission received the following electric reliability filings:

*Docket Numbers:* RR18-1-000.

*Applicants:* North American Electric Reliability Corporation.

*Description:* Petition of the North American Electric Reliability Corporation for Approval of Proposed Revisions to Appendix 3D to the Rules of Procedure.

*Filed Date:* 11/21/17.

*Accession Number:* 20171121-5170.

*Comments Due:* 5 p.m. ET 12/12/17.

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: November 22, 2017.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2017-25755 Filed 11-28-17; 8:45 am]

**BILLING CODE 6717-01-P**

**DEPARTMENT OF ENERGY****Federal Energy Regulatory Commission**

[Docket No. EF18-1-000]

**Western Area Power Administration; Notice of Filing**

Take notice that on November 13, 2017 Western Area Power Administration submitted tariff filing per: DSW-BCP-FY2018 Base Charge—20171109 to be effective 12/14/2017.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the eFiling link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the eLibrary link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

*Comment Date:* 5:00 p.m. Eastern Time on December 13, 2017.

Dated: November 22, 2017.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2017-25757 Filed 11-28-17; 8:45 am]

**BILLING CODE 6717-01-P**

**DEPARTMENT OF ENERGY****Federal Energy Regulatory Commission****[Docket No. CP18-6-000]****RH energytrans, LLC; Notice of Intent To Prepare an Environmental Assessment for the Proposed Risberg Line Project, and Request for Comments on Environmental Issues**

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the Risberg Line Project involving construction, modification, and operation of facilities by RH energytrans, LLC (RH) in Crawford and Erie Counties, Pennsylvania and Ashtabula County, Ohio. The Commission will use this EA in its decision-making process to determine whether the project is in the public convenience and necessity.

This notice announces the opening of the scoping process the Commission will use to gather input from the public and interested agencies on the project. You can make a difference by providing us with your specific comments or concerns about the project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. Your input will help the Commission staff determine what issues they need to evaluate in the EA. To ensure that your comments are timely and properly recorded, please send your comments so that the Commission receives them in Washington, DC on or before December 21, 2017.

If you sent comments on this project to the Commission before the opening of this docket on October 16, 2017, you will need to file those comments in Docket No. CP18-6-000 to ensure they are considered as part of this proceeding.

This notice is being sent to the Commission's current environmental mailing list for this project. State and local government representatives should notify their constituents of this proposed project and encourage them to comment on their areas of concern.

If you are a landowner receiving this notice, a pipeline company representative may contact you about the acquisition of an easement to construct, operate, and maintain the proposed facilities. The company would seek to negotiate a mutually acceptable agreement. However, if the Commission approves the project, that approval

conveys with it the right of eminent domain. Therefore, if easement negotiations fail to produce an agreement, the pipeline company could initiate condemnation proceedings where compensation would be determined in accordance with state law.

RH provided landowners with a fact sheet prepared by the FERC entitled *An Interstate Natural Gas Facility On My Land? What Do I Need To Know?* This fact sheet addresses a number of typically asked questions, including the use of eminent domain and how to participate in the Commission's proceedings. It is also available for viewing on the FERC Web site ([www.ferc.gov](http://www.ferc.gov)).

**Public Participation**

For your convenience, there are three methods you can use to submit your comments to the Commission. The Commission encourages electronic filing of comments and has expert staff available to assist you at (202) 502-8258 or [FercOnlineSupport@ferc.gov](mailto:FercOnlineSupport@ferc.gov). Please carefully follow these instructions so that your comments are properly recorded.

(1) You can file your comments electronically using the *eComment* feature on the Commission's Web site ([www.ferc.gov](http://www.ferc.gov)) under the link to *Documents and Filings*. This is an easy method for submitting brief, text-only comments on a project;

(2) You can file your comments electronically by using the *eFiling* feature on the Commission's Web site ([www.ferc.gov](http://www.ferc.gov)) under the link to *Documents and Filings*. With *eFiling*, you can provide comments in a variety of formats by attaching them as a file with your submission. New *eFiling* users must first create an account by clicking on *eRegister*. If you are filing a comment on a particular project, please select "Comment on a Filing" as the filing type; or

(3) You can file a paper copy of your comments by mailing them to the following address. Be sure to reference the project docket number (CP18-6-000) with your submission: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Room 1A, Washington, DC 20426.

In addition, the FERC environmental staff plans on attending RH-sponsored open houses in Conneaut, Ohio on December 5, 2017 and in Edinboro, Pennsylvania on December 6, 2017 to explain the Commission's environmental review process. If you are interested in attending, RH has requested that you RSVP at

[www.rhenergytrans.com/rsvp](http://www.rhenergytrans.com/rsvp) or by calling (844) 315-0857.

**Summary of the Proposed Project**

RH proposes to construct, modify, operate, and maintain a new interstate natural gas pipeline system located in Crawford and Erie Counties, Pennsylvania and Ashtabula County, Ohio. The Risberg Line Project would provide about 55 million standard cubic feet of natural gas per day to Dominion Energy Ohio and other prospective customers in the vicinity of the project.

The Risberg Line Project would consist of the following actions in Pennsylvania:

- Minor modifications at the existing County Line Compressor Station in Erie County;
  - installation of compression (approximately 1,600 horsepower, natural gas-fired), receipt metering, and appurtenant facilities at the existing (currently vacant) Meadville Compressor Station in Crawford County;
  - re-certification and use of an existing 12-inch-diameter pipeline extending 26.6 miles from the Meadville Compressor Station north to an existing valve set in Washington Township, Erie County, including construction of a new launcher/receiver;
  - next to the Meadville Compressor Station, construction of a 650-foot lateral within the existing 12-inch-diameter pipeline right-of-way to move gas from the Tennessee Gas Pipeline Company, LLC system to the existing pipeline; and
  - re-certification and use of a portion of an existing 8-inch-diameter pipeline extending from the 12-inch valve set west about 5.0 miles to a point in Elk Creek Township, Erie County (Line 10257), including construction of two new launcher/receivers.
- In Pennsylvania and Ohio, the project would include:
- Construction of 28.3 miles of new 12-inch-diameter pipeline from the west end of the recertified 8-inch-diameter pipeline to connect with Dominion Energy Ohio facilities located in North Kingsville, Ashtabula County, Ohio (Risberg Pipeline). The pipeline would be constructed in new right-of-way and include launcher/receiver facilities and mainline valves; and
  - construction of a new meter station at the terminus of the new pipeline in North Kingsville, Ashtabula County, Ohio.

The general location of the project facilities is shown in appendix 1.<sup>1</sup>

<sup>1</sup> The appendices referenced in this notice will not appear in the **Federal Register**. Copies of

## Land Requirements for Construction

Construction of the proposed facilities would disturb about 242 acres of land for the aboveground facilities, access roads, and the pipeline. Following construction, RH would maintain about 171 acres for permanent operation of the project's facilities; the remaining acreage would be restored and revert to former uses. Approximately 30 percent of the proposed new pipeline route parallels existing roads and railroads.

## The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us<sup>2</sup> to discover and address concerns the public may have about proposals. This process is referred to as "scoping." The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this notice, the Commission requests public comments on the scope of the issues to address in the EA. We will consider all filed comments during the preparation of the EA.

In the EA we will discuss impacts that could occur as a result of the construction and operation of the proposed project under these general headings:

- Geology and soils;
- land use;
- socioeconomics;
- water resources, fisheries, and wetlands;
- cultural resources;
- vegetation and wildlife;
- endangered and threatened species;
- air quality and noise;
- public safety; and
- cumulative impacts.

We will also evaluate reasonable alternatives to the proposed project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

The EA will present our independent analysis of the issues. The EA will be available in the public record through eLibrary. Depending on the comments received during the scoping process, we may also publish and distribute the EA

to the public for an allotted comment period. We will consider all comments on the EA before making our recommendations to the Commission. To ensure we have the opportunity to consider and address your comments, please carefully follow the instructions in the Public Participation section, beginning on page 2.

With this notice, we are asking agencies with jurisdiction by law and/or special expertise with respect to the environmental issues of this project to formally cooperate with us in the preparation of the EA.<sup>3</sup> Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the Public Participation section of this notice.

## Consultations Under Section 106 of the National Historic Preservation Act

In accordance with the Advisory Council on Historic Preservation's implementing regulations for section 106 of the National Historic Preservation Act, we are using this notice to initiate consultation with the applicable State Historic Preservation Offices (SHPO), and to solicit their views and those of other government agencies, interested Indian tribes, and the public on the project's potential effects on historic properties.<sup>4</sup> We will define the project-specific Area of Potential Effects (APE) in consultation with the SHPO(s) as the project develops. On natural gas facility projects, the APE at a minimum encompasses all areas subject to ground disturbance (examples include construction right-of-way, contractor/pipe storage yards, compressor stations, and access roads). Our EA for this project will document our findings on the impacts on historic properties and summarize the status of consultations under section 106.

## Environmental Mailing List

The environmental mailing list includes federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American Tribes; other interested parties; and local libraries and newspapers. This list also includes

all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within certain distances of aboveground facilities, and anyone who submits comments on the project. We will update the environmental mailing list as the analysis proceeds to ensure that we send the information related to this environmental review to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project.

If we publish and distribute the EA, copies will be sent to the environmental mailing list for public review and comment. If you would prefer to receive a paper copy of the document instead of the CD version or would like to remove your name from the mailing list, please return the attached Information Request (appendix 2).

## Becoming an Intervenor

In addition to involvement in the EA scoping process, you may want to become an intervenor which is an official party to the Commission's proceeding. Intervenor play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. An intervenor formally participates in the proceeding by filing a request to intervene. Instructions for becoming an intervenor are in the Document-less Intervention Guide under the e-filing link on the Commission's Web site. Motions to intervene are more fully described at <http://www.ferc.gov/resources/guides/how-to/intervene.asp>.

## Additional Information

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 at [www.ferc.gov](http://www.ferc.gov) using the eLibrary link. Click on the eLibrary link, click on General Search and enter the docket number, excluding the last three digits in the Docket Number field (*i.e.*, CP18-6). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at [FercOnlineSupport@ferc.gov](mailto:FercOnlineSupport@ferc.gov) or toll free at (866) 208-3676, or for TTY, contact (202) 502-8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific

appendices were sent to all those receiving this notice in the mail and are available at [www.ferc.gov](http://www.ferc.gov) using the link called eLibrary or from the Commission's Public Reference Room, 888 First Street NE., Washington, DC 20426, or call (202) 502-8371. For instructions on connecting to eLibrary, refer to the last page of this notice.

<sup>2</sup> We, us, and our refer to the environmental staff of the Commission's Office of Energy Projects.

<sup>3</sup> The Council on Environmental Quality regulations addressing cooperating agency responsibilities are at Title 40, Code of Federal Regulations, Part 1501.6.

<sup>4</sup> The Advisory Council on Historic Preservation's regulations are at Title 36, Code of Federal Regulations, Part 800. Those regulations define historic properties as any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places.

dockets. 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](http://www.ferc.gov/docs-filing/esubscription.asp).

Finally, public sessions or site visits will be posted on the Commission's calendar located at [www.ferc.gov/](http://www.ferc.gov/)

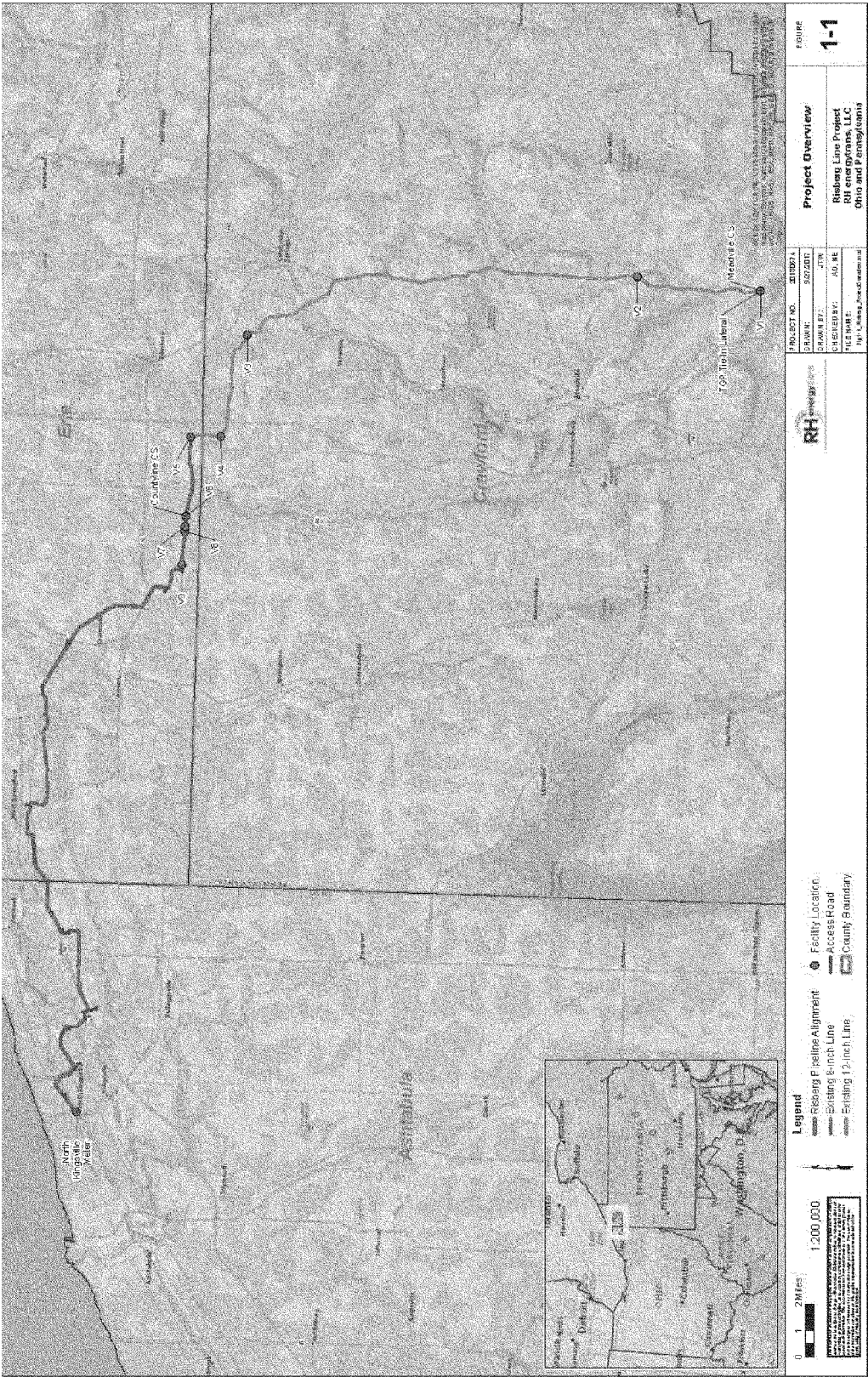
[EventCalendar/EventsList.aspx](#) along with other related information.

Dated: November 21, 2017.

**Kimberly D. Bose,**  
*Secretary.*

**BILLING CODE 6717-01-P**

Appendix 1



# Appendix 2

## INFORMATION REQUEST

### Risberg Line Project

Name \_\_\_\_\_

Agency \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip Code \_\_\_\_\_

☐ Please send me a paper copy of the published NEPA document

☐ Please remove my name from the mailing list

FROM \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**ATTN: OEP - Gas 2, PJ - 11.2**  
**Federal Energy Regulatory Commission**  
**888 First Street NE**  
**Washington, DC 20426**

*(Docket No. CP18-6-000 Risberg Line Project)*

**Staple or Tape Here**

[FR Doc. 2017-25722 Filed 11-28-17; 8:45 am]

BILLING CODE 6717-01-C

**DEPARTMENT OF HEALTH AND HUMAN SERVICES****Centers for Disease Control and Prevention****[30Day-18-0214]****Agency Forms Undergoing Paperwork Reduction Act Review**

In accordance with the Paperwork Reduction Act of 1995, the Centers for Disease Control and Prevention (CDC) has submitted the information collection request titled National Health Interview Survey (NHIS) to the Office of Management and Budget (OMB) for review and approval. CDC previously published a "Proposed Data Collection Submitted for Public Comment and Recommendations" notice on August 21, 2017. CDC received eight comments related to the previous notice. This notice serves to allow an additional 30 days for public and affected agency comments.

CDC will accept all comments for this proposed information collection project. The Office of Management and Budget is particularly interested in comments that:

(a) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(b) Evaluate the accuracy of the 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](mailto: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, 725 17th Street NW., Washington, DC 20503 or by fax to (202) 395-5806. Provide written comments within 30 days of notice publication.

**Proposed Project**

National Health Interview Survey (NHIS) (OMB Control Number 0920-0214, Expiration Date 12/31/2019)—Revision—National Center for Health Statistics (NCHS), Centers for Disease Control and Prevention (CDC).

**Background and Brief Description**

Section 306 of the Public Health Service (PHS) Act (42 U.S.C.), as amended, authorizes that the Secretary of Health and Human Services (HHS), acting through NCHS, shall collect statistics on the extent and nature of illness and disability of the population of the United States.

The annual National Health Interview Survey (NHIS) is a major source of general statistics on the health of the U.S. population and has been in the field continuously since 1957. This voluntary and confidential household-based survey collects demographic and health-related information from a nationally-representative sample of households and noninstitutionalized, civilian persons throughout the country. NHIS data have long been used by government, academic, and private researchers to evaluate both general health and specific issues, such as smoking, diabetes, health care coverage, and access to health care. The survey is also a leading source of data for the Congressionally-mandated "Health US" and related publications, as well as the single most important source of statistics to track progress toward Departmental health objectives.

The 2018 NHIS questionnaire remains largely unchanged from its 2017

version, with the exception of new supplements that are being added on asthma and cancer control. These supplements replace those from 2017 on receipt of culturally and linguistically appropriate health care services, diabetes, epilepsy, cognitive disability, complementary health, hepatitis B/C screening, vision, and heart disease and stroke prevention. Continuing from 2017 are supplemental questions about access to and utilization of care and barriers to care, disability and functioning, family food security, ABCS of heart disease and stroke prevention, immunizations, smokeless tobacco and e-cigarettes, and children's mental health.

In addition, in the last quarter of 2018, a portion of the regular 2018 NHIS sample will be used to carry out a dress rehearsal and systems test of the redesigned NHIS questionnaire that is scheduled for launch in January 2019. The redesigned questionnaire revises the NHIS both in terms of content and structure in order to (1) improve the measurement of covered health topics, (2) reduce respondent burden by shortening the length of the questionnaire and seamlessly integrating supplements, (3) harmonize overlapping content with other federal health surveys, (4) establish a long-term structure of ongoing and periodic topics, and (5) incorporate advances in survey methodology and measurement.

As in past years, and in accordance with the 1995 initiative to increase the integration of surveys within the DHHS, respondents to the 2018 NHIS will serve as the sampling frame for the Medical Expenditure Panel Survey. In addition, a subsample of NHIS respondents and/or members of commercial survey panels may be identified to participate in cognitive testing and methodological projects, using web and/or mail survey tools, that will inform the development of new rotating and supplemental content.

There is no cost to the respondents other than their time. Clearance is sought for three years, to collect data for 2018-2020, with an estimated annualized burden of 47,735 hours.

**ESTIMATED ANNUALIZED BURDEN HOURS**

| Type of respondents          | Form name                                   | Number of respondents | Number of responses per respondent | Average burden per response (in hours) |
|------------------------------|---------------------------------------------|-----------------------|------------------------------------|----------------------------------------|
| Adult Household Member ..... | Main Household Composition and Family Core. | 39,375                | 1                                  | 23/60                                  |
| Sample Adult .....           | Main Adult Core .....                       | 31,500                | 1                                  | 15/60                                  |
| Adult Family Member .....    | Main Child Core .....                       | 12,250                | 1                                  | 10/60                                  |

## ESTIMATED ANNUALIZED BURDEN HOURS—Continued

| Type of respondents          | Form name                            | Number of respondents | Number of responses per respondent | Average burden per response (in hours) |
|------------------------------|--------------------------------------|-----------------------|------------------------------------|----------------------------------------|
| Adult Family Member .....    | Main Supplements .....               | 39,375                | 1                                  | 20/60                                  |
| Adult Household Member ..... | Redesigned Household Roster .....    | 5,625                 | 1                                  | 5/60                                   |
| Sample Adult .....           | Redesigned Adult Questionnaire ..... | 4,500                 | 1                                  | 39/60                                  |
| Adult Family Member .....    | Redesigned Child Questionnaire ..... | 1,750                 | 1                                  | 27/60                                  |
| Adult Family Member .....    | Methodological Projects .....        | 15,000                | 1                                  | 20/60                                  |
| Adult Family Member .....    | Main Reinterview Survey .....        | 4,375                 | 1                                  | 5/60                                   |
| Adult Family Member .....    | Redesigned Reinterview Survey .....  | 625                   | 1                                  | 5/60                                   |

**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. 2017-25739 Filed 11-28-17; 8:45 am]

BILLING CODE 4163-18-P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA-2016-E-2181]

#### Determination of Regulatory Review Period for Purposes of Patent Extension; XURIDEN

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for XURIDEN and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human drug product.

**DATES:** Anyone with knowledge that any of the dates as published (in the **SUPPLEMENTARY INFORMATION** section) are incorrect may submit either electronic or written comments and ask for a redetermination by January 29, 2018. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by May 29, 2018. See “Petitions” in the **SUPPLEMENTARY INFORMATION** section for more information.

**ADDRESSES:** You may submit comments as follows. Please note that late, untimely filed comments will not be

considered. Electronic comments must be submitted on or before January 29, 2018. The <https://www.regulations.gov> electronic filing system will accept comments until midnight Eastern Time at the end of January 29, 2018.

Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

#### Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

#### Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

**Instructions:** All submissions received must include the Docket No. FDA-2016-E-2181 for “Determination of Regulatory Review Period for Purposes of Patent Extension; XURIDEN.” Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with § 10.20 (21 CFR 10.20) and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469,

September 18, 2015, or access the information at: <https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

**Docket:** For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301-796-3600.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98-417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100-670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human drug product XURIDEN (uridine triacetate). XURIDEN is indicated for the treatment of hereditary orotic aciduria.

Subsequent to this approval, the USPTO received a patent term restoration application for XURIDEN (U.S. Patent No. 6,258,795) from Wellstat Therapeutics Corp., and the USPTO requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated August 25, 2016, FDA advised the USPTO that this human drug product had undergone a regulatory review period and that the approval of XURIDEN represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

##### II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for XURIDEN is 8,494 days. Of this time, 8,254 days occurred during the testing phase of the regulatory review period, while 240 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 355(i)) became effective:* June 4, 1992. The applicant claims May 4, 1992, as the date the investigational new drug application (IND) became effective. However, FDA records indicate that the IND effective date was June 4, 1992, which was 30 days after FDA receipt of the IND.

2. *The date the application was initially submitted with respect to the human drug product under section 505(b) of the FD&C Act:* January 8, 2015. FDA has verified the applicant's claim that the new drug application (NDA) for XURIDEN (NDA 208169) was initially submitted on January 8, 2015.

3. *The date the application was approved:* September 4, 2015. FDA has verified the applicant's claim that NDA 208169 was approved on September 4, 2015.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 5 years of patent term extension.

##### III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and, under 21 CFR 60.24, ask for a redetermination (see **DATES**). Furthermore, as specified in § 60.30 (21

CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must comply with all the requirements of 21 CFR 60.30, including but not limited to: Must be timely (see **DATES**), must be filed in accordance with 21 CFR 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41-42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to <https://www.regulations.gov> at Docket No. FDA-2013-S-0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: November 24, 2017.

**Leslie Kux,**

*Associate Commissioner for Policy.*

[FR Doc. 2017-25770 Filed 11-28-17; 8:45 am]

**BILLING CODE 4164-01-P**

#### DEPARTMENT OF HEALTH AND HUMAN SERVICES

##### Food and Drug Administration

[Docket No. FDA-2017-N-6373]

##### **Roxane Laboratories, Inc.; Withdrawal of Approval of a New Drug Application for ROXICODONE (Oxycodone Hydrochloride) Sustained-Release Tablets, 10 Milligrams and 30 Milligrams**

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA or Agency) is withdrawing approval of new drug application (NDA) 020932 for ROXICODONE (oxycodone hydrochloride (HCl)) Sustained-Release Tablets, 10 milligrams (mg) and 30 mg, held by Roxane Laboratories, Inc. (Roxane). Roxane requested withdrawal of this application and waived its opportunity for a hearing.

**DATES:** The approval is withdrawn as of November 29, 2017.

**FOR FURTHER INFORMATION CONTACT:** Kristiana Brugger, Office of Regulatory Policy, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire

Ave., Bldg. 51, Rm. 6262, Silver Spring, MD 20993, 301-796-3601.

**SUPPLEMENTARY INFORMATION:** NDA 020932 for ROXICODONE SR (oxycodone HCl) Sustained-Release Tablets, 10 mg and 30 mg, was received on December 29, 1997, and approved on October 26, 1998, as safe and effective “for the management of moderate to severe pain where use of an opioid analgesic is appropriate for more than a few days” (see approval letter, available at [https://www.accessdata.fda.gov/drugsatfda\\_docs/appletter/1998/20932ltr.pdf](https://www.accessdata.fda.gov/drugsatfda_docs/appletter/1998/20932ltr.pdf)). (FDA has verified the Web site addresses as of the date this document publishes in the **Federal Register**, but Web sites are subject to change over time.) FDA later determined, however, that this application had serious deficiencies. Accordingly, on February 3, 2000, FDA granted Roxane’s request for a stay of the effective date of the approval of NDA 020932 until such time as: (1) Roxane submits additional data; (2) FDA has reviewed those data; and (3) FDA has determined that the submitted data support a finding of safety and effectiveness without reliance on investigations to which Roxane does not have a right of reference.<sup>1</sup> Roxane has not submitted any additional information to support approval of NDA 020932, nor has it submitted any annual reports for this NDA since 2002. The product has never been marketed.<sup>2</sup> Roxane requested that FDA withdraw approval of NDA 020932 for ROXICODONE (oxycodone HCl) Sustained Release Tablets, and waived the opportunity for a hearing concerning this action.

For the reasons discussed above, approval of NDA 020932, and all amendments and supplements thereto, is withdrawn. Distribution of ROXICODONE (oxycodone HCl) Sustained-Release Tablets, 10 mg and 30 mg, in interstate commerce without an approved application is illegal and subject to regulatory action (see sections 505(a) and 301(d) of the FD&C Act (21 U.S.C. 355(a) and 331(d)).

<sup>1</sup> February 3, 2000 FDA Response to Citizen Petition and Petition for Stay of Action, Docket FDA-1999-P-2921, available at <https://www.regulations.gov/document?D=FDA-1999-P-2921-0014>.

<sup>2</sup> Reflecting their non-marketed status, ROXICODONE (oxycodone HCl) Sustained-Release Tablets, 10 mg and 30 mg, are on the “Discontinued Drug Products” list in the Orange Book, where the drug is listed as “Roxicodone” and described as “extended release” (see [https://www.accessdata.fda.gov/scripts/cder/ob/results\\_product.cfm?Appl\\_Type=N&Appl\\_No=020932](https://www.accessdata.fda.gov/scripts/cder/ob/results_product.cfm?Appl_Type=N&Appl_No=020932)).

Dated: November 24, 2017.

**Leslie Kux,**

*Associate Commissioner for Policy.*

[FR Doc. 2017-25771 Filed 11-28-17; 8:45 am]

**BILLING CODE 4164-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA-2017-D-5570]

#### Select Updates for Recommendations for Clinical Laboratory Improvement Amendments of 1988 Waiver Applications for Manufacturers of In Vitro Diagnostic Devices; Draft Guidance for Industry and Food and Drug Administration Staff; 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 the draft guidance entitled “Select Updates for Recommendations for Clinical Laboratory Improvement Amendments of 1988 (CLIA) Waiver Applications for Manufacturers of In Vitro Diagnostic Devices.” FDA has developed this draft guidance to implement a section of the 21st Century Cures Act (Cures Act) that requires FDA to revise “V. Demonstrating Insignificant Risk of an Erroneous Result—Accuracy” of the guidance “Recommendations for Clinical Laboratory Improvement Amendments of 1988 (CLIA) Waiver Applications for Manufacturers of In Vitro Diagnostic Devices” (“2008 CLIA Waiver Guidance”) that was issued on January 30, 2008. This draft guidance updates FDA’s thinking regarding the appropriate use of comparable performance between a waived user and a moderately complex laboratory user to demonstrate accuracy. This draft guidance is not final nor is it in effect at this time.

**DATES:** Submit either electronic or written comments on the draft guidance by January 29, 2018 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

**ADDRESSES:** You may submit comments on any guidance at any time 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):** Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

**Instructions:** All submissions received must include the Docket No. FDA-2017-D-5570 for “Recommendations for Clinical Laboratory Improvement Amendments of 1988 (CLIA) Waiver Applications for Manufacturers of In Vitro Diagnostic Devices.” 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 Dockets Management Staff 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 Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

**Docket:** For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

An electronic copy of the guidance document is available for download from the internet. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance. Submit written requests for a single hard copy of the draft guidance document entitled "Recommendations for Clinical Laboratory Improvement Amendments of 1988 (CLIA) Waiver Applications for Manufacturers of In Vitro Diagnostic Devices" to the Office of the Center Director, Guidance and Policy Development, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993-0002. Send one self-addressed adhesive label to assist that office in processing your request.

**FOR FURTHER INFORMATION CONTACT:** Marina Kondratovich, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 4672, Silver Spring, MD 20993-0002, 301-796-6036; or Peter Tobin, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5657, Silver Spring, MD 20993-0002, 301-796-6169.

**SUPPLEMENTARY INFORMATION:**

## I. Background

FDA has developed this draft guidance to implement section 3057 of the Cures Act (Pub. L. 114-255), which requires FDA to revise "V. Demonstrating Insignificant Risk of an Erroneous Result—Accuracy" of the guidance "Recommendations for Clinical Laboratory Improvement Amendments of 1988 (CLIA) Waiver Applications for Manufacturers of In Vitro Diagnostic Devices" ("2008 CLIA Waiver Guidance") that was issued on January 30, 2008. This draft guidance updates FDA's thinking regarding the appropriate use of comparable performance between a waived user and a moderately complex laboratory user to demonstrate accuracy. The 2008 CLIA Waiver Guidance remains in effect, in its current form, until this draft guidance is finalized, at which time the updates in section III of this draft guidance will supersede the recommendations in section V of the 2008 CLIA Waiver Guidance.

FDA will incorporate the updates of the final version of this draft guidance into "V. Demonstrating Insignificant Risk of an Erroneous Result—Accuracy" of the 2008 CLIA Waiver Guidance. The remainder of the 2008 CLIA Waiver Guidance will not be changed by this update and will remain in effect.

The Secretary of Health and Human Services has delegated to FDA the authority to determine whether particular tests are "simple" and have "an insignificant risk of an erroneous result" under CLIA and are thus eligible for waiver categorization (69 FR 22849, April 27, 2004). The Centers for Medicare & Medicaid Services (CMS) is responsible for oversight of clinical laboratories, which includes issuing Certificates of Waiver. CLIA requires that clinical laboratories obtain a certificate before accepting materials derived from the human body for laboratory tests (42 U.S.C. 263a(b)). Laboratories that perform only tests that are "simple" and that have an "insignificant risk of an erroneous result" may obtain a certificate of waiver (42 U.S.C. 263a(d)(2)).

CLIA, 42 U.S.C. 263a(d)(3) Examinations and Procedures, as modified by the Food and Drug Administration Modernization Act of 1997 (FDAMA), reads as follows regarding tests that may be performed by laboratories with a Certificate of Waiver:

"The examinations and procedures [that may be performed by a laboratory with a Certificate of Waiver] . . . are laboratory examinations and procedures that have been approved by the Food and Drug

Administration for home use or that, as determined by the Secretary, are simple laboratory examinations and procedures that have an insignificant risk of an erroneous result, including those that—(A) employ methodologies that are so simple and accurate as to render the likelihood of erroneous results by the user negligible, or (B) the Secretary has determined pose no unreasonable risk of harm to the patient if performed incorrectly."

The 2008 CLIA Waiver Guidance describes recommendations for device manufacturers about study design and analysis for CLIA Waiver by Application to support an FDA determination as to whether the device meets the statutory criteria for waiver described above. This update provides additional details and pathways for demonstrating that a test has an insignificant risk of erroneous result which is a key element for obtaining a CLIA Waiver by Application.

In developing this specific update, we have considered interactions with stakeholders since the issuance of the final guidance on January 30, 2008.

## II. Significance of Guidance

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 "Recommendations for Clinical Laboratory Improvement Amendments of 1988 (CLIA) Waiver Applications for Manufacturers of In Vitro Diagnostic Devices." 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. This draft guidance is not subject to Executive Order 12866.

## III. Electronic Access

Persons interested in obtaining a copy of the draft guidance may do so by downloading an electronic copy from the internet. A search capability for all Center for Devices and Radiological Health guidance documents is available at <https://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm>. Guidance documents are also available at <https://www.regulations.gov>. Persons unable to download an electronic copy of "Recommendations for Clinical Laboratory Improvement Amendments of 1988 (CLIA) Waiver Applications for Manufacturers of In Vitro Diagnostic Devices" may send an email request to [CDRH-Guidance@fda.hhs.gov](mailto:CDRH-Guidance@fda.hhs.gov) to receive an electronic copy of the document. Please use the document number GUD1627 to identify the guidance you are requesting.

#### IV. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information found in FDA regulations. The collections of information in this guidance were approved under OMB control number 0910–0598. The collections of information in 21 CFR part 54 have been approved under 0910–0396, and the collections of information in 21 CFR parts 50 and 56 have been approved under OMB control number 0910–0755.

Dated: November 22, 2017.

**Leslie Kux,**

*Associate Commissioner for Policy.*

[FR Doc. 2017–25775 Filed 11–28–17; 8:45 am]

BILLING CODE 4164–01–P

#### DEPARTMENT OF HEALTH AND HUMAN SERVICES

##### Food and Drug Administration

[Docket No. FDA–2016–E–2216]

##### Determination of Regulatory Review Period for Purposes of Patent Extension; VELTASSA

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for VELTASSA and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human drug product.

**DATES:** Anyone with knowledge that any of the dates as published (in the **SUPPLEMENTARY INFORMATION** section) are incorrect may submit either electronic or written comments and ask for a redetermination by January 29, 2018. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by May 29, 2018. See “Petitions” in the **SUPPLEMENTARY INFORMATION** section for more information.

**ADDRESSES:** You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before January 29, 2018. The <https://www.regulations.gov>

electronic filing system will accept comments until midnight Eastern Time at the end of January 29, 2018. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

##### Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

##### Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

**Instructions:** All submissions received must include the Docket No. FDA–2016–E–2216 for “Determination of Regulatory Review Period for Purposes of Patent Extension; VELTASSA.” Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9

a.m. and 4 p.m., Monday through Friday.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with § 10.20 (21 CFR 10.20) and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

**Docket:** For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301–796–3600.

##### SUPPLEMENTARY INFORMATION:

##### I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product,

medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: a testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human drug product VELTASSA (patiromer sorbitex calcium). VELTASSA is indicated for the treatment of hyperkalemia. Subsequent to this approval, the USPTO received a patent term restoration application for VELTASSA (U.S. Patent No. 8,147,873) from Relypsa, Inc., and the USPTO requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated September 1, 2016, FDA advised the USPTO that this human drug product had undergone a regulatory review period and that the approval of VELTASSA represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

## II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for VELTASSA is 2,844 days. Of this time, 2,478 days occurred during the testing phase of the regulatory review period, while 366 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 355(i)) became effective:* January 9, 2008. FDA has verified the applicant's claim that January 9, 2008,

is the date the investigational new drug application (IND) became effective.

2. *The date the application was initially submitted with respect to the human drug product under section 505(b) of the FD&C Act:* October 21, 2014. FDA has verified the applicant's claim that the new drug application (NDA) for VELTASSA (NDA 205739) was initially submitted on October 21, 2014.

3. *The date the application was approved:* October 21, 2015. FDA has verified the applicant's claim that NDA 205739 was approved on October 21, 2015.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 832 days of patent term extension.

## III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and, under 21 CFR 60.24, ask for a redetermination (see DATES). Furthermore, as specified in § 60.30 (21 CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must comply with all the requirements of § 60.30, including but not limited to: Must be timely (see DATES), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to <https://www.regulations.gov> at Docket No. FDA-2013-S-0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: November 24, 2017.

**Leslie Kux,**

*Associate Commissioner for Policy.*

[FR Doc. 2017-25761 Filed 11-28-17; 8:45 am]

**BILLING CODE 4164-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA-2017-D-5625]

### Recommendations for Dual 510(k) and Clinical Laboratory Improvement Amendments Waiver by Application Studies; Draft Guidance for Industry and Food and Drug Administration Staff; 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 the draft guidance entitled "Recommendations for Dual 510(k) and Clinical Laboratory Improvement Amendments (CLIA) Waiver by Application Studies." It describes study designs for generating data that supports *both* 510(k) clearance and CLIA waived categorization. Use of the Dual 510(k) and CLIA Waiver by Application pathway is optional; however, FDA believes this pathway is in many instances the least burdensome and fastest approach for manufacturers to obtain a CLIA waived categorization in addition to 510(k) clearance for new In Vitro Diagnostic (IVD) devices. FDA believes increased use of this pathway will speed up the process of bringing simple and accurate IVD devices to CLIA waived settings, which will better serve patients and providers. This draft guidance is not final nor is it in effect at this time.

**DATES:** Submit either electronic or written comments on the draft guidance by January 29, 2018 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

**ADDRESSES:** You may submit comments on any guidance at any time 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):* Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

*Instructions:* All submissions received must include the Docket No. FDA-2017-D-5625 for “Recommendations for Dual 510(k) and CLIA Waiver by Application Studies.” 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 Dockets Management Staff 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 Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed

except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

*Docket:* For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

You may submit comments on any guidance at any time (see 21CFR 10.115(g)(5)).

An electronic copy of the guidance document is available for download from the internet. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance. Submit written requests for a single hard copy of the draft guidance document entitled “Recommendations for Dual 510(k) and CLIA Waiver by Application Studies” to the Office of the Center Director, Guidance and Policy Development, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993-0002. Send one self-addressed adhesive label to assist that office in processing your request.

**FOR FURTHER INFORMATION CONTACT:** Peter Tobin, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5645, Silver Spring, MD 20993-0002, 240-402-6169.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

In an application for CLIA waived categorization (CLIA Waiver by Application) a manufacturer submits evidence to FDA that a test, initially categorized as moderate complexity, meets the CLIA statutory criteria for waiver, 42 U.S.C. 263a(d)(3), and requests that FDA categorize the test as waived. Historically, CLIA Waiver by Application has followed clearance or approval of an IVD test. This stepwise approach currently remains the most utilized path by manufacturers. For additional information, please see FDA’s Guidance, “Administrative Procedures for CLIA Categorization” (<https://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/UCM070889>).

While a premarket notification (510(k)) and CLIA Waiver by Application each include discrete elements not required in the other, both submissions include comparison and reproducibility studies. For a 510(k), such studies are often performed by trained operators (*i.e.*, laboratory professionals who meet the qualifications to perform moderate complexity testing and with previous training in performing the test; sometimes referred to as “moderate complexity users”). For a CLIA Waiver by Application, such studies must be conducted by untrained operators (*i.e.*, operators in waived settings with limited or no training or hands on experience in conducting laboratory testing; sometimes referred to as “waived users”).

An applicant may choose to conduct a single set of comparison and reproducibility studies with untrained operators to satisfy associated requirements for both 510(k) and CLIA Waiver by Application. To streamline the review of such data, the Dual 510(k) and CLIA Waiver by Application (Dual Submission) pathway, was established as part of the Medical Device User Fee Amendments of 2012 (MDUFA III), allowing the review of both a 510(k) and CLIA Waiver Application within a single submission with a reduced overall review time.

This guidance leverages FDA’s experience implementing this pathway in MDUFA III in order to make the Dual Submission pathway least burdensome. Use of this guidance is expected to reduce study-related costs and provide time savings for manufacturers of certain Class II IVD devices intended for CLIA waived settings.

##### **II. Significance of Guidance**

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 Recommendations for Dual 510(k) and CLIA Waiver by Application Studies. 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. This guidance is not subject to Executive Order 12866.

##### **III. Electronic Access**

Persons interested in obtaining a copy of the draft guidance may do so by downloading an electronic copy from the Internet. A search capability for all Center for Devices and Radiological Health guidance documents is available

at <https://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm>.

Guidance documents are also available at <https://www.regulations.gov>. Persons unable to download an electronic copy of "Recommendations for Dual 510(k) and CLIA Waiver by Application Studies" may send an email request to [CDRH-Guidance@fda.hhs.gov](mailto:CDRH-Guidance@fda.hhs.gov) to receive an electronic copy of the document. Please use the document number 16038 to identify the guidance you are requesting.

#### IV. Paperwork Reduction Act of 1995

This draft guidance also refers to previously approved collections of information found in FDA regulations. The collections of information in 21 CFR 54 have been approved under 0910-0396; the collections of information in 21 CFR parts 50 and 56 have been approved under OMB control number 0910-0755, the collections of information in 21 CFR 807 have been approved under 0910-0120; the collections of information in the guidance document entitled "Recommendations for Clinical Laboratory Improvement Amendments of 1988 (CLIA) Waiver Applications for Manufacturers of In Vitro Diagnostic Devices" have been approved under 0910-0598, the collections of information in the guidance document entitled "Requests for Feedback on Medical Device Submissions" have been approved under 0910-0756; and the collections of information in the guidance document entitled "Administrative Procedures for Clinical Laboratory Improvement Amendments of 1988 Categorization" have been approved under 0910-0607.

Dated: November 22, 2017.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2017-25774 Filed 11-28-17; 8:45 am]

BILLING CODE 4164-01-P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA-2016-E-1292]

#### Determination of Regulatory Review Period for Purposes of Patent Extension; REXULTI

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period

for REXULTI and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human drug product.

**DATES:** Anyone with knowledge that any of the dates as published (in the **SUPPLEMENTARY INFORMATION** section) are incorrect may submit either electronic or written comments and ask for a redetermination by January 29, 2018. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by May 29, 2018. See "Petitions" in the **SUPPLEMENTARY INFORMATION** section for more information.

**ADDRESSES:** You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before January 29, 2018. The <https://www.regulations.gov> electronic filing system will accept comments until midnight Eastern Time at the end of January 29, 2018. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

#### Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a

written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

#### Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

**Instructions:** All submissions received must include the Docket No. FDA-2016-E-1292 for "Determination of Regulatory Review Period for Purposes of Patent Extension; REXULTI." Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with § 10.20 (21 CFR 10.20) and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.gpo.gov/>

[fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf](https://www.fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf).

**Docket:** For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301-796-3600.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98-417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100-670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human drug product REXULTI (brexipiprazole). REXULTI is indicated for:

- Use as an adjunctive therapy to antidepressants for the treatment of major depressive disorder.

- Treatment of schizophrenia.

Subsequent to this approval, the USPTO received a patent term restoration application for REXULTI (U.S. Patent No. 7,888,362) from Otsuka Pharmaceutical Co., Ltd., and the USPTO requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated July 12, 2016, FDA advised the USPTO that this human drug product had undergone a regulatory review period and that the approval of REXULTI represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

**II. Determination of Regulatory Review Period**

FDA has determined that the applicable regulatory review period for REXULTI is 2,636 days. Of this time, 2,271 days occurred during the testing phase of the regulatory review period, while 365 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 355(i)) became effective:* April 23, 2008. The applicant claims April 20, 2008, as the date the investigational new drug application (IND) became effective. However, FDA records indicate that the IND effective date was April 23, 2008, which was 30 days after FDA receipt of the IND.

2. *The date the application was initially submitted with respect to the human drug product under section 505(b) of the FD&C Act:* July 11, 2014. FDA has verified the applicant's claim that the new drug application (NDA) for REXULTI (NDA 205422) was initially submitted on July 11, 2014.

3. *The date the application was approved:* July 10, 2015. FDA has verified the applicant's claim that NDA 205422 was approved on July 10, 2015.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 868 days of patent term extension.

**III. Petitions**

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and, under 21 CFR 60.24, ask for a redetermination (see **DATES**). Furthermore, as specified in § 60.30 (21

CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must comply with all the requirements of § 60.30, including but not limited to: Must be timely (see **DATES**), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41-42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to <https://www.regulations.gov> at Docket No. FDA-2013-S-0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: November 24, 2017.

**Leslie Kux,**

*Associate Commissioner for Policy.*

[FR Doc. 2017-25772 Filed 11-28-17; 8:45 am]

**BILLING CODE 4164-01-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Food and Drug Administration**

[Docket No. FDA-2014-E-1653]

**Determination of Regulatory Review Period for Purposes of Patent Extension; SOLX SYSTEM**

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for SOLX SYSTEM and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human drug product.

**DATES:** Anyone with knowledge that any of the dates as published (in the **SUPPLEMENTARY INFORMATION** section) are incorrect may submit either electronic or written comments and ask for a redetermination by January 29, 2018. Furthermore, any interested person may petition FDA for a determination

regarding whether the applicant for extension acted with due diligence during the regulatory review period by May 29, 2018. See “Petitions” in the **SUPPLEMENTARY INFORMATION** section for more information.

**ADDRESSES:** You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before January 29, 2018. The <https://www.regulations.gov> electronic filing system will accept comments until midnight Eastern Time at the end of January 29, 2018.

Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

#### *Electronic Submissions*

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

#### *Written/Paper Submissions*

Submit written/paper submissions as follows:

- **Mail/Hand delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

**Instructions:** All submissions received must include the Docket No. FDA-2014-E-1653 for “Determination of Regulatory Review Period for Purposes of Patent Extension; SOLX SYSTEM.” Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with § 10.20 (21 CFR 10.20) and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

**Docket:** For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

#### **FOR FURTHER INFORMATION CONTACT:**

Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301-796-3600.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98-417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100-670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human drug product SOLX SYSTEM. SOLX SYSTEM is indicated for:

- Pre-storage leukocyte reduction of Citrate Phosphate Dextrose Solution (CPD) whole blood followed by preparation of AS-7 Red Cells, Leukocytes Reduced, prepared at room temperature and placed at 1 to 6 °C within 24 hours of collection. AS-7 Red Cells, Leukocytes Reduced, may be stored at 1 to 6 °C for up to 42 days after collection.

- Pre-storage leukocyte reduction of CPD whole blood held at 1 to 6 °C and preparation of AS-7 Red Cells, Leukocytes Reduced within 72 hours after collection. AS-7 Red Cells, Leukocytes Reduced, may be stored at 1 to 6 °C for up to 42 days after collection.

- Preparation of Fresh Frozen Plasma (FFP), Leukocytes Reduced prepared from a whole blood collection and frozen at -18 °C or below within 8 hours of collection. FFP, Leukocytes

Reduced may be stored at  $-18^{\circ}\text{C}$  or colder for up to 1 year after collection.

- Preparation of Plasma Frozen within 24 hours after Phlebotomy (PF24), Leukocytes Reduced prepared from a whole blood collection. The product can be held at room temperature up to 8 hours after collection, refrigerated at  $1$  to  $6^{\circ}\text{C}$  until separated, and placed at  $-18^{\circ}\text{C}$  or below within 24 hours of whole blood collection. PF24, Leukocytes Reduced may be stored at  $-18^{\circ}\text{C}$  or colder for up to 1 year after collection.

Subsequent to this approval, the USPTO received a patent term restoration application for SOLX SYSTEM (U.S. Patent No. 6,150,085) from Haemonetics Corporation, and the USPTO requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated November 5, 2015, FDA advised the USPTO that this human drug product had undergone a regulatory review period and that the approval of SOLX SYSTEM represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

## II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for SOLX SYSTEM is 1,250 days. Of this time, 708 days occurred during the testing phase of the regulatory review period, while 542 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 355(i)) became effective:* November 24, 2009. The applicant claims November 25, 2009, as the date the investigational new drug application (IND) became effective. However, FDA records indicate that the IND effective date was November 24, 2009, which was 30 days after FDA receipt of the IND.

2. *The date the application was initially submitted with respect to the human drug product under section 505(b) of the FD&C Act:* November 1, 2011. FDA has verified the applicant's claim that the new drug application (NDA) for SOLX SYSTEM (NDA BN110059) was initially submitted on November 1, 2011.

3. *The date the application was approved:* April 25, 2013. FDA has verified the applicant's claim that NDA BN110059 was approved on April 25, 2013.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 894 days of patent term extension.

## III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and, under 21 CFR 60.24, ask for a redetermination (see **DATES**). Furthermore, as specified in § 60.30 (21 CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must comply with all the requirements of § 60.30, including but not limited to: Must be timely (see **DATES**), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to <https://www.regulations.gov> at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: November 24, 2017.

**Leslie Kux,**

Associate Commissioner for Policy.

[FR Doc. 2017–25773 Filed 11–28–17; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA–2009–N–0505]

#### Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Recordkeeping and Reporting Requirements for Human Food and Cosmetics Manufactured From, Processed With, or Otherwise Containing Material From Cattle

**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 December 29, 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 [oir\\_submission@omb.eop.gov](mailto:oir_submission@omb.eop.gov). All comments should be identified with the OMB control number 0910–0623. Also, include the FDA docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:** Ila S. Mizrahi, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–7726, [PRASStaff@fda.hhs.gov](mailto:PRASStaff@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.

#### Recordkeeping and Reporting Requirements for Human Food and Cosmetics Manufactured From, Processed With, or Otherwise Containing Material From Cattle—21 CFR 189.5 and 700.27

OMB Control Number 0910–0623—Extension

FDA's regulations in §§ 189.5 and 700.27 (21 CFR 189.5 and 700.27) set forth bovine spongiform encephalopathy (BSE)-related restrictions applicable to FDA-regulated human food and cosmetics. The regulations designate certain materials from cattle as “prohibited cattle materials,” including specified risk materials (SRMs), the small intestine of cattle not otherwise excluded from being a prohibited cattle material, material from nonambulatory disabled cattle, and mechanically separated (MS) beef. Sections 189.5(c) and 700.27(c) set forth the requirements for recordkeeping and records access for FDA-regulated human food, including dietary supplements, and cosmetics manufactured from, processed with, or otherwise containing material derived

from cattle. FDA issued these recordkeeping regulations under the adulteration provisions in sections 402(a)(2)(C), (a)(3), (a)(4), (a)(5), 601(c), and 701(a) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 342(a)(2)(C), (a)(3), (a)(4), (a)(5), 361(c), and 371(a)). Under section 701(a) of the FD&C Act, FDA is authorized to issue regulations for the FD&C Act's efficient enforcement. With regard to records concerning imported human food and cosmetics, FDA relied on its authority under sections 701(b) and 801(a) of the FD&C Act (21 U.S.C. 371(b) and 381(a)). Section 801(a) of the FD&C Act provides requirements with regard to imported human food and cosmetics and provides for refusal of admission of human food and cosmetics that appear to be adulterated into the United States. Section 701(b) of the FD&C Act authorizes the Secretaries of Treasury and Health and Human Services to jointly prescribe regulations for the efficient enforcement of section 801 of the FD&C Act.

These requirements are necessary because once materials are separated from an animal it may not be possible, without records, to know the following: (1) Whether cattle material may contain SRMs (brain, skull, eyes, trigeminal ganglia, spinal cord, vertebral column (excluding the vertebrae of the tail, the transverse processes of the thoracic and lumbar vertebrae and the wings of the sacrum), and dorsal root ganglia from animals 30 months and older and tonsils and distal ileum of the small intestine from all animals of all ages); (2) whether the source animal for cattle material was inspected and passed; (3) whether the source animal for cattle material was nonambulatory disabled or MS beef; and (4) whether tallow in human food or cosmetics contain less than 0.15 percent insoluble impurities.

FDA's regulations in §§ 189.5(c) and 700.27(c) require manufacturers and processors of human food and cosmetics manufactured from, processed with, or otherwise containing material from cattle establish and maintain records sufficient to demonstrate that the human food or cosmetics are not manufactured from, processed with, or otherwise contains prohibited cattle materials. These records must be retained for 2 years at the manufacturing

or processing establishment or at a reasonably accessible location. Maintenance of electronic records is acceptable, and electronic records are considered to be reasonably accessible if they are accessible from an onsite location. Records required by these sections and existing records relevant to compliance with these sections must be available to FDA for inspection and copying. Existing records may be used if they contain all of the required information and are retained for the required time period.

Because FDA does not easily have access to records maintained at foreign establishments, FDA regulations in §§ 189.5(c)(6) and 700.27(c)(6), respectively, require that when filing for entry with U.S. Customs and Border Protection (CBP), the importer of record of human food or cosmetics manufactured from, processed with, or otherwise containing cattle material must affirm that the human food or cosmetics were manufactured from, processed with, or otherwise containing-cattle material and must affirm that the human food or cosmetics were manufactured in accordance with the applicable requirements of §§ 189.5 or 700.27. In addition, if human food or cosmetics were manufactured from, processed with, or otherwise containing-cattle material, the importer of record must provide within 5 business days records sufficient to demonstrate that the human food or cosmetics were not manufactured from, processed with, or otherwise contains prohibited cattle material, if requested.

Under FDA's regulations, FDA may designate a country from which cattle materials inspected and passed for human consumption are not considered prohibited cattle materials, and their use does not render human food or cosmetics adulterated. Sections 189.5(e) and 700.27(e) provide that a country seeking to be designated must send a written request to the Director of the Center for Food Safety and Applied Nutrition (CFSAN Director). The information the country is required to submit includes information about a country's BSE case history, risk factors, measures to prevent the introduction and transmission of BSE, and any other information relevant to determining whether SRMs, the small intestine of

cattle not otherwise excluded from being a prohibited cattle material, material from nonambulatory disabled cattle, or MS beef from the country seeking designation should be considered prohibited cattle materials. FDA uses the information to determine whether to grant a request for designation and to impose conditions if a request is granted.

Sections 189.5 and 700.27 further state that countries designated under §§ 189.5(e) and 700.27(e) will be subject to future review by FDA to determine whether their designations remain appropriate. As part of this process, FDA may ask designated countries to confirm their BSE situation and that the information submitted by them, in support of their original application, has remained unchanged. FDA may revoke a country's designation if FDA determines that it is no longer appropriate. Therefore, designated countries may respond to periodic FDA requests by submitting information to confirm their designations remain appropriate. FDA uses the information to ensure their designations remain appropriate.

*Description of Respondents:* Respondents to this information collection include manufacturers, processors, and importers of FDA regulated human food, including dietary supplements, and cosmetics manufactured from, processed with, or otherwise containing material derived from cattle, as well as, with regard to §§ 189.5(e) and 700.27(e), foreign governments seeking designation under those regulations.

In the **Federal Register** of June 15, 2017 (82 FR 27501), FDA published a 60-day notice requesting public comment on the proposed collection of information. FDA received three comments. One comment was unrelated to the information collection; one comment noted that the length of time to keep records was insufficient but offered no suggested timeframe; and one comment supported the information collection. After evaluating these comments FDA will not revise the information collection.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN <sup>1</sup>

| 21 CFR section                                        | Number of respondents | Number of responses per respondent | Total annual responses | Average burden per response | Total hours |
|-------------------------------------------------------|-----------------------|------------------------------------|------------------------|-----------------------------|-------------|
| 189.5(c)(6) and 700.27(c)(6) .....                    | 54,825                | 1                                  | 54,825                 | 0.033 (2 minutes) .....     | 1,809       |
| 189.5(e) and 700.27(e); request for designation ..... | 1                     | 1                                  | 1                      | 80 .....                    | 80          |

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN <sup>1</sup>—Continued

| 21 CFR section                                                 | Number of respondents | Number of responses per respondent | Total annual responses | Average burden per response | Total hours |
|----------------------------------------------------------------|-----------------------|------------------------------------|------------------------|-----------------------------|-------------|
| 189.5(e) and 700.27(e); response to request for review by FDA. | 1                     | 1                                  | 1                      | 26 .....                    | 26          |
| Total .....                                                    | .....                 | .....                              | .....                  | .....                       | 1,915       |

<sup>1</sup> There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN <sup>1</sup>

| Activity                  | Number of recordkeepers | Number of records per recordkeeper | Total annual records | Average burden per recordkeeper | Total hours |
|---------------------------|-------------------------|------------------------------------|----------------------|---------------------------------|-------------|
| Domestic facilities ..... | 697                     | 52                                 | 36,244               | 0.25 (15 minutes) .....         | 9,061       |
| Foreign facilities .....  | 916                     | 52                                 | 47,632               | 0.25 (15 minutes) .....         | 11,908      |
| Total .....               | .....                   | .....                              | .....                | .....                           | 20,969      |

<sup>1</sup> There are no capital costs or operating and maintenance costs associated with this collection of information.

Except where otherwise noted, this estimate is based on FDA's estimate of the number of facilities affected by the final rule entitled "Recordkeeping Requirements for Human Food and Cosmetics Manufactured From, Processed With, or Otherwise Containing Material From Cattle" published in the **Federal Register** of October 11, 2006 (71 FR 59653).

**Reporting:** FDA's regulations in §§ 189.5(c)(6) and 700.27(c)(6) impose a reporting burden on importers of human food and cosmetics manufactured from, processed with, or otherwise containing cattle material. Importers of these products must affirm that the human food or cosmetics are not manufactured from, processed with, or otherwise contain prohibited cattle materials and must affirm that the human food or cosmetics were manufactured in accordance with the applicable requirements of §§ 189.5 or 700.27. The affirmation is made by the importer of record at CBP entry. Affirmation by importers is expected to take approximately 2 minutes per entry line. Table 1 shows 54,825 lines of human food and cosmetics likely to contain cattle materials are imported annually. The reporting burden of affirming whether import entry lines contain cattle-derived materials is estimated to take 1,809 hours annually (54,825 lines × 2 minutes per line).

FDA's estimate of the reporting burden for designation under §§ 189.5 and 700.27 is based on its experience and the average number of requests for designation received in the past 3 years. In the last 3 years, FDA has not received any requests for designation. Thus, FDA estimates that one or fewer will be received annually in the future. Based

on this experience, FDA estimates the annual number of new requests for designation will be one. FDA estimates that preparing the information required by §§ 189.5 and 700.27 and submitting it to FDA in the form of a written request to the CFSAN Director will require a burden of approximately 80 hours per request. Thus, the burden for new requests for designation is estimated to be 80 hours annually, as shown in table 1, row 2.

Under §§ 189.5(e) and 700.27(e), designated countries are subject to future review by FDA and may respond to periodic FDA requests by submitting information to confirm their designations remain appropriate. In the last 3 years, FDA has not requested any reviews. Thus, FDA estimates that one or fewer will occur annually in the future. FDA estimates that the designated country undergoing a review in the future will need one-third of the time it took preparing its request for designation to respond to FDA's request for review, or 26 hours (80 hours × 0.33 = 26.4 hours, rounded to 26). The annual burden for reviews is estimated to be 26 hours, as shown in table 1, row 3. The total reporting burden for this information collection is estimated to be 1,915 hours annually.

**Recordkeeping:** FDA estimates that there are 697 domestic facility relationships and 916 foreign facility relationships consisting of the following facilities: An input supplier of cattle-derived materials that requires records (the upstream facility) and a purchaser of cattle-derived materials requiring documentation (this may be a human food or cosmetics manufacturer or processor). The recordkeeping burden of FDA's regulations in §§ 189.5(c) and

700.27(c) is the burden of sending, verifying, and storing documents regarding shipments of cattle material that is to be used in human food and cosmetics.

In this estimate of the recordkeeping burden, FDA treats these recordkeeping activities as shared activities between the upstream and downstream facilities. It is in the best interests of both facilities in the relationship to share the burden necessary to comply with the regulations; therefore, FDA estimates the time burden of developing these records as a joint task between the two facilities. Thus, FDA estimates that this recordkeeping burden will be about 15 minutes per week, or 13 hours per year, and FDA assumes that the recordkeeping burden will be shared between two entities (*i.e.*, the ingredient supplier and the manufacturer of finished products). Therefore, the total recordkeeping burden for domestic facilities is estimated to be 9,061 hours (13 hours × 697), and the total recordkeeping burden for foreign facilities is estimated to be 11,908 hours (13 hours × 916), as shown in table 2.

Dated: November 24, 2017.

**Leslie Kux,**

*Associate Commissioner for Policy.*

[FR Doc. 2017–25767 Filed 11–28–17; 8:45 am]

**BILLING CODE 4164–01–P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES****Health Resources and Services Administration****Agency Information Collection****Activities: Proposed Collection: Public Comment Request; Information Collection Request Title: NURSE Corps Scholarship Program, OMB No. 0915–0301—Revision**

**AGENCY:** Health Resources and Services Administration (HRSA), Department of Health and Human Services.

**ACTION:** Notice.

**SUMMARY:** In compliance with the requirement for opportunity for public comment on proposed data collection projects of the Paperwork Reduction Act of 1995, HRSA announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, HRSA seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

**DATES:** Comments on this ICR must be received no later than January 29, 2018.

**ADDRESSES:** Submit your comments to [paperwork@hrsa.gov](mailto:paperwork@hrsa.gov) or mail the HRSA Information Collection Clearance Officer, 14N39, 5600 Fishers Lane, Rockville, MD 20857.

**FOR FURTHER INFORMATION CONTACT:** To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email [paperwork@hrsa.gov](mailto:paperwork@hrsa.gov) or call Lisa Wright-Solomon, the HRSA Information Collection Clearance Officer at (301) 443–1984.

**SUPPLEMENTARY INFORMATION:** When submitting comments or requesting information, please include the information request collection title for reference.

*Information Collection Request Title:* NURSE Corps Scholarship Program OMB No. 0915–0301—Revision

*Abstract:* The NURSE Corps Scholarship Program (SP), administered by the Bureau of Health Workforce in HRSA, provides scholarships to nursing students in exchange for a minimum two-year full-time service commitment (or part-time equivalent), at an eligible health care facility with a critical shortage of nurses (*i.e.*, Critical Shortage Facility (CSF)). The scholarship consists of payment of tuition, fees, other reasonable educational costs, and a monthly support stipend. Program recipients are required to fulfill NURSE Corps SP service commitments at CSFs located in the 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, the Northern Mariana Islands, the U.S. Virgin Islands, American Samoa, the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau.

*Need and Proposed Use of the Information:* The NURSE Corps SP collects data to determine an applicant's eligibility for the program, monitor a participant's continued enrollment in a school of nursing, monitor the participant's compliance with the NURSE Corps SP service obligation, and prepare annual reports to Congress. The following information will be collected (1) from the schools, on a quarterly basis—general applicant and nursing school data such as full name, location,

tuition/fees, and enrollment status; (2) from the schools, on an annual basis—data concerning tuition/fees and overall student enrollment status; and (3) from the participants and their employing CSF, on a biannual basis—data concerning the participant's employment status, work schedule and leave usage.

The revision to this clearance package will incorporate one new form and one updated form. The CSF Verification Form will be used to verify participant transfers to critical shortage facilities. The Initial Employment Verification Form has been revised to include all eligible service site types listed in the NURSE Corps SP Application and Program Guidance.

*Likely Respondents:* NURSE Corps SP scholars in school and graduates, educational institutions, and critical shortage facilities.

*Burden Statement:* Burden in this context means the time expended by persons to generate, maintain, retain, disclose, or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

**TOTAL ESTIMATED ANNUALIZED BURDEN HOURS**

| Form name                                                | Number of respondents | Number of responses per respondent | Total responses | Average burden per response (in hours) | Total burden hours |
|----------------------------------------------------------|-----------------------|------------------------------------|-----------------|----------------------------------------|--------------------|
| Eligible Applications/Application Program Guidance ..... | 2,600                 | 1                                  | 2,600           | 2                                      | 5,200              |
| School Enrollment Verification Form .....                | 500                   | 4                                  | 2,000           | .33                                    | 660                |
| Confirmation of Interest Form .....                      | 250                   | 1                                  | 250             | .2                                     | 50                 |
| Data Collection Worksheet Form .....                     | 500                   | 1                                  | 500             | 1                                      | 500                |
| Graduation Close Out Form .....                          | 200                   | 1                                  | 200             | .17                                    | 34                 |
| Initial Employment Verification Form .....               | 500                   | 1                                  | 500             | .42                                    | 210                |
| Employer—Participant Service Verification Form .....     | 1,000                 | 2                                  | 2,000           | .12                                    | 240                |
| CSF Verification Form .....                              | 200                   | 1                                  | 200             | .2                                     | 40                 |
| Total .....                                              | 5,750                 | .....                              | 8,250           | .....                                  | 6,934              |

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

**Amy McNulty,**

*Acting Director, Division of the Executive Secretariat.*

[FR Doc. 2017-25748 Filed 11-28-17; 8:45 am]

**BILLING CODE 4165-15-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

**Agency Information Collection Activities: Proposed Collection: Public Comment Request Information Collection Request Title: Health Professions Student Loan (HPSL) Program and Nursing Student Loan (NSL) Program Administrative Requirements (Regulations and Policy). OMB No. 0915-0047—Revision**

**AGENCY:** Health Resources and Services Administration (HRSA), Department of Health and Human Services.

**ACTION:** Notice.

**SUMMARY:** In compliance with the requirement for opportunity for public comment on proposed data collection projects of the Paperwork Reduction Act of 1995, HRSA announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, HRSA seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

**DATES:** Comments on this ICR should be received no later than January 29, 2018.

**ADDRESSES:** Submit your comments to [paperwork@hrsa.gov](mailto:paperwork@hrsa.gov) or mail the HRSA Information Collection Clearance Officer, Room 14N39, 5600 Fishers Lane, Rockville, MD 20857.

**FOR FURTHER INFORMATION CONTACT:** To request more information on the

proposed project or to obtain a copy of the data collection plans and draft instruments, email [paperwork@hrsa.gov](mailto:paperwork@hrsa.gov) or call Lisa Wright-Solomon, the HRSA Information Collection Clearance Officer at (301) 443-1984.

**SUPPLEMENTARY INFORMATION:** When submitting comments or requesting information, please include the information request collection title for reference.

**Information Collection Request Title:** Health Professions Student Loan (HPSL) Program and Nursing Student Loan (NSL) Program Administrative Requirements (Regulations and Policy). OMB No. 0915-0047—Revision.

**Abstract:** The Health Professions Student Loan (HPSL) Program, as authorized by Public Health Service (PHS) Act sections 721-722 and 725-735, provides long-term, low-interest loans to students attending schools of medicine, osteopathic medicine, dentistry, veterinary medicine, optometry, podiatric medicine, and pharmacy. The Nursing Student Loan (NSL) Program, as authorized by PHS Act sections 835-842, provides long-term, low-interest loans to students who attend eligible schools of nursing in programs leading to a diploma, an associate degree, a baccalaureate degree, or graduate degree in nursing. It also contains a number of recordkeeping and reporting requirements for academic institutions and loan applicants. The applicable regulations for these programs under 42 CFR part 57 implement and detail the various statutory requirements (see chart below).

In an effort to consolidate information collection requests and achieve greater programmatic efficiency, HRSA is incorporating the Deferment-HRSA Form 519 and AOR-HRSA Form 501 (OMB No. 0915-0044) into this information collection request. As a result, the OMB No. 0915-0044 package will be discontinued.

**Need and Proposed Use of the Information:** Participating HPSL and NSL schools are responsible for determining eligibility of applicants, making loans, and collecting monies owed by borrowers on their outstanding loans. The Deferment Form (Deferment-HRSA Form 519), formerly incorporated under OMB No. 0915-0044, provides the schools with documentation of a

borrower's deferment status, as detailed for the HPSL program under 42 CFR part 57.210 and for NSL under 42 CFR part 57.310. The Annual Operating Report (AOR-HRSA Form 501), formerly incorporated under OMB No. 0915-0044, provides the Department of Health and Human Services (HHS) with information from participating schools (including schools that are no longer disbursing loans but are required to report and maintain program records, student records, and repayment records until all student loans are repaid in full and all monies due to the Federal Government are returned) relating to HPSL and NSL program operations and financial activities. Moreover, the HPSL and NSL program requirements are essential for assuring that borrowers are aware of their rights and responsibilities, academic institutions have accurate records of the history and status of each loan account in order to pursue aggressive collection efforts to reduce default rates, and that academic institutions maintain adequate records for audit and assessment purposes to help HHS safeguard federal funds made through the Federal Capital Contribution (FCC). Academic institutions are free to use improved information technology to manage the information required by the regulations.

**Likely Respondents:** Financial Aid Directors working at institutions participating in the HPSL and/or NSL Programs.

**Burden Statement:** Burden in this context means the time expended by persons to generate, maintain, retain, disclose, or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the tables below.

## TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

| Instrument<br>(HPSL & NSL)    | Number of<br>respondents | Responses<br>per<br>respondent | Total<br>responses | Hours per<br>response | Total burden<br>hours |
|-------------------------------|--------------------------|--------------------------------|--------------------|-----------------------|-----------------------|
| Deferment—HRSA Form 519 ..... | 3,125                    | 1                              | 3,125              | .5                    | 1562.5                |
| AOR—HRSA—Form 501 .....       | 768                      | 1                              | 768                | 12                    | 9,216                 |
| Total .....                   | 3,893                    | .....                          | 3,893              | .....                 | 10,778.5              |

\* The deferment form is only used by the schools if a student requests a deferment. The AOR form is filled out for all grantees with a loan program at their school.

## RECORDKEEPING REQUIREMENTS

| Regulatory/section requirements                             | Number of<br>recordkeepers | Hours per<br>year | Total burden<br>hours |
|-------------------------------------------------------------|----------------------------|-------------------|-----------------------|
| <i>HPSL Program:</i>                                        |                            |                   |                       |
| 57.206(b)(2), Documentation of Cost of Attendance .....     | 432                        | 1.05              | 454                   |
| 57.208(a), Promissory Note .....                            | 432                        | 1.25              | 540                   |
| 57.210(b)(1)(i), Documentation of Entrance Interview .....  | 432                        | 1.25              | 540                   |
| 57.210(b)(1)(ii), Documentation of Exit Interview .....     | * 475                      | 0.37              | 176                   |
| 57.215(a) & (d), Program Records .....                      | * 475                      | 10                | 4,750                 |
| 57.215(b), Student Records .....                            | * 475                      | 10                | 4,750                 |
| 57.215(c), Repayment Records .....                          | * 475                      | 19.55             | 9,286                 |
| HPSL Subtotal .....                                         | 475                        | .....             | 20,496                |
| <i>NSL Program:</i>                                         |                            |                   |                       |
| 57.306(b)(2)(ii), Documentation of Cost of Attendance ..... | 304                        | 0.25              | 76                    |
| 57.308(a), Promissory Note .....                            | 304                        | 0.5               | 152                   |
| 57.310(b)(1)(i), Documentation of Entrance Interview .....  | 304                        | 0.5               | 152                   |
| 57.310(b)(1)(ii), Documentation of Exit Interview .....     | * 486                      | 0.14              | 68                    |
| 57.315(a)(1) & (a)(4), Program Records .....                | * 486                      | 5                 | 2,430                 |
| 57.315(a)(2), Student Records .....                         | * 486                      | 1                 | 486                   |
| 57.215(b)(3), Repayment Records .....                       | * 486                      | 2.51              | 1,220                 |
| NSL Subtotal .....                                          | 486                        | .....             | 4,584                 |

\* Includes active and closing schools. The HPSL and NSL programs are under two separate Titles VII and VII and CFDA numbers. The reporting requirements are items that are required of financial aid offices for administration of the loan programs at their school. HPSL data include active and closing Loans for Disadvantaged Students program schools.

## REPORTING REQUIREMENTS

| Regulatory/section<br>requirements                                      | Number of<br>respondents | Responses<br>per<br>respondent | Total annual<br>responses | Hours per<br>response | Total burden<br>hours |
|-------------------------------------------------------------------------|--------------------------|--------------------------------|---------------------------|-----------------------|-----------------------|
| <i>HPSL:</i>                                                            |                          |                                |                           |                       |                       |
| 57.206(a)(2), Student Financial Aid Transcript .....                    | 4,600                    | 1                              | 4,600                     | 0.25                  | 1,150                 |
| 57.208(c), Loan Information Disclosure .....                            | 325                      | 299.5                          | 97,338                    | 0.63                  | 61,323                |
| 57.210(b)(1)(i), Entrance Interview .....                               | 325                      | 139.5                          | 45,338                    | 0.50                  | 22,669                |
| 57.210(b)(1)(ii), Exit Interview .....                                  | * 334                    | 113.5                          | 37,909                    | 1.00                  | 37,909                |
| 57.210(b)(1)(iii), Notification of Repayment .....                      | * 334                    | 862.5                          | 288,075                   | 0.38                  | 109,469               |
| 57.210(b)(1)(iv), Notification During Deferment .....                   | * 333                    | 17                             | 5,661                     | 0.63                  | 3,566                 |
| 57.210(b)(1)(vi), Notification of Delinquent Accounts ...               | 334                      | 172.5                          | 57,615                    | 1.25                  | 72,019                |
| 57.210(b)(1)(x), Credit Bureau Notification .....                       | 334                      | 6                              | 2,004                     | 0.50                  | 1,002                 |
| 57.210(b)(4)(i), Write-off of Uncollectable Loans .....                 | 520                      | 1                              | 520                       | 3                     | 1560                  |
| 57.211(a), Disability Cancellation .....                                | 3                        | 1                              | 3                         | 1                     | 3                     |
| 57.215(a), Administrative Hearings record retention ....                | 0                        | 0                              | 0                         | 0                     | 0                     |
| 57.215(a)(2), Administrative Hearings reporting re-<br>quirements ..... | 0                        | 0                              | 0                         | 0                     | 0                     |
| HPSL Subtotal .....                                                     | .....                    | .....                          | .....                     | .....                 | 310,670               |
| <i>NSL:</i>                                                             |                          |                                |                           |                       |                       |
| 57.306(a)(2), Student Financial Aid Transcript .....                    | 4,100                    | 1                              | 4,100                     | 0.25                  | 1,025                 |
| 57.310(b)(1)(i), Entrance Interview .....                               | 282                      | 17.5                           | 4,935                     | 0.42                  | 2,073                 |
| 57.310(b)(1)(ii), Exit Interview .....                                  | 348                      | 9                              | 3,132                     | 0.42                  | 1,315                 |
| 57.310(b)(1)(iii), Notification of Repayment .....                      | 348                      | 9                              | 3,132                     | 0.27                  | 846                   |
| 57.310(b)(1)(iv), Notification During Deferment .....                   | 348                      | 1.5                            | 522                       | 0.29                  | 151                   |
| 57.310(b)(1)(vi), Notification of Delinquent Accounts ...               | 348                      | 42.5                           | 14,790                    | 0.04                  | 592                   |
| 57.310(b)(1)(x), Credit Bureau Notification .....                       | 348                      | 709                            | 246,732                   | 0.006                 | 1,480                 |
| 57.310(b)(4)(i), Write-off of Uncollectable Loans .....                 | 23                       | 1                              | 23                        | 3                     | 69                    |

## REPORTING REQUIREMENTS—Continued

| Regulatory/section requirements                 | Number of respondents | Responses per respondent | Total annual responses | Hours per response | Total burden hours |
|-------------------------------------------------|-----------------------|--------------------------|------------------------|--------------------|--------------------|
| 57.311(a), Disability Cancellation .....        | 16                    | 1                        | 16                     | 1                  | 16                 |
| 57.315(a)(1)(ii), Administrative Hearings ..... | 0                     | 0                        | 0                      | 0                  | 0                  |
| 57.316(a), Administrative Hearings .....        | 0                     | 0                        | 0                      | 0                  | 0                  |
| NSL Subtotal .....                              |                       |                          |                        |                    | 7,567              |

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

**Amy McNulty,**

*Acting Director, Division of the Executive Secretariat.*

[FR Doc. 2017-25750 Filed 11-28-17; 8:45 am]

**BILLING CODE 4165-15-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### Prospective Grant of an Exclusive Patent License: Concatenated L2 Peptide Based Human Papillomavirus Vaccines

**AGENCY:** National Institutes of Health.

**ACTION:** Notice.

**SUMMARY:** The National Cancer Institute, an institute of the National Institutes of Health, Department of Health and Human Services, is contemplating the grant of an exclusive patent license to practice the inventions embodied in the Patents and Patent Applications listed in the Supplementary Information section of this notice to BravoVax Co., Ltd located in Wuhan, China.

**DATES:** Only written comments and/or applications for a license which are received by the National Cancer Institute's Technology Transfer Center on or before December 14, 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: Kevin W. Chang, Ph.D., Senior Technology Transfer Manager, NCI Technology Transfer Center, 9609 Medical Center Drive, RM 1E530 MSC

9702, Bethesda, MD 20892-9702 (for business mail), Rockville, MD 20850-9702 Telephone: (240)-276-6910; Facsimile: (240)-276-5504 Email: [changke@mail.nih.gov](mailto:changke@mail.nih.gov).

#### SUPPLEMENTARY INFORMATION:

##### Intellectual Property

United States Provisional Patent Application No. 60/649,249 filed February 1, 2005 and entitled, "Papillomavirus L2 N-terminal Peptides For The Induction Of Broadly Cross-neutralizing Antibodies" [HHS Reference No. E-103-2005/0-US-01]; United States Provisional Patent Application No. 60/697,655 filed July 7, 2005 and entitled, "Papillomavirus L2 N-terminal Peptides For The Induction Of Broadly Cross-neutralizing Antibodies" [HHS Reference No. E-103-2005/1-US-01]; United States Provisional Patent Application No. 60/752,268 filed December 21, 2005 and entitled, "Papillomavirus L2 N-terminal Peptides For The Induction Of Broadly Cross-neutralizing Antibodies" [HHS Reference No. E-103-2005/2-US-01]; International PCT Application No. PCT/US2006/003601 filed February 1, 2006, and entitled, "Papillomavirus L2 N-terminal Peptides For The Induction Of Broadly Cross-neutralizing Antibodies" [HHS Reference No. E-103-2005/3-US-02]; United States Patent No. 8,404,244, issued March 26, 2013 and entitled, "Papillomavirus L2 N-terminal Peptides For The Induction Of Broadly Cross-neutralizing Antibodies" [HHS Ref. No. E-103-2005/3-US-10]; Canadian Patent No. 2,596,698 issued May 16, 2017 and entitled, "Papillomavirus L2 N-terminal Peptides For The Induction Of Broadly Cross-neutralizing Antibodies" [HHS Ref. No. E-103-2005/3-CA-03]; Australian Patent No. 2006210792 issued November 8, 2012 and entitled, "Papillomavirus L2 N-terminal Peptides For The Induction Of Broadly Cross-

neutralizing Antibodies" [HHS Ref. No. E-103-2005/3-AU-04]; Japanese Patent No. 5224821 issued March 22, 2013 and entitled, "Papillomavirus L2 N-terminal Peptides For The Induction Of Broadly Cross-neutralizing Antibodies" [HHS Ref. No. E-103-2005/3-JP-05]; Brazilian Patent Application No. PI0607097-3 filed February 1, 2006 and entitled, "Papillomavirus L2 N-terminal Peptides For The Induction Of Broadly Cross-neutralizing Antibodies" [HHS Ref. No. E-103-2005/3-BR-06]; Chinese Patent No. 200680011079.1 issued March 27, 2013 and entitled, "Papillomavirus L2 N-terminal Peptides For The Induction Of Broadly Cross-neutralizing Antibodies" [HHS Ref. No. E-103-2005/3-CN-07]; Indian Patent No. 263255 issued October 16, 2014 and entitled, "Papillomavirus L2 N-terminal Peptides For The Induction Of Broadly Cross-neutralizing Antibodies" [HHS Ref. No. E-103-2005/3-IN-08]; European Patent No. 1853307 issued December 14, 2016 and entitled, "Papillomavirus L2 N-terminal Peptides For The Induction Of Broadly Cross-neutralizing Antibodies" [HHS Ref. No. E-103-2005/3-EP-09]; German Patent No. 1853307 issued December 14, 2016 and entitled, "Papillomavirus L2 N-terminal Peptides For The Induction Of Broadly Cross-neutralizing Antibodies" [HHS Ref. No. E-103-2005/3-DE-11]; French Patent No. 1853307 issued December 14, 2016 and entitled, "Papillomavirus L2 N-terminal Peptides For The Induction Of Broadly Cross-neutralizing Antibodies" [HHS Ref. No. E-103-2005/3-FR-12]; and United Kingdom Patent No. 1853307 issued December 14, 2016 and entitled, "Papillomavirus L2 N-terminal Peptides For The Induction Of Broadly Cross-neutralizing Antibodies" [HHS Ref. No. E-103-2005/3-GB-13]. The patent rights in these inventions have been assigned and/or exclusively licensed 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 the use of Licensed Patent Rights for the following: "Development and use of

concatenated L2 peptides for the prevention of Human Papillomavirus (HPV) infection and associated diseases. Specifically excluded from the field of use are L2 based virus-like particles (VLPs), L1/L2 chimeric peptides, and L1/L2 chimeric peptide/protein based VLPs."

The subject technologies are papillomavirus L2 capsid protein based vaccines against HPV. The L2 protein is the minor papillomavirus capsid protein for papillomaviruses. It is known that antibodies to this protein can neutralize homologous infection. Furthermore, L2 proteins can induce cross-neutralizing antibodies. Specifically, epitopes at the N-terminus of L2 shared by cutaneous and mucosal types of papillomavirus types and by types that infect divergent species are broadly cross-neutralizing. These epitopes at the N-terminus of L2 can be used to elicit cross-neutralizing antibodies against different types of HPV.

This notice is made in accordance with 35 U.S.C. 209 and 37 CFR part 404. The prospective exclusive license will be royalty bearing, and the prospective exclusive license may be granted unless within fifteen (15) days from the date of this published notice, the National Cancer Institute 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.

In response to this Notice, the public may file comments or objections. Comments and objections, other than those in the form of a license application, will not be treated confidentially, and may be made publicly available.

License applications submitted in response to this Notice will be presumed to contain business confidential information and any release of information in these license applications will be made only as required and upon a request under the Freedom of Information Act, 5 U.S.C. 552.

Dated: November 14, 2017.

**Richard U. Rodriguez,**

*Associate Director, Technology Transfer Center, National Cancer Institute.*

[FR Doc. 2017-25744 Filed 11-28-17; 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, 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; NCI SPORE V Review.

*Date:* February 5-6, 2018.

*Time:* 4:00 p.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Gaithersburg Washingtonian Marriott, 9751 Washingtonian Boulevard, Gaithersburg, MD 20878.

*Contact Person:* Mukesh Kumar, Ph.D., Scientific Review Officer, Research Program Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W618, Bethesda, MD 20892-9750, 240-276-6611, [mukesh.kumar3@nih.gov](mailto:mukesh.kumar3@nih.gov).

*Name of Committee:* National Cancer Institute Special Emphasis Panel; Molecular and Cellular Analysis Technologies.

*Date:* February 8, 2018.

*Time:* 10:00 a.m. to 4:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Cancer Institute, Shady Grove, 9609 Medical Center Drive, Room 7W030, 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, NIH, 9609 Medical Center Drive, Room 7W260, Bethesda, MD 20892-9750, 240-276-5856, [nadeem.khan@nih.gov](mailto:nadeem.khan@nih.gov).

*Name of Committee:* National Cancer Institute Special Emphasis Panel; NCI SPORE VI Review.

*Date:* February 8-9, 2018.

*Time:* 4:00 p.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Gaithersburg Washingtonian Marriott, 9751 Washingtonian Boulevard, Gaithersburg, MD 20878.

*Contact Person:* Anita T. Tandle, Ph.D., Scientific Review Officer, Research Program Review Branch, Division of Extramural

Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W248, Bethesda, MD 20892-9750, 240-276-5007, [tandlea@mail.nih.gov](mailto:tandlea@mail.nih.gov).

*Name of Committee:* National Cancer Institute Special Emphasis Panel; Quantitative Imaging.

*Date:* February 14, 2018.

*Time:* 10:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Cancer Institute, Shady Grove, 9609 Medical Center Drive, Room 4W030, Rockville, MD 20850 (Telephone Conference Call).

*Contact Person:* Eduardo E. Chufan, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W254, Bethesda, MD 20892-9750, 240-276-7975, [chufanee@mail.nih.gov](mailto:chufanee@mail.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: November 22, 2017.

**Melanie J. Pantoja,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2017-25732 Filed 11-28-17; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### Prospective Grant of Exclusive Patent License: T-Cells Transduced with HLA A11 Restricted CT-RCC HERV-E Reactive T-Cell Receptors for the Treatment of Renal Cell Carcinoma

**AGENCY:** National Institutes of Health.

**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 T-Cure Bioscience, Inc. located in Thousand Oaks, California 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 December 14, 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](mailto:thalhamc@mail.nih.gov).

**SUPPLEMENTARY INFORMATION:** The following represents the intellectual property to be licensed under the prospective agreement:

US Provisional Patent Application No. 62/357,265, filed June 30, 2016; and PCT Patent Application PCT/US2017/040449, filed June 30, 2017, "HERV-E Reactive T Cell Receptors and Methods of Use", NIH Reference No. E-120-2016/0,1.

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 the use of Licensed Patent Rights for the following: "Development and commercialization of T cell receptor based cancer immunotherapy for Renal Cell Carcinoma".

The subject technology is based on an allogeneic T cell clone isolated from a clear cell renal cell carcinoma (ccRCC) HLA-A11 patient who showed prolonged tumor regression after an allogeneic transplant. This clone was found to have tumor specific cytotoxicity, killing patient's tumor cells in vitro. The antigen recognized by this clone is an HLA-A11 restricted peptide (named CT-RCC-1) and it is encoded by a novel human endogenous retrovirus-E (named CT-RCC HERV-E) whose expression was discovered to be restricted to ccRCC, but not observed in normal tissues or other tumor types. More than 80% of ccRCC tumors express CT-RCC HERV-E provirus, which makes it an ideal target for T cell based immunotherapy. The genes for a T cell receptor (TCR) that specifically recognizes an HLA-A11 restricted CT-RCC-1 antigen were sequenced and cloned. A retroviral vector encoding this TCR as well as a truncated CD34 protein lacking the intracellular domain, which can be used to facilitate the isolation of T-cells transduced with this TCR, was

created. The vector can be used to transduce and expand normal T cells from HLA-A11 patients with metastatic ccRCC with the TCR. The transduced cytotoxic T cells can then be administered to subjects to treat or inhibit metastatic kidney cancer. Kidney cancer is responsible for approximately 12,000 deaths every year in the United States alone. As with most cancer, when detected at early stages, surgical intervention is highly effective. Phase I/II clinical trials are currently being planned in patients with metastatic ccRCC using normal patient's T-cells transduced with this vector.

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.

The public may file comments or objections in response to this Notice. Comments and objections, other than those in the form of a license application, will not be treated confidentially, and may be made publicly available.

License applications submitted in response to this Notice will be presumed to contain business confidential information and any release of information in these license applications will be made only as required and upon a request under the Freedom of Information Act, 5 U.S.C. 552.

Dated: November 16, 2017.

**Cristina Thalhammer-Reyero**,  
Senior Licensing and Patenting Manager,  
Office of Technology Transfer and  
Development, National Heart, Lung, and  
Blood Institute.

[FR Doc. 2017-25743 Filed 11-28-17; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### Prospective Grant of Exclusive Patent Commercialization License: N6, A Novel, Broad, Highly Potent HIV-Specific Antibody

**AGENCY:** National Institutes of Health.

**ACTION:** Notice.

**SUMMARY:** The National Institute of Allergy and Infectious Diseases (NIAID), an institute of the National Institutes of Health, Department of Health and Human Services, is contemplating the grant of an exclusive patent commercialization license to GlaxoSmithKline Intellectual Property Development Ltd (GSK) located at 980 Great West Road, Brentford, Middlesex, TW8 9GS, United Kingdom, to practice the inventions embodied in the patent applications listed in the **SUPPLEMENTARY INFORMATION** section of this notice.

**DATES:** Only written comments and/or applications for a license which are received by the Technology Transfer and Intellectual Property Office, National Institute of Allergy and Infectious Diseases on or before December 14, 2017 will be considered.

**ADDRESSES:** Requests for copies of the patent applications, inquiries, and comments relating to the contemplated exclusive patent commercialization license should be directed to: Chris Kornak, Lead Technology Transfer and Patent Specialist, Technology Transfer and Intellectual Property Office, National Institute of Allergy and Infectious Diseases, 5601 Fishers Lane, Suite 6D, MSC 9804, Rockville, MD 20852-9804, phone number 301-496-2644, or [chris.kornak@nih.gov](mailto:chris.kornak@nih.gov).

**SUPPLEMENTARY INFORMATION:** The following represents the intellectual property to be licensed under the prospective agreement: HHS Reference No. E-131-2015/0-US-01, United States Provisional Patent Application Serial No. 62/136,228, filed on 03/20/2015; HHS Reference No. E-131-2015/1-US-01, United States Provisional Patent Application Serial No. 62/250,378 filed on 11/03/2015; HHS Reference No. E-131-2015/2-PCT-01, PCT Patent Application Serial No. PCT/US2016/023145, filed on 03/18/2016; HHS Reference No. E-131-2015/2-US-07, United States Patent Application Serial No. 15/559,791, filed on 09/19/2017; HHS Reference No. E-131-2015/2-EP-05, European Patent Application Serial No. 16716979.6, filed on 10/19/2017; HHS Reference No. E-131-2015/2-CA-03, Canadian Patent Application Serial No. 2,980,005, filed on 09/15/2017; HHS Reference No. E-131-2015/2-AU-02, Australian Patent Application Serial No. 2016235541, filed on 09/08/2017; HHS Reference No. E-131-2015/2-CN-04, filing in process, HHS Reference No. E-131-2015/2-ZA-08, South African Patent Application Serial No. 2017/06155, filed on 09/11/2017; and HHS Reference No. E-131-2015/2-IN-06, Indian Patent Application

Serial No. 201737032671, filed on 09/14/2017.

All rights in these inventions have been assigned to the Government of the United States of America.

The prospective exclusive patent commercialization license territory may be worldwide and the field of use may be limited to: "Administration to humans of a GP120-binding protein or proteins, containing the 6 CDRs of the N6 antibody, all as described in the Licensed Patent Rights. This field of use does not include bi-specific/multi-specific constructs utilizing the Licensed Patent Rights."

The N6 antibody has evolved a unique mode of binding that depends less on a variable area of the HIV envelope known as the V5 region and focuses more on conserved regions, which change relatively little among HIV strains. This allows N6 to tolerate changes in the HIV envelope, including the attachment of sugars in the V5 region, a major mechanism by which HIV develops resistance to other VRC01-class antibodies. N6 was shown in pre-clinical studies to neutralize approximately 98 percent of HIV isolates tested. The studies also demonstrate that N6 neutralizes approximately 80 percent of HIV isolates which were resistant to other antibodies of the same class, and does so very potently. Its breadth and potency makes N6 a highly desirable candidate for development in therapeutic or prophylactic strategies. An abstract of the subject invention was published in the **Federal Register** on March 13, 2017.

This notice is made in accordance with 35 U.S.C. 209 and 37 CFR part 404. The prospective exclusive patent commercialization license will be royalty bearing and may be granted unless within fifteen (15) days from the date of this published notice, the National Institute of Allergy and Infectious Diseases 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 commercialization license. Comments and objections submitted in response to this notice 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.

**Suzanne Frisbie,**

*Deputy Director, Technology Transfer and Intellectual Property Office, National Institute of Allergy and Infectious Diseases.*

[FR Doc. 2017-25745 Filed 11-28-17; 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, 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; AD Sequencing II.

*Date:* December 1, 2017.

*Time:* 1:00 p.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institute on Aging, Gateway Building, Suite 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20814 (Telephone Conference Call).

*Contact Person:* Bitu 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](mailto:nakhaib@nia.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: November 22, 2017.

**Melanie J. Pantoja,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2017-25734 Filed 11-28-17; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Center for Advancing Translational Sciences; Notice of Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of meetings of the National Center for Advancing Translational Sciences.

The meetings 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 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:* Cures Acceleration Network Review Board.

*Date:* January 11, 2018.

*Time:* 8:30 a.m. to 3:00 p.m.

*Agenda:* Report from the Institute Director.

*Place:* National Institutes of Health, Building 31, Conference Room 10, 31 Center Drive, Bethesda, MD 20892.

*Contact Person:* Anna L. Ramsey-Ewing, Ph.D., Executive Secretary, National Center for Advancing Translational Sciences, 1 Democracy Plaza, Room 1072, Bethesda, MD 20892, 301-435-0809, [anna.ramseyewing@nih.gov](mailto:anna.ramseyewing@nih.gov).

*Name of Committee:* National Center for Advancing Translational Sciences Advisory Council.

*Date:* January 11, 2018.

*Open:* 8:30 a.m. to 3:00 p.m.

*Agenda:* Report from the Institute Director and other staff.

*Place:* National Institutes of Health, Building 31, Conference Room 10, 31 Center Drive, Bethesda, MD 20892.

*Closed:* 3:15 p.m. to 4:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Building 31, Conference Room 10, 31 Center Drive, Bethesda, MD 20892.

*Contact Person:* Anna L. Ramsey-Ewing, Ph.D., Executive Secretary, National Center for Advancing Translational Sciences, 1 Democracy Plaza, Room 1072, Bethesda, MD 20892, 301-435-0809, [anna.ramseyewing@nih.gov](mailto:anna.ramseyewing@nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.350, B—Cooperative Agreements; 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: November 22, 2017.

**David Clary,**  
Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2017-25731 Filed 11-28-17; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the NHLBI Special Emphasis Panel.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Heart, Lung, and Blood Institute Special Emphasis Panel; Support for Conference Grants.

*Date:* December 15, 2017.

*Time:* 8:00 a.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Room 7200, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Michael P. Reilly, Ph.D., Scientific Review Officer Office of Scientific Review, National Heart, Lung, and Blood Institute, National Institutes of Health, 6701 Rockledge Drive, Room 7200, Bethesda, MD 20892, 301-827-7975, [reillymp@nhlbi.nih.gov](mailto:reillymp@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: November 22, 2017.

**Michelle Trout,**  
Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2017-25733 Filed 11-28-17; 8:45 am]

**BILLING CODE 4140-01-P**

## INTERNATIONAL TRADE COMMISSION

[USITC SE-17-057]

### Government in the Sunshine Act Meeting Notice

**AGENCY HOLDING THE MEETING:** United States International Trade Commission.

**TIME AND DATE:** December 7, 2017 at 11:00 a.m.

**PLACE:** Room 101, 500 E Street SW., Washington, DC 20436, Telephone: (202) 205-2000.

**STATUS:** Open to the public.

#### MATTERS TO BE CONSIDERED:

1. Agendas for future meetings: None.
2. Minutes.
3. Ratification List.
4. Vote in Inv. Nos. 701-TA-566 and 731-TA-1342 (Final) (Softwood Lumber from Canada). The Commission is currently scheduled to complete and file its determinations and views of the Commission on December 22, 2017.
5. Outstanding action jackets: None. In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.

Issued: November 27, 2017.

**William R. Bishop,**  
Supervisory Hearings and Information Officer.

[FR Doc. 2017-25825 Filed 11-27-17; 4:15 pm]

**BILLING CODE 7020-02-P**

## INTERNATIONAL TRADE COMMISSION

[USITC SE-17-056]

### Government in the Sunshine Act Meeting Notice

**AGENCY HOLDING THE MEETING:** United States International Trade Commission.

**TIME AND DATE:** December 5, 2017 at 9:30 a.m.

**PLACE:** Room 101, 500 E Street SW., Washington, DC 20436, Telephone: (202) 205-2000.

**STATUS:** Open to the public.

#### MATTERS TO BE CONSIDERED:

1. Agendas for future meetings: None.
2. Minutes.
3. Ratification List.
4. Vote in Inv. Nos. 701-TA-571-572 and 731-TA-1347-1348 (Final) (Biodiesel from Argentina and Indonesia). The Commission is currently scheduled to complete and file its determinations and views of the Commission on December 21, 2017.

5. Outstanding action jackets: None.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.

Issued: November 27, 2017.

**William R. Bishop,**  
Supervisory Hearings and Information Officer.

[FR Doc. 2017-25824 Filed 11-27-17; 4:15 pm]

**BILLING CODE 7020-02-P**

## INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-1088]

### Certain Road Construction Machines and Components Thereof; Institution of Investigation

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on October 26, 2017, under section 337 of the Tariff Act of 1930, as amended, on behalf of Caterpillar Inc. of Peoria, Illinois and Caterpillar Paving Products, Inc. of Minneapolis, Minnesota. A supplement was filed on November 9, 2017. The complaint, as supplemented, alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain road construction machines and components thereof by reason of infringement of one or more of U.S. Patent No. 7,140,693 (“the ‘693 patent”); U.S. Patent No. 9,045,871 (“the ‘871 patent”); and U.S. Patent No. 7,641,419 (“the ‘419 patent”). The complaint further alleges that an industry in the United States exists, or is in the process of being established, as required by the applicable Federal Statute.

The complainants request that the Commission institute an investigation and, after the investigation, issue a limited exclusion order and a cease and desist order.

**ADDRESSES:** The complaint, except for any confidential information contained therein, is 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., Room 112, Washington, DC 20436, telephone (202) 205-2000. Hearing impaired individuals are advised that information

on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205-2000. General information concerning the Commission may also be obtained by accessing its internet server at <https://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>.

**FOR FURTHER INFORMATION CONTACT:** The Office of the Secretary, Docket Services Division, U.S. International Trade Commission, telephone (202) 205-1802.

**SUPPLEMENTARY INFORMATION:**

**Authority:** The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2017).

**Scope of Investigation:** Having considered the complaint, the U.S. International Trade Commission, on November 22, 2017, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain road construction machines and components thereof by reason of infringement of one or more of claims 1, 15-19, 24-28, 36 and 38 of the '693 patent; claims 1-5, 8, 9, 12-17 of the '871 patent; and claims 1-3, 7, and 8 of the '419 patent; and whether an industry in the United States exists, or is in the process of being established, as required by subsection (a)(2) of section 337;

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainants are:

Caterpillar Inc., 100 NE Adams St., Peoria, IL 61629  
Caterpillar Paving Products, Inc., 9401 85th Avenue North, Minneapolis, MN 55445

(b) The respondent is the following entity alleged to be in violation of section 337, and is the party upon which the complaint is to be served:  
Wirtgen GmbH, Reinhard-Wirtgen-Str. 2, 53578 Windhagen, Germany  
Joseph Vögele AG, Joseph-Vögele-Str. 1, 67075 Ludwigshafen, Germany

Wirtgen Group Holding GmbH,  
Reinhard-Wirtgen-Str.2, 53578  
Windhagen, Germany  
Wirtgen America, Inc., 6030 Dana Way,  
Antioch, TN 37013

(3) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

The Office of Unfair Import Investigations will not participate as a party in the investigation.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: November 22, 2017.

**Katherine M. Hiner,**  
*Supervisory Attorney.*

[FR Doc. 2017-25728 Filed 11-28-17; 8:45 am]

**BILLING CODE 7020-02-P**

## NATIONAL SCIENCE FOUNDATION

### Notice of Permit Modification Issued Under the Antarctic Conservation Act of 1978

**AGENCY:** National Science Foundation.

**ACTION:** Notice of permit modification issued.

**SUMMARY:** The National Science Foundation (NSF) is required to publish notice of permits issued under the Antarctic Conservation Act of 1978. This is the required notice.

### FOR FURTHER INFORMATION CONTACT:

Nature McGinn, ACA Permit Officer, Office of Polar Programs, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314; 703-292-8030; email: [ACAPermits@nsf.gov](mailto:ACAPermits@nsf.gov).

**SUPPLEMENTARY INFORMATION:** On October 23, 2017, the National Science Foundation published a notice in the **Federal Register** of a permit modification request received. The permit modification was issued on November 22, 2017 to: Laura K.O. Smith, Permit No. 2016-020.

**Nadene G. Kennedy,**

*Polar Coordination Specialist, Office of Polar Programs.*

[FR Doc. 2017-25721 Filed 11-28-17; 8:45 am]

**BILLING CODE 7555-01-P**

## NATIONAL SCIENCE FOUNDATION

### Notice of Permit Modification Received Under the Antarctic Conservation Act of 1978

**AGENCY:** National Science Foundation.

**ACTION:** Notice of permit modification request received and permit issued.

**SUMMARY:** The National Science Foundation (NSF) is required to publish a notice of requests to modify permits issued to conduct activities regulated and permits issued under the Antarctic Conservation Act of 1978. NSF has published regulations under the Antarctic Conservation Act in the Code of Federal Regulations. This is the required notice of a requested permit modification and permit issued.

### FOR FURTHER INFORMATION CONTACT:

Nature McGinn, ACA Permit Officer, Office of Polar Programs, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314; 703-292-8030; email: [ACAPermits@nsf.gov](mailto:ACAPermits@nsf.gov).

**SUPPLEMENTARY INFORMATION:** The National Science Foundation (NSF), as directed by the Antarctic Conservation Act of 1978 (Pub. L. 95-541, 45 CFR 670), as amended by the Antarctic Science, Tourism and Conservation Act of 1996, has developed regulations for the establishment of a permit system for various activities in Antarctica and designation of certain animals and certain geographic areas requiring special protection.

NSF issued a permit (ACA 2018-012) to Jay J. Rotella on October 16, 2017. The issued permit allows the applicant to continue long-term studies of Weddell seal populations in Erebus Bay and the McMurdo Sound region to evaluate how temporal variation in the marine environment affects individual

life histories and population dynamics of a long-lived mammal. These studies may require the applicant and agents to enter into six ASPAs in the area. Research involves capture and release of up to 675 Weddell seal pups at one to four days after birth for flipper tagging per year. Now the applicant proposes a permit modification to increase the total take of Weddell seal pups for flipper tagging from 675 to 1000. The Environmental Officer has reviewed the modification request and has determined that the amendment is not a material change to the permit, and it will have a less than a minor or transitory impact.

*Dates of Permitted Activities:*

November 22, 2017 to September 30, 2022.

The permit modification was issued on November 22, 2017.

**Nadene G. Kennedy,**

*Polar Coordination Specialist, Office of Polar Programs.*

[FR Doc. 2017-25753 Filed 11-28-17; 8:45 am]

**BILLING CODE 7555-01-P**

## NATIONAL TRANSPORTATION SAFETY BOARD

### Sunshine Act Meeting

**FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT:** 2017-25417.

**TIME AND DATE:** 9:30 a.m., Tuesday, December 12, 2017.

**CHANGE IN THE MEETING TIME:** 9:00 a.m., Tuesday, December 12, 2017.

Dated: November 27, 2017.

**Candi R. Bing,**

*Federal Register Liaison Officer.*

[FR Doc. 2017-25830 Filed 11-27-17; 4:15 pm]

**BILLING CODE 7533-01-P**

## NUCLEAR REGULATORY COMMISSION

[Docket No. 40-9083; NRC-2017-0106]

### U.S. Army Installation Command

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** 10 CFR 2.206 request; receipt.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is giving notice that by petition dated March 16, 2017, as supplemented on April 10, May 21, June 25, July 24, August 16, August 18, October 11, October 12, October 15, and October 16, 2017, Dr. Michael Reimer (the petitioner) has requested that the NRC take action with regard to depleted uranium (DU) from the M101 spotting

rounds licensed at the Pohakuloa Training Area (PTA) under source materials license SUC-1593. The petitioner's requests that have been accepted for evaluation are included in the **SUPPLEMENTARY INFORMATION** section of this document.

**ADDRESSES:** Please refer to Docket ID NRC-2017-0106 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-2017-0106. Address questions about NRC dockets to Carol Gallagher; telephone: 301-415-3463; email: [Carol.Gallagher@nrc.gov](mailto:Carol.Gallagher@nrc.gov).

- *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](mailto:pdr.resource@nrc.gov). The ADAMS accession number for each document referenced in this document (if that document is available in ADAMS) is provided the first time that a document is referenced.

- *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 20852-2738.

**FOR FURTHER INFORMATION CONTACT:**

Amy Snyder, Senior Project Manager, Office of Nuclear Material Safety and Safeguards, Division of Decommissioning, Uranium Recovery and Waste Programs, Materials Decommissioning Branch, M.S. T8F05, 11545 Rockville Pike, Rockville, Maryland 20852-2738, [Amy.Snyder@nrc.gov](mailto:Amy.Snyder@nrc.gov) or 301 415-6822.

**SUPPLEMENTARY INFORMATION:** On March 16, 2017 (ADAMS Accession No. ML17110A308), as supplemented on April 10 (ADAMS Accession No. ML17250A248); May 21 (ADAMS Accession No. ML17143A165); June 25 (ADAMS Accession No. ML17177A703); July 24 (ADAMS Accession No. ML17249A091); August 16 (ADAMS Accession No. ML17248A524); August 18, 2017 (ADAMS Accession No. ML17249A075); and October 11, October 12, October 15, and October 16, 2017 (ADAMS Accession No.

ML17292A690 (Pkg.)), the petitioner requested that the NRC take action with regard to the U.S. Army Installation Command (ADAMS Accession No. ML17079A447). The petitioner requested that the NRC reconsider approval of License SUC-1593 (ADAMS Accession No. ML16343A164) for possession of DU at four ranges located on PTA, one of the facilities licensed under SUC-1593 paying particular attention to environmental radiation monitoring. The petitioner is concerned about the adequacy of various aspects of the Environmental Radiation Monitoring Program for the licensed DU that is located in the radiation control areas at the PTA, transparency in the licensing of DU at the PTA, and the appropriateness of the DU inventory estimate at the PTA. As the basis for this request, the petitioner identified concerns about the lack of air sampling, the inappropriateness of the location and number of sediment samples, and insufficient geologic sampling procedures for sediment collection for the licensed DU that is located in radiation controlled areas at the PTA.

The request is being treated pursuant to section 2.206 of title 10 of the *Code of Federal Regulations* (10 CFR) of the Commission's regulations. The request has been referred to the Director of Nuclear Material Safety and Safeguards. The NRC has accepted the following concerns for evaluation under the 10 CFR 2.206 process:

- Inappropriate number of sediment samples,
- Inappropriate frequency of sediment sampling,
- Inappropriate and poorly described analytical techniques (sample analysis methods),
- Inappropriate geological sampling procedures for sediment collection, and
- Inappropriate data evaluation methods (leading to dilution of samples) to determine the presence of depleted uranium outside the ranges associated with the Pohakuloa Training Area.

As provided by 10 CFR 2.206, appropriate action will be taken on this petition within a reasonable time.

Dated at Rockville, Maryland, this 22th day of November 2017.

For the Nuclear Regulatory Commission.

**Scott W. Moore,**

*Acting Director, Office of Nuclear Material Safety and Safeguards.*

[FR Doc. 2017-25776 Filed 11-28-17; 8:45 am]

**BILLING CODE 7590-01-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:** *Date of notice required under 39 U.S.C. 3642(d)(1)*: November 29, 2017.

**FOR FURTHER INFORMATION CONTACT:** Maria W. Votsch, 202–268–6525.

**SUPPLEMENTARY INFORMATION:** The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 22, 2017, it filed with the Postal Regulatory

Commission a *USPS Request to Add Priority Mail Contract 377 to Competitive Product List*. Documents are available at [www.prc.gov](http://www.prc.gov), Docket Nos. MC2018–32, CP2018–62.

**Maria W. Votsch,**

*Attorney, Corporate and Postal Business Law.*

[FR Doc. 2017–25769 Filed 11–28–17; 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:** *Date of notice required under 39 U.S.C. 3642(d)(1)*: November 29, 2017.

**FOR FURTHER INFORMATION CONTACT:**

Maria W. Votsch, 202–268–6525.

**SUPPLEMENTARY INFORMATION:** The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 24, 2017, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express & Priority Mail Contract 53 to Competitive Product List*. Documents are available at [www.prc.gov](http://www.prc.gov), Docket Nos. MC2018–33, CP2018–63.

**Maria W. Votsch,**

*Attorney, Corporate and Postal Business Law.*

[FR Doc. 2017–25777 Filed 11–28–17; 8:45 am]

**BILLING CODE 7710–12–P**



# FEDERAL REGISTER

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## Part II

### Department of the Treasury

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Office of the Comptroller of the Currency

12 CFR Parts 3, 47 and 50

Mandatory Contractual Stay Requirements for Qualified Financial Contracts;  
Final Rule

**DEPARTMENT OF THE TREASURY****Office of the Comptroller of the Currency****12 CFR Parts 3, 47 and 50**

[Docket ID OCC–2016–0009]

RIN 1557–AE05

**Mandatory Contractual Stay Requirements for Qualified Financial Contracts****AGENCY:** Office of the Comptroller of the Currency, Treasury (OCC).**ACTION:** Final rule.

**SUMMARY:** The OCC is adopting a final rule that adds a new part to its rules to enhance the resilience and the safety and soundness of federally chartered and licensed financial institutions by addressing concerns relating to the exercise of default rights of certain financial contracts that could interfere with the orderly resolution of certain systemically important financial firms. Under the final rule, a covered bank is required to ensure that a covered qualified financial contract contains a contractual stay-and-transfer provision analogous to the statutory stay-and-transfer provision imposed under Title II of the Dodd-Frank, Wall Street Reform and Consumer Protection Act and in the Federal Deposit Insurance Act, and limits the exercise of default rights based on the insolvency of an affiliate of the covered bank. In addition, this final rule makes conforming amendments to the Capital Adequacy Standards and the Liquidity Risk Measurement Standards in its regulations. The requirements of this final rule are substantively identical to those adopted in the final rules issued by the Board of Governors of the Federal Reserve System and by the Federal Deposit Insurance Corporation.

**DATES:** This final rule is effective on January 1, 2018.

**FOR FURTHER INFORMATION CONTACT:** Valerie Song, Assistant Director, Scott Burnett, Attorney, or Colby Mangels, Attorney, Bank Activities and Structure Division, (202) 649–5500; Allison Hester-Haddad, Counsel, or Ron Shimabukuro, Senior Counsel, Legislative and Regulatory Activities Division, (202) 649–6282, 400 7th Street SW., Washington, DC 20219.

**SUPPLEMENTARY INFORMATION:****Table of Contents**

- I. Introduction
  - A. Shared Policy Concerns of the Federal Banking Agencies

- B. Specific Policy Concerns Affecting National Banks, FSAs and Federal Branches and Agencies
- II. Background
  - A. Qualified Financial Contracts, Default Rights, and Financial Stability
  - B. QFC Default Rights and GSIB Resolution Strategies
  - C. Default Rights and Relevant Resolution Laws
- III. Discussion of the Final Rule
  - A. Overview, Purpose, and Authority
  - B. Covered Banks
  - C. Covered QFCs
    - 1. General Definition
    - 2. Definition of Counterparty
    - 3. Exclusion of Cleared QFCs and Financial Market Utilities
    - 4. Exclusion of Certain QFCs Under Foreign Bank Multi-Branch Master Agreements
    - 5. QFCs With Central Banks and Sovereign Entities
  - D. Definition of “Default Right”
  - E. Required Contractual Provisions Related to U.S. Special Resolution Regimes
  - F. Prohibited Cross-Default Rights
    - 1. Definitions
    - 2. General Prohibition
    - 3. General Creditor Protections
    - 4. Additional Creditor Protections for Supported QFCs
    - 5. Creditor Protections Related to FDI Act Proceedings
    - 6. Prohibited Terminations
    - 7. Agency Transactions
    - 8. Enforceability
    - 9. Interaction With Other Regulatory Requirements
    - 10. Compliance With the Universal Protocol
    - 11. Compliance With the U.S. Protocol
  - G. Process for Approval of Enhanced Creditor Protections
    - 1. Requests for Approval of Enhanced Creditor Protections
    - 2. Compliance With the International Swaps and Derivatives Association (ISDA) 2015 Universal Resolution Stay Protocol and U.S. Protocol
  - H. Transition Periods
  - I. Revisions to Certain Definitions in the OCC’s Capital and Liquidity Rules
- IV. Regulatory Analysis

**I. Introduction**

In the wake of the financial crisis of 2007–2008, U.S. and international financial regulators have placed increased focus on improving the resolvability of large, complex financial institutions that operate in multiple jurisdictions, which are often referred to as global systemically important banking organizations (GSIBs). In connection with these ongoing efforts, the Office of the Comptroller of the Currency (OCC) and the Board of Governors of the Federal Reserve System (FRB) worked jointly to develop and issue two separate notice of proposed rulemakings (NPRMs). The FRB issued an NPRM on May 3, 2016 (FRB Proposed Rule); the OCC issued an

NPRM on August 19, 2017 (OCC Proposed Rule).<sup>1</sup> The FRB Proposed Rule and the OCC Proposed Rule were substantively identical, with any differences generally relating to differences in the types of entities supervised by the FRB and OCC—the FRB Proposed Rule primarily addressed entities at the bank holding company level, while the OCC Proposed Rule addressed entities at the bank level (specifically, national banks, Federal savings associations (FSAs), and Federal branches and agencies). The Federal Deposit Insurance Corporation (FDIC) issued an NPRM on October 26, 2016, which paralleled the FRB Proposed Rule and the OCC Proposed Rule.<sup>2</sup> The OCC, FRB, and FDIC issued these NPRMs (hereinafter collectively referred to as the “Agencies’ NPRMs”) as part of their ongoing efforts to improve the resolvability of U.S. GSIBs and Foreign GSIBs that operate in the United States.<sup>3</sup>

The OCC received 21 comments on the proposed rule,<sup>4</sup> representing comments from banks and other financial institutions, trade associations, and individuals. Most of the comments submitted to the OCC were also submitted to the FRB and FDIC. As part of the effort to coordinate development of the final rules, all comments were shared among the Federal banking agencies (OCC, FRB, and FDIC).

The OCC has carefully reviewed all of the comments received. The proposed rule and the comments are discussed in Section III (Discussion of the Final Rule) of the preamble. The OCC notes that many of the comments submitted to the OCC also included attachments with the comments submitted to the FRB and FDIC. The OCC further notes that to the degree applicable, all comments submitted as attachments were treated

<sup>1</sup> 81 FR 29169 (May 11, 2016) (Restrictions on Qualified Financial Contracts of Systemically Important U.S. Banking Organizations and the U.S. Operations of Systemically Important Foreign Banking Organizations; Revisions to the Definition of Qualifying Master Netting Agreement and Related Definitions) (FRB Proposed Rule); 81 FR 55381 (August 19, 2017) (Mandatory Contractual Stay Requirements for Qualified Financial Contracts) (OCC Proposed Rule).

<sup>2</sup> 81 FR 74326 (October 26, 2016) (Restrictions on Qualified Financial Contracts of Certain FDIC-Supervised Institutions; Revisions to the Definition of Qualifying Master Netting Agreement and Related Definitions) (FDIC Proposed Rule).

<sup>3</sup> While the focus of the discussion in this preamble is on the impact of the OCC Proposed Rule specifically on national banks, FSAs, Federal branches and agencies, and generally on the national banking system, in light of the parallel nature of the OCC, FRB, and FDIC NPRMs, portions of the discussion in this preamble may be equally applicable to the FRB Proposed Rule and FDIC Proposed Rule.

<sup>4</sup> Unless otherwise noted, any reference to the “proposed rule” in this preamble is intended to refer to the OCC Proposed Rule.

as comments on the OCC Proposed Rule. As such, for discussion purposes these comments may be recharacterized or otherwise paraphrased in this preamble to reflect the points applicable to this final rule. In some instances, however, the preamble may discuss a comment that is not directly relevant to this final rule but illustrates the interaction between this final rule and the final rules of the FRB and FDIC. This is likely to be the case with respect to comments submitted to the FRB that address broad policy issues, such as the systemic risk of GSIBs.

#### *A. Shared Policy Concerns of the Federal Banking Agencies*

At the most basic level, the collective purpose of Agencies' NPRMs is to address a common supervisory concern raised by the resolvability of large, complex financial institutions in the United States that operate in multiple jurisdictions and that are subject to different supervisory authorities.<sup>5</sup> The Agencies' NPRMs reflected the coordinated efforts by the Federal banking agencies to develop a comprehensive U.S. regulatory framework, designed to be implemented by the OCC, FRB, and FDIC to apply to all entities of a GSIB in the United States to address the threat to financial stability posed by the disorderly exercise of default rights contained in certain qualified financial contracts (QFCs).

The threat to financial stability arises because all GSIBs are interconnected with other financial firms, including other GSIBs, through large volumes of QFCs. The failure of one entity within a GSIB can trigger disruptive terminations of these contracts if the counterparties of both the failed entity and its affiliates exercise their contractual rights to terminate the contracts and liquidate collateral. These terminations, especially if many counterparties lose confidence in the GSIB quickly, can destabilize the financial system and potentially spark a financial crisis through several channels. For example, such terminations can destabilize the failed entity's otherwise solvent affiliates, causing them to weaken or fail with adverse consequences to their counterparties that can result in a chain reaction that ripples through the financial system. They also may result in "fire sales" of large volumes of financial assets, in particular, the

collateral that secures the contracts, which can in turn weaken and cause stress for other firms by depressing the value of similar assets that they hold.

The Agencies' NPRMs, generally would require banking organizations that are covered by the NPRMs to ensure that their covered QFCs: (1) Contain a contractual stay-and-transfer provision analogous to the statutory stay-and-transfer provision imposed under Title II of the Dodd-Frank, Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),<sup>6</sup> and in the Federal Deposit Insurance Act (FDI Act),<sup>7</sup> and (2) limit the exercise of default rights based on the insolvency of an affiliate of the financial firm.

In the United States, the FDI Act and the Dodd-Frank Act create special resolution frameworks for failed financial firms that provide that the rights of a failed financial firm's counterparties to terminate their QFCs are temporarily stayed when the financial firm enters a resolution proceeding to allow for the transfer of the relevant obligations under the QFC to a solvent entity. By requiring covered QFCs to contain a contractual stay-and-transfer provision analogous to the statutory stay-and-transfer provision imposed under the FDI Act and Title II of the Dodd-Frank Act, the counterparties of QFCs have essentially contractually opted into the FDI Act and Title II of the Dodd-Frank Act temporary stay-and-transfer treatment. In this way, the Agencies' NPRMs address the concern that the statutory stay-and-transfer treatment would be challenged by a QFC counterparty, and might not be enforced by a court in a foreign jurisdiction.

With respect to the default rights based on the insolvency of an affiliate, the Agencies' NPRMs required covered QFCs to contain mandatory contractual provisions that would prohibit the counterparties of the QFCs from exercising default rights related, directly or indirectly, to the entry into resolution of an affiliate of the banking organizations covered by the NPRMs (cross-default rights), subject to certain creditor protection exceptions.

#### *B. Specific Policy Concerns Affecting National Banks, FSAs and Federal Branches and Agencies*

While the OCC shares many of the overall policy concerns discussed in Section I-A with the FRB and FDIC

with respect to the resolvability of large, complex financial institutions in the United States, the primary focus of this final rule is specifically on the safety and soundness of national banks, FSAs, and Federal branches and agencies, as well as the overall stability of the Federal banking system,<sup>8</sup> as posed by the disorderly exercise of default rights contained in QFCs. As the primary regulator for national banks, FSAs, and Federal branches and agencies (generally referred to as "OCC-supervised institutions"), the OCC has a strong safety and soundness interest in preventing such a disorderly termination of QFCs upon a GSIB's entry into resolution proceedings. QFCs are typically entered into by various operating entities in the GSIB group, which will often include a large depository institution that is subject to the OCC's supervision. These OCC-supervised institutions typically are some of the largest entities by asset size in the GSIB group, and often a party to large volumes of QFCs, making these institutions highly interconnected with other large financial firms.<sup>9</sup> The exercise of default rights against an otherwise healthy national bank, FSA, or Federal branch or agency resulting from the failure of its affiliate, for example its top-tier U.S. holding company, may cause it to weaken or fail, and in turn spread contagion throughout the U.S. financial system, including the national banking system, by causing a chain of failures by other financial institutions—including other national banks, FSAs, or Federal branches or agencies—that are its QFC counterparties. Furthermore, if an OCC-supervised institution were to fail, it is imperative that the default rights triggered by such an event are exercised in an orderly manner, both by domestic and foreign counterparties, to ensure that financial contagion does not spread to other federally chartered and licensed institutions and beyond, throughout the Federal banking system.

Accordingly, OCC-supervised institutions that are affiliates or branches of U.S. GSIBs or Foreign GSIBs are exposed, through the interconnectedness of their QFCs and the QFCs of their affiliates, to destabilizing effects if their counterparties or the counterparties of their affiliates exercise default rights upon the entry into resolution of the

<sup>5</sup> This section is only intended to give a general overview of the NPRMs issued by the OCC, FRB, and FDIC. Please refer to the NPRMs and final rules of each of the Federal banking agencies for any specific issues.

<sup>6</sup> 12 U.S.C. 5390(c)(9) (empowering the FDIC to transfer QFCs); 12 U.S.C. 5390(c)(10)(B)(i)(I) (providing for a temporary stay that generally lasts until 5:00 p.m. eastern time on the business day following the appointment of the FDIC as receiver).

<sup>7</sup> See 12 U.S.C. 1821(e)(8)–(10).

<sup>8</sup> The term "Federal banking system" refers to all OCC-supervised institutions, including national banks, FSAs, and Federal branches and agencies.

<sup>9</sup> 81 FR 29619, 29172 ("From the standpoint of financial stability, the most important of these operating subsidiaries are generally a U.S. insured depository institution, a U.S. broker-dealer, and similar entities organized in other countries.").

OCC-supervised institution or any affiliate of the OCC-supervised institution. These potential destabilizing effects are best addressed by requiring all GSIB entities to amend their QFCs to include contractual provisions designed to avoid such destabilization. As the primary supervisor of national banks, FSAs, and Federal branches and agencies, the OCC has a significant interest in preventing or mitigating these destabilizing effects on the safety and soundness of not just the OCC-supervised institutions within a GSIB group, but to all OCC-supervised institutions in the Federal banking system. Measures to improve financial stability and the probability of a successful resolution of a GSIB likely will affect the operations of the OCC-supervised institutions that are within the GSIB group.

The OCC believes that each of the Federal banking agencies share a collective interest to insure the orderly resolution of all entities that make up a GSIB group. This final rule represents the OCC's effort to help address this systemic issue with respect to OCC-supervised institutions. Consequently, for the reasons discussed in this preamble, the OCC is issuing this final rule, which imposes substantively identical requirements on national banks, FSAs, and Federal branches and agencies as those imposed by the FRB and FDIC final rules.<sup>10</sup>

## II. Background

The following background discussion describes in detail the financial contracts that are the subject of this final rule, the default rights often contained in such contracts, and impacts on financial stability resulting from the exercise of such default rights. This section also provides in more detail background information on the resolution strategies for GSIBs and how they fit within the resolution frameworks in the United States.

### A. Qualified Financial Contracts, Default Rights, and Financial Stability

The final rule covers QFCs, which include swaps, other derivative contracts, repurchase agreements (repos)

and reverse repos, and securities lending and borrowing agreements. GSIB entities enter into QFCs to borrow money to finance their investments, to lend money, to manage risk, to attempt to profit from market movements, and to enable their clients and counterparties to perform these financial activities.

QFCs play a role in economically valuable financial intermediation when markets are functioning normally. But they are also a major source of financial interconnectedness, which may pose a threat to financial stability in times of stress. The final rule focuses on one of the most serious threats to both a global systemically important bank holding company (BHC) and its covered banks' subsidiaries—the failure of a GSIB that is party to large volumes of QFCs, which are likely to include QFCs with counterparties that are themselves systemically important. By contract, a party to a QFC generally has the right to take certain actions if its counterparty defaults on the QFC (that is, if it fails to meet certain contractual obligations). Common default rights include the right to suspend performance of the non-defaulting party's obligations, the right to terminate or accelerate the contract, the right to set off amounts owed between the parties, and the right to seize and liquidate the defaulting party's collateral. In general, default rights allow a party to a QFC to reduce the credit risk associated with the QFC by granting it the right to exit the QFC and thereby reduce its exposure to its counterparty upon the occurrence of a specified condition, such as its counterparty's entry into resolution proceedings.

This final rule focuses on two distinct scenarios in which a non-defaulting party to a QFC is commonly able to exercise default rights. These two scenarios involve a default that occurs when either the defaulting party to the QFC or an affiliate of that party enters a resolution proceeding.<sup>11</sup>

<sup>11</sup> This preamble uses phrases such as “entering a resolution proceeding” and “going into resolution” to refer to the concept of “becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding.” These phrases refer to proceedings established by law to deal with a failed legal entity. In the context of the failure of a global systemically important BHC, the most relevant types of resolution proceeding include: (1) For most US-based legal entities, the bankruptcy process established by the U.S. Bankruptcy Code (Title 11, United States Code); (2) for U.S. insured depository institutions, a receivership administered by the FDIC under the FDI Act (12 U.S.C. 1821); (3) for companies whose “resolution under otherwise applicable Federal or State law would have serious adverse effects on the financial stability of the United States,” the Dodd-Frank Act's Orderly Liquidation Authority (12 U.S.C. 5383(b)(2)); and, (4) for entities based outside the United States, resolution proceedings created by foreign law.

The first scenario occurs when a legal entity that is itself a party to the QFC enters a resolution proceeding. This final rule refers to such a scenario as a “direct default” and refers to the contractual default rights that arise from a direct default as “direct default rights.”<sup>12</sup>

The second scenario occurs when an affiliate of the legal entity that is a direct party to the QFC (such as the direct party's parent holding company) enters a resolution proceeding. This final rule refers to such a scenario as a “cross-default” and refers to contractual default rights that arise from a cross-default as “cross-default rights.” For example, a GSIB parent entity might guarantee the derivatives transactions of its subsidiaries and those derivatives contracts could contain cross-default rights against a subsidiary of the GSIB that would be triggered by the bankruptcy filing of the GSIB parent entity even though the subsidiary continues to meet all of its financial obligations.

Direct default rights and cross-default rights are referred to collectively in this final rule as “default rights.”

As noted in the OCC Proposed Rule, if a significant number of QFC counterparties exercise their default rights precipitously and in a manner that would impede an orderly resolution of a GSIB, all QFC counterparties and the broader financial system, including institutions supervised by the OCC, may potentially be worse off and less stable.

The destabilization can occur in several ways. First, counterparties' exercise of default rights may drain liquidity from the troubled GSIB, forcing it to sell off assets at depressed prices, both because the sales must be done in a short timeframe and because the elevated supply will push prices down. These asset “fire sales” may cause or deepen balance-sheet insolvency at the GSIB, reducing the amount that its other creditors can recover and thereby imposing losses on those creditors and threatening their solvency (and, indirectly, the solvency of their own creditors, and so on). The GSIB may also respond by withdrawing liquidity that it had offered to other firms, forcing them to engage in asset fire sales. Alternatively, if the GSIB's QFC counterparty itself liquidates the QFC collateral at fire sale prices, the effect will again be to weaken the GSIB's balance sheet, because the debt satisfied by the liquidation would be less than

<sup>12</sup> For convenience, this preamble uses the general term “default” to refer specifically to a default that occurs when a QFC party or its affiliate enters a resolution proceeding.

<sup>10</sup> “Restrictions on Qualified Financial Contracts of Systemically Important U.S. Banking Organizations and the U.S. Operations of Systemically Important Foreign Banking Organizations; Revisions to the Definition of Qualifying Master Netting Agreement and Related Definitions,” 82 FR 42882 (September 12, 2017) (FRB Final Rule). See also 12 U.S.C. 5365(b)(4) (requiring the FRB to consult with each Financial Stability Oversight Council (FSOC) member that primarily supervises any subsidiary when any prudential standard is likely to have a “significant impact” on such subsidiary).

what the value of the collateral would have been outside the fire sale context. The counterparty's set-off rights may allow it to further drain the GSIB's capital and liquidity by withholding payments owed to the GSIB. The GSIB may also have rehypothecated collateral that it received from QFC counterparties, for instance in back-to-back repo or securities lending transactions, in which case demands from those counterparties for the early return of their rehypothecated collateral could be especially disruptive.

The asset fire sales can also spread contagion throughout the financial system by increasing volatility and by lowering the value of similar assets held by other financial institutions, potentially causing them to suffer diminished market confidence in their own solvency, mark-to-market losses, margin calls, and creditor runs (which could lead to further fire sales, thereby worsening the contagion). Finally, the early terminations of derivatives upon which the defaulting GSIB relied on to hedge its risks could leave major risks unhedged, increasing the GSIB's probable losses going forward.

Where there are significant simultaneous terminations and these effects occur contemporaneously, such as upon the failure of a GSIB that is party to a large volume of QFCs, they may pose a substantial risk to financial stability. In short, QFC continuity is important for the orderly resolution of a GSIB so that the instability caused by asset fire sales can be avoided.<sup>13</sup>

As will be discussed further, the final rule is primarily concerned only with default rights that run against a GSIB—that is, direct default rights and cross-default rights that arise from the entry into resolution of a GSIB. The final rule would not affect contractual default rights that a GSIB (or any other entity)

may have against a counterparty that is not a GSIB. The OCC believes that this limited scope is appropriate because the risk posed to financial stability by the exercise of QFC default rights is greatest when the defaulting counterparty is a GSIB.

#### *B. QFC Default Rights and GSIB Resolution Strategies*

Under the Dodd-Frank Act, many complex GSIBs are required to submit resolution plans to the FRB and the FDIC, detailing how the company can be resolved in a rapid and orderly manner in the event of material financial distress or failure of the company. In response to these requirements, these firms have developed resolution strategies that, broadly speaking, fall into two categories: The single-point-of-entry (SPOE) strategy and the multiple-point-of-entry (MPOE) strategy. As noted in the FRB Proposed Rule, cross-default rights in QFCs pose a potential obstacle to the implementation of either of these strategies.

In an SPOE resolution, only a single legal entity—the GSIB's top-tier BHC—would enter a resolution proceeding. The losses that led to the GSIB's failure would be passed up from the operating subsidiaries that incurred the losses to the holding company and would then be imposed on the equity holders and unsecured creditors of the holding company through the resolution process. This strategy is designed to help ensure that the GSIB's subsidiaries remain adequately capitalized. An SPOE resolution could thereby prevent those operating subsidiaries from failing or entering resolution themselves and allow them to instead continue normal operations. The expectation that the holding company's equity holders and unsecured creditors would absorb the GSIB's losses in the event of failure would help to maintain the confidence of the operating subsidiaries' creditors and counterparties (including QFC counterparties), reducing their incentive to engage in potentially destabilizing funding runs or margin calls and thus lowering the risk of asset fire sales.

An SPOE proceeding can avoid the need for covered banks to be placed into receivership or similar proceedings, as they would continue to operate as going concerns, only if the parent's entry into resolution proceedings does not trigger the exercise of cross-default rights. Accordingly, this final rule, by limiting such cross-default rights based on an affiliate's entry into resolution proceedings, enables the SPOE strategy, and in turn, would assist in stabilizing both the covered bank and the Federal banking system.

This final rule is also intended to yield benefits for resolution under the MPOE strategy. Unlike the SPOE strategy, an MPOE strategy involves several entities in the GSIB group entering proceedings. For example, an MPOE strategy might involve a Foreign GSIB's U.S. intermediate holding company going into resolution or a GSIB's U.S. insured depository institution entering resolution under the FDI Act. Similar to the benefits associated with the SPOE strategy, this final rule would help support the continued operation of affiliates of an entity experiencing resolution to the extent the affiliate continues to perform on its QFCs.

#### *C. Default Rights and Relevant Resolution Laws*

In order to understand the connection between direct defaults, cross-defaults, the SPOE and MPOE resolution strategies, and the threats to financial stability discussed previously, it is necessary to understand how QFCs, and the default rights contained therein, are treated when an entity enters resolution. The following sections discuss the treatment of QFCs in greater detail under three U.S. resolution laws: The Bankruptcy Code, the Orderly Liquidation Authority (OLA), and the FDI Act. As discussed in these sections, each of these resolution laws has special provisions detailing the treatment of QFCs upon an entity's entry into such proceedings.

*U.S. Bankruptcy Code.* While covered banks themselves are not subject to resolution under the Bankruptcy Code, in general, if a BHC were to fail, it would be resolved under the Bankruptcy Code. When an entity goes into resolution under the Bankruptcy Code, attempts by the creditors of the debtor to enforce their debts through any means other than participation in the bankruptcy proceeding (for instance, by suing in another court, seeking enforcement of a preexisting judgment, or seizing and liquidating collateral) are generally blocked by the imposition of an automatic stay, which generally persists throughout the bankruptcy proceeding.<sup>14</sup> A key purpose of the automatic stay, and of bankruptcy law in general, is to maximize the value of the bankruptcy estate and the creditors' ultimate recoveries by facilitating an orderly liquidation or restructuring of the debtor. As a result, the automatic stay addresses the collective action problem, in which the creditors' individual incentives to race to recover as much from the debtor as possible

<sup>13</sup> The FRB and the FDIC identified the exercise of default rights in financial contracts as a potential obstacle to orderly resolution in the context of resolution plans filed pursuant to § 165(d) of the Dodd-Frank Act, and accordingly, instructed the most systemically important firms to demonstrate that they are “amending, on an industry-wide and firm-specific basis, financial contracts to provide for a stay of certain early termination rights of external counterparties triggered by insolvency proceedings.” FRB and FDIC, “Agencies Provide Feedback on Second Round Resolution Plans of ‘First-Wave’ Filers” (August 5, 2014), available at <http://www.federalreserve.gov/newsevents/press/bcreg/20140805a.htm>. See also FRB and FDIC, “Agencies Provide Feedback on Resolution Plans of Three Foreign Banking Organizations” (March 23, 2015), available at <http://www.federalreserve.gov/newsevents/press/bcreg/20150323a.htm>; FRB and FDIC, “Guidance for 2013 165(d) Annual Resolution Plan Submissions by Domestic Covered Companies that Submitted Initial Resolution Plans in 2012” 5–6 (April 15, 2013), available at <http://www.federalreserve.gov/newsevents/press/bcreg/20130415c2.pdf>.

<sup>14</sup> See 11 U.S.C. 362.

before other creditors can do so, collectively cause a value-destroying disorderly liquidation of the debtor.<sup>15</sup>

The Bankruptcy Code, however, largely exempts QFC counterparties of the debtor from the automatic stay through special “safe harbor” provisions.<sup>16</sup> Under these provisions, any contractual rights that a QFC counterparty has to terminate the contract, set off obligations, or liquidate collateral in response to a direct default or cross-default are not subject to the stay and may be exercised at any time.<sup>17</sup>

Where the failed firm is a GSIB’s holding company with covered banks that are going concerns and are party to large volumes of QFCs, the mass exercise of default rights under the QFCs based on the affiliate default represents a significant impediment to the SPOE resolution strategy.<sup>18</sup> This is because the failure of a covered bank’s affiliate will trigger the mass exercise of cross-default rights against the covered bank, which will not be stayed by the affiliate’s entry into bankruptcy proceedings. This can in turn lead to fire sales that could threaten the ongoing viability of the covered bank and the successful resolution of the particular GSIB—and thus could also pose a threat to the Federal banking system and broader financial system.

*Special Resolution Regimes Under U.S. Law.* For purposes of this final rule, there are two special resolution regimes under U.S. law: Title II of the Dodd-Frank Act and the Orderly Liquidation Authority and the FDI Act. While these regimes both impose certain limitations on the ability of counterparties to exercise default rights—thus mitigating the potential for disorderly resolution due to the exercise by counterparties of such default rights—these limitations may not be applicable or clearly enforceable in certain contexts.

*Title II of the Dodd-Frank Act and the Orderly Liquidation Authority.* Title II of

the Dodd-Frank Act establishes an alternative resolution framework intended “to provide the necessary authority to liquidate failing financial companies that pose a significant risk to the financial stability of the United States in a manner that mitigates such risk and minimizes moral hazard.”<sup>19</sup>

As noted, although a failed BHC would generally be resolved under the Bankruptcy Code, Congress recognized that a U.S. financial company might fail under extraordinary circumstances, in which an attempt to resolve it through the bankruptcy process would have serious adverse effects on financial stability in the United States. Title II therefore authorizes the Secretary of the Treasury, upon the recommendation of other government agencies and a determination that several preconditions are met, to place a U.S. financial company into a receivership conducted by the FDIC as an alternative to bankruptcy.

Title II empowers the FDIC, when it acts as receiver in an OLA resolution, to protect financial stability against the QFC-related threats discussed previously. Title II addresses direct default rights in a number of ways. Title II empowers the FDIC to transfer the QFCs to a bridge financial company or some other financial company that is not in a resolution proceeding and should therefore be capable of performing under the QFCs.<sup>20</sup> To give the FDIC time to effect this transfer, Title II temporarily stays QFC counterparties of the failed entity from exercising termination, netting, and collateral liquidation rights “solely by reason of or incidental to” the failed entity’s entry into OLA resolution, its insolvency, or its financial condition.<sup>21</sup> Once the QFCs are transferred in accordance with the statute, Title II permanently stays the exercise of those direct default rights based on the prior event of default and receivership.<sup>22</sup>

Title II addresses cross-default rights through a similar procedure. It empowers the FDIC “to enforce contracts of subsidiaries or affiliates” of

the failed company that are guaranteed or otherwise supported by or linked to the covered financial company, notwithstanding any contractual right to cause the termination, liquidation, or acceleration of such contracts based solely on the insolvency, financial condition, or receivership of the failed company, so long as, if such contracts are guaranteed or otherwise supported by the covered financial company, the FDIC takes certain steps to protect the QFC counterparty’s interests by the end of the business day following the company’s entry into OLA resolution.<sup>23</sup>

These stay-and-transfer provisions of the Dodd-Frank Act go far to mitigate the threat posed by QFC default rights by preventing mass closeouts against the entity that has entered into OLA proceedings or its going concern affiliates. At the same time, they allow for appropriate protections for QFC counterparties of the failed financial company. They only stay the exercise of default rights based on the failed company’s entry into resolution, the fact of its insolvency, or its financial condition. Further, the stay period is brief, unless the FDIC transfers the QFCs to another financial company that is not in resolution and should therefore be capable of performing under the QFCs.

*Federal Deposit Insurance Act.* Under the FDI Act, a failing insured depository institution would generally enter a receivership administered by the FDIC. The FDI Act addresses direct default rights in the failed bank’s QFCs with stay-and-transfer provisions that are substantially similar to the provisions of Title II of the Dodd-Frank Act as discussed.<sup>24</sup> However, the FDI Act does not address cross-default rights, leaving the QFC counterparties of the failed depository institution’s affiliates free to exercise any contractual rights they may have to terminate, net, and liquidate collateral based on the depository institution’s entry into resolution.

### III. Discussion of the Final Rule

#### A. Overview, Purpose, and Authority

As discussed previously, the exercise of default rights by counterparties of a failed GSIB can have a significant impact on financial stability. This financial stability concern is necessarily intertwined with the safety and soundness of covered banks and the Federal banking system—the disorderly exercise of default rights can produce a sudden, contemporaneous threat to the safety and soundness of individual institutions throughout the system,

<sup>15</sup> See, e.g., *Aiello v. Provident Financial Corp.*, 239 F.3d 876, 879 (7th Cir. 2001).

<sup>16</sup> The U.S. Bankruptcy Code does not use the term “qualified financial contract,” but the set of transactions covered by its safe harbor provisions closely tracks the set of transactions that fall within the definition of “qualified financial contract” used in Title II of the Dodd-Frank Act and in this final rule. See 11 U.S.C. 362(b)(6), (7), (17), (27), 362(o), 555, 556, 559, 560, and 561.

<sup>17</sup> The Bankruptcy Code does not itself confer any default rights upon QFC counterparties; it merely permits QFC counterparties to exercise certain contractual rights that they have under the terms of the QFC. This final rule does not restrict the exercise of any default rights that fall within the Bankruptcy Code’s safe harbor provisions, which are described here to provide context.

<sup>18</sup> As noted previously, the MPOE strategy will similarly benefit from the override of cross-defaults. The SPOE strategy is used here for illustrative purposes only.

<sup>19</sup> 12 U.S.C. 5384(a) (section 204(a) of the Dodd-Frank Act).

<sup>20</sup> 12 U.S.C. 5390(c)(9).

<sup>21</sup> 12 U.S.C. 5390(c)(10)(B)(i)(I). This temporary stay generally lasts until 5:00 p.m. eastern time on the business day following the appointment of the FDIC as receiver.

<sup>22</sup> If the QFCs are transferred to a solvent third party before the stay expires, the counterparty is permanently enjoined from exercising such rights based upon the appointment of the FDIC as receiver of the financial company (or the insolvency or financial condition of the financial company), but is not stayed from exercising such rights based upon other events of default. 12 U.S.C. 5390(c)(10)(B)(i)(II).

<sup>23</sup> 12 U.S.C. 5390(c)(16); 12 CFR 380.12.

<sup>24</sup> See 12 U.S.C. 1821(e)(8)–(10).

which in turn threatens the system as a whole. Accordingly, national banks, FSAs, and Federal branches and agencies are affected by financial instability—even if such instability is precipitated outside the Federal banking system—and can themselves also be sources of financial destabilization due to the interconnectedness of these institutions to each other and to other entities within the financial system. Thus, safety and soundness of individual national banks, FSAs, and Federal branches and agencies, the Federal banking system, and financial stability of the system as a whole are interconnected.

The purpose of this final rule is to enhance the safety and soundness of covered banks and the Federal banking system, thereby also bolstering financial stability generally, by addressing the two main issues raised by covered QFCs with the orderly resolution of these covered banks as generally previously described.

While Title II and the FDI Act empower the use of the QFC stay-and-transfer provisions, a court in a foreign jurisdiction may decline to enforce these important provisions. The final rule directly improves the safety and soundness of covered banks by clarifying the applicability of U.S. special resolution regimes to all counterparties, whether they are foreign or domestic. Although domestic entities are clearly subject to the temporary stay provisions of OLA and the FDI Act, these stays may be difficult to enforce in a cross-border context. As a result, domestic counterparties of a failed U.S. financial institution may be disadvantaged relative to foreign counterparties, as the domestic counterparties would be subject to the stay, and accompanying potential market volatility, while if the stay was not enforced by foreign authorities, foreign counterparties could close out immediately. Furthermore, a mass close out by such foreign counterparties would likely exacerbate market volatility, which in turn would likely magnify harm to the stayed U.S. counterparties' positions, which are likely to include other national banks and FSAs. This final rule would eliminate the potential for these adverse consequences by requiring covered banks to condition the exercise of default rights in covered contracts on the stay provisions of OLA and the FDI Act.

In spite of the QFC stay-and-transfer provisions in Title II and the FDI Act, the affiliates of a global systemically important BHC that goes into resolution under the Bankruptcy Code may face

disruptions to their QFCs as their counterparties exercise cross-default rights. Thus, a healthy covered bank whose parent BHC entered resolution proceedings could fail due to its counterparties exercising cross-default rights. This is both a safety and soundness concern for the otherwise healthy covered bank, but it also has the additional negative effect of defeating the orderly resolution of the GSIB, since a key element of SPOE resolution in the United States is ensuring that critical operating subsidiaries—such as covered banks—continue to operate on a going concern basis. This final rule would address this issue by generally restricting the exercise of cross-default rights by counterparties against a covered bank.

Moreover, a disorderly resolution of the kind described could jeopardize not just the covered bank and the orderly resolution of its failed parent BHC, but all surviving counterparties, many of which are likely to be other national banks and other FSAs, regardless of size or interconnectedness, by harming the overall condition of the Federal banking system and the financial system as a whole. A disorderly resolution could result in additional defaults, fire sales of collateral, and other consequences likely to amplify the systemic fallout of the resolution of a covered bank.

The final rule is designed to minimize such disorder, and therefore enhance the safety and soundness of all individual national banks, FSAs, and Federal branches and agencies, the Federal banking system, and the broader financial system. This is particularly important because financial institutions are more sensitive than other firms to the overall health of the financial system.<sup>25</sup>

The final rule covers the OCC-supervised operations of foreign banking organizations (FBOs) designated as systemically important, including national bank and FSA subsidiaries, as well as Federal branches and agencies, of these FBOs. As with a national bank or FSA subsidiary of a U.S. global systemically important BHC, the OCC believes that this final rule should apply to a national bank or FSA

subsidiary of a global systemically important FBO for essentially the same reasons. While the national bank or FSA may not be considered systemically important itself, as part of a GSIB, the disorderly resolution of the covered national banks and FSAs could have a significant negative impact on the Federal banking system and on the U.S. financial system, in general.

Specifically, the final rule is designed to prevent the failure of a global systemically important FBO from disrupting the ongoing operations or orderly resolution of the covered bank by protecting the healthy national bank or FSA from the mass triggering of default rights by the QFC counterparties. Additionally, the application of this final rule to the QFCs of these national bank and FSA subsidiaries should avoid creating what may otherwise be an incentive for counterparties to concentrate QFCs in these firms because they are subject to fewer counterparty restrictions. Similarly, it is important to cover certain QFCs entered into by any Federal branch or agency of a global systemically important FBO in order to ensure the orderly resolution of these entities if the parent FBO were to be placed into resolution in its home jurisdiction.

The OCC is issuing this final rule under its authorities under the National Bank Act (12 U.S.C. 1 *et seq.*), the Home Owners' Loan Act (12 U.S.C. 1461 *et seq.*), and the International Banking Act of 1978 (12 U.S.C. 3101 *et seq.*), including its general rulemaking authorities.<sup>26</sup> The OCC views the final rule as consistent with its overall statutory mandate of assuring the safety and soundness of entities subject to its supervision, including national banks, FSAs, and Federal branches and agencies.<sup>27</sup>

In developing this final rule, the OCC reviewed and carefully considered all comments received on the OCC Proposed Rule as part of the notice and comment process. In addition, in light of the closely connected nature between BHC supervision and the supervision of national banks, FSAs, and Federal branches and agencies, and in order to maintain substantive consistency with the FRB Proposed Rule and FDIC Proposed Rule, the OCC reviewed comments received by the FRB and FDIC on their proposed rules to the degree such comments were relevant to

<sup>25</sup> The OCC, along with the FDIC and FRB, recently made this point in the swap margin notice of proposed rulemaking. 79 FR 57348, 57361 (September 24, 2014) ("Financial firms present a higher level of risk than other types of counterparties because the profitability and viability of financial firms is more tightly linked to the health of the financial system than other types of counterparties. Because financial counterparties are more likely to default during a period of financial stress, they pose greater systemic risk and risk to the safety and soundness of the covered swap entity.").

<sup>26</sup> See 12 U.S.C. 93a, 1463(a)(2), and 3108(a).

<sup>27</sup> See 12 U.S.C. 1. This primary responsibility is also defined in various provisions throughout the OCC's express statutory authorities with respect to each institution type under their respective statutes.

the substance of this final rule. In characterizing comments and the OCC responses to the commenters in this preamble, the OCC may reference and discuss comments received by the FRB and FDIC as comments to the OCC to the extent applicable to the substance of the OCC final rule.

*B. Covered Banks (§ 47.3(a), (b), and (c))*

*OCC Proposed Rule.*<sup>28</sup> The proposed rule applied to “covered banks.” The term “covered bank” was defined to include (i) any national bank or FSA that is a subsidiary of a global systemically important BHC that has been designated pursuant to subpart I of 12 CFR part 252 (FRB Regulation YY); or (ii) any national bank or FSA subsidiary, or Federal branch or agency of a global systemically important FBO that has been designated pursuant to subpart I of 12 CFR part 252 (FRB Regulation YY).

The proposed rule defined global systemically important BHC and global systemically important FBO by cross-reference to newly added subpart I of 12 CFR part 252 of the FRB Proposed Rule. The list of banking organizations that meet the methodology proposed in the FRB Proposed Rule is currently the same set of banking organizations that meet the Basel Committee on Banking Supervision (BCBS) definition of a GSIB.<sup>29</sup>

Under the proposed rule, the term covered bank also included any subsidiary of a national bank, FSA, or Federal branch or agency. The definition of “subsidiary of covered bank” in the proposed rule was intended to mirror the definition of subsidiary in the FRB Regulation YY (12 CFR 252.82(b)(2) and (3)), and it was intended to be substantially the same as the FRB definition with respect to a subsidiary of a covered bank.<sup>30</sup>

<sup>28</sup> References in this preamble to the “proposed rule” refer to the OCC Proposed Rule unless otherwise specified.

<sup>29</sup> In November 2015, the Financial Stability Board and BCBS published a list of banks that meet the BCBS definition of a global systemically important bank (BCBS G-SIB) based on year-end 2014 data. A list based on year-end 2014 data was published November 3, 2015 (available at <http://www.fsb.org/wp-content/uploads/2015-update-of-list-of-global-systemically-important-banks-G-SIBs.pdf>). The U.S. top-tier BHCs that are currently identified as a BCBS G-SIB are Bank of America Corporation, Bank of New York Mellon Corporation, Citigroup Inc., Goldman Sachs Group, Inc., JP Morgan Chase & Co., Morgan Stanley, State Street Corporation, and Wells Fargo & Company.

<sup>30</sup> The Bank Holding Company Act (BHC Act) definition of control includes ownership, control or the power to vote 25 percent of any class of voting securities; control in any manner of the election of a majority of the directors or trustees of; or exercise of a controlling influence over the management or policies. 12 U.S.C. 1841.

*Comments.* While commenters overall supported the purpose of the proposed rule, a few commenters urged the OCC not to expand the scope of covered banks to include non-GSIBs. The definition of covered bank in the proposed rule only applied to a national bank, FSA, or Federal branch or agency that is under a global systemically important BHC or FBO as designated by the FRB final rule. However, the OCC requested comment on whether an additional threshold should be added to the definition of covered bank to cover a national bank or FSA that is not under a BHC but may have total assets sufficiently large to require application of the final rule. As discussed further in the following section, the OCC has decided to add an additional provision to the definition of covered bank to capture a national bank or FSA that has more than \$700 billion in total assets as reported on its most recent Consolidated Reports of Condition and Income (Call Report).

A number of commenters urged the OCC to move to a financial consolidation standard to define a “subsidiary of a covered bank” instead of the BHC Act control standard set forth in the FRB Regulation YY.<sup>31</sup> These commenters asserted that, under U.S. generally accepted accounting principles (GAAP), a company generally would consolidate an entity in which it holds a majority voting interest, or over which it has the power to direct the most significant economic activities, to the extent it also holds a variable interest in the entity. In addition, commenters pointed out that financially consolidated subsidiaries are often subject to operational control and generally fully integrated into the parent’s enterprise-wide governance, policies, procedures, control frameworks, business strategies, information technology systems, and management systems. These commenters pointed out that the concept of BHC Act control was designed to serve other policy purposes (e.g., separation between banking and commercial activities). A number of commenters raised concerns that BHC Act control may include an entity that is not under the day-to-day operational control of the GSIB and over whom the GSIB does not have the practical ability to require remediation of that entity’s QFCs to comply with the proposed rule. Moreover, commenters contended that

entities that are not consolidated with a GSIB for financial reporting are unlikely to raise the types of concerns for the orderly resolution of GSIBs targeted by the proposed rule. Commenters also noted that the International Swaps and Derivatives Association (ISDA) master agreements and Universal Protocol define “affiliate” by reference to ownership of a majority of the voting power of an entity or person. For these reasons, commenters urged the OCC to define the term “subsidiary” of a covered bank based on financial consolidation under the final rule.

Commenters generally urged that regardless of whether financial consolidation is adopted for the purpose of defining “subsidiary,” the final rule should exclude any entities over which the covered bank does not exercise operational control. Specifically, with respect to comments to the FRB Proposed Rule, commenters noted that such entities could include merchant banking portfolio companies, section 2(h)(2) companies, joint ventures, sponsored funds as distinct from their sponsors or investment advisors, securitization vehicles, entities in which the covered entity holds only a minority interest and does not exert a controlling influence, and subsidiaries held pursuant to provisions for debt previously contracted in good faith (DPC subsidiaries).<sup>32</sup>

Similarly, OCC commenters also requested that covered banks should exempt entities over which a covered bank does not exercise operational control. The OCC notes that with respect to covered banks, such entities would include DPC subsidiaries,<sup>33</sup> as well as a covered bank’s investment in community development corporations (CDCs) or small business investment corporations (SBICs).<sup>34</sup> These entities potentially present similar issues of operational control as in merchant banking, sponsored funds, and joint ventures.

In terms of foreign GSIBs, some commenters believed that FBO subsidiaries for which the FBO has been given special relief by FRB order not to hold the subsidiary under an intermediate holding company (IHC) should not be included in the definition

<sup>32</sup> See, e.g., 12 U.S.C. 1842(a)(A)(ii), 1843(c)(2); 12 CFR 225.12(b), 225.22(d)(1).

<sup>33</sup> See 12 U.S.C. 29; 12 CFR 5.34; and 12 U.S.C. 1464 (FSA DPC authority).

<sup>34</sup> National banks may own or make controlling or minority investments in SBICs as defined under 13 CFR 107.50, CDCs pursuant to 12 U.S.C. 24(Eleventh), or other public welfare investments pursuant to 12 U.S.C. 24(Seventh). FSAs may also make such controlling or minority investments in SBICs and CDCs pursuant to their general lending authority under 12 U.S.C. 1464(c).

<sup>31</sup> Commenters generally expressed a similar view with respect to the definition of “affiliate” of a covered bank as the term is used in §§ 47.4 and 47.5 of the proposed rule which was likewise defined by reference to BHC Act control.

of covered bank, even if such entities would be consolidated under financial consolidation principles.<sup>35</sup> These commenters asserted that since neither the covered bank nor the Foreign GSIB parent would provide credit support to these entities or name such entities in a cross-default provision in a QFC or related agreement, the failure of any of these types of entities would be unlikely to affect QFCs entered into by the covered bank or any other affiliate. These commenters further noted that the few such requests that have been granted by the FRB often involved situations in which the FBO did not have sufficient operational control over the entity to ensure its compliance. Commenters also requested that U.S. Federal branches and agencies of FBOs be excluded from the definition of “covered bank” where the FBO’s home country legal framework imposes similar requirements of the final rule on the FBO and the Federal branch or agency. These commenters asserted that the requirements of the final rule would be duplicative of the requirements with respect to such Federal branches and agencies if their QFCs are already subject to existing and substantially equivalent resolution powers in the home country, without a proportionate incremental benefit to their resolvability or reduction in risk to U.S. financial stability.<sup>36</sup>

**Final Rule.** Under the final rule, a “covered bank” is generally defined to include (1) a national bank or FSA not under a BHC and that has more than \$700 billion in total assets as reported on their most recent Call Report, (2) a national bank or FSA that is a subsidiary of a global systemically important BHC that has been designated pursuant to subpart I of 12 CFR part 252 of this title (FRB Regulation YY); or (3) is a national bank or FSA subsidiary, or Federal branch or agency of a global systemically important FBO designated pursuant to subpart I of 12 CFR part 252 of this title (FRB Regulation YY) that has been designated pursuant to FRB Regulation YY.

The final rule generally adopts the definition of covered bank as proposed

with the exception of the addition of a provision to include a national bank or FSA not under a BHC and that has more than \$700 billion in total assets as reported on their most recent Call Report. This provision is intended to address the OCC’s concern that a national bank or FSA, not under a BHC, with a sufficient number of large total assets would be subject to the requirement of the final rule. While currently a null set, the OCC believes that any national bank or FSA that has total assets that exceed \$700 billion would raise similar concerns with respect to interconnectedness and financial contagion.

As in the proposed rule, a covered bank includes the OCC-regulated subsidiaries of entities identified as U.S. GSIB top-tier holding companies under the FRB GSIB surcharge rule.<sup>37</sup> U.S. GSIBs generally enter into QFCs through subsidiary legal entities rather than through the top-tier holding company.<sup>38</sup> Therefore, in order to increase GSIB resilience and resolvability by addressing the potential obstacles to orderly resolution posed by QFCs, it is necessary to apply the proposed restrictions to the U.S. GSIBs’ subsidiaries. In particular, to facilitate the resolution of a GSIB under an SPOE strategy, in which only the top-tier holding company would enter a resolution proceeding while its subsidiaries would continue to meet their financial obligations, or an MPOE strategy where an affiliate of an entity that is otherwise performing under a QFC enters resolution, it is necessary to ensure that those subsidiaries or affiliates do not enter into QFCs that contain cross-default rights that the counterparty could exercise based on the holding company’s or an affiliate’s entry into resolution (or that any such cross-default rights are stayed when the holding company enters resolution). Moreover, including U.S. and non-U.S. entities of a U.S. GSIB as a covered bank should help ensure that such cross-default rights do not affect the ability of performing and solvent entities of a GSIB—regardless of jurisdiction—to remain outside of resolution proceedings.

The term “subsidiary” in the final rule continues to be defined by reference to BHC Act control as does the

definition of “affiliate.”<sup>39</sup> The final rule does not define covered banks to include only those subsidiaries of GSIBs that are financially consolidated subsidiaries as requested by certain commenters. Defining “subsidiary” and “affiliate” by reference to BHC Act control is consistent with the definitions of those terms in the FDI Act and Title II of the Dodd-Frank Act. Specifically, Title II permits the FDIC, as receiver of a covered financial company or a receiver for its subsidiary, to enforce QFCs and other contracts of subsidiaries and affiliates, defined by reference to the BHC Act, notwithstanding cross-default rights based solely on the insolvency, financial condition, or receivership of the covered financial company.<sup>40</sup> Therefore, maintaining consistent definitions of subsidiary and affiliate with Title II should better ensure that QFC stays may be effected in a resolution under a U.S. Special Resolution Regime. As covered banks, as well as their subsidiaries and affiliates, are typically subsidiaries of BHCs, which are in turn subject to the activity restrictions and other requirements of the BHC Act, they should already know all of their BHC Act controlled subsidiaries and be familiar with BHC Act control principles.<sup>41</sup> Moreover, GSIBs should be able to rely on governance rights and other negotiated mechanisms to ensure that such subsidiaries conform their QFCs to the final rule’s requirements.

The final rule excludes from the scope of covered bank DPC subsidiaries, portfolio companies held under the

<sup>39</sup> See 12 CFR 252.2.

<sup>40</sup> 12 U.S.C. 5390(c)(16).

<sup>41</sup> For example, under the FRB final rule a covered entity may own more than five percent (and less than 25 percent) of the voting shares of a registered investment company for which the covered entity provides investment advisory, administrative, and other services and has a number of director and officer interlocks, without controlling the fund for purposes of the BHC Act. See letter to H. Rodgin Cohen, Esq., Sullivan & Cromwell (First Union Corp.), from Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System (June 24, 1999) (finding that a bank holding company does not control a mutual fund for which it provides investment advisory and other services and that complies with the limitations of section 4(c)(7) of the BHC Act (12 U.S.C. 1843(c)(7)), so long as (i) the BHC reduces its interest in the fund to less than 25 percent of the fund’s voting shares after a six-month period, and (ii) a majority of the fund’s directors are independent of the BHC and the BHC cannot select a majority of the board); see also 12 CFR 225.86(b)(3) (authorizing a financial holding company to organize, sponsor, and manage a mutual fund so long as (i) the fund does not exercise managerial control over the entities in which the fund invests, and (ii) the financial holding company reduces its ownership in the fund, if any, to less than 25 percent of the equity of the fund within one year of sponsoring the fund or such additional period as the FRB permits).

<sup>35</sup> FRB orders granting such approvals to FBOs that have requested such treatment can be found at Regulation YY Foreign Banking Organization Requests, available at <https://www.federalreserve.gov/supervisionreg/regulation-yy-foreign-banking-organization-requests.htm>.

<sup>36</sup> In the alternative, these commenters requested that the requirements only apply to U.S. Federal branches and agencies of Foreign GSIBs insofar as the home resolution regime and group resolution strategy would not adequately ensure that early termination rights, including cross-default rights against the U.S. IHC or subsidiaries, will not be triggered in resolution.

<sup>37</sup> 12 CFR 217.402; 80 FR 49106 (Aug. 14, 2015). See the FRB final rule § 252.82(a)(1).

<sup>38</sup> Under the clean holding company component of the FRB’s recent Total Loss-Absorbing Capacity (TLAC) final rule, the top-tier holding companies of U.S. GSIBs would be prohibited from entering into direct QFCs with third parties. See 82 FR 8266, 8298 (December 15, 2016).

Small Business Investment Act of 1956, and certain companies engaged in the business of making public welfare investments. In general, there are legal restrictions and other limitations on the involvement of the GSIB in the operations of these kinds of subsidiaries. Moreover, it is unlikely that the disorderly unwind of the QFCs of these subsidiaries would impair the orderly resolution of the GSIB. Therefore, the impact of these exclusions should be relatively small while responding to commenter's concerns and reducing burden.

Finally, covered banks include almost all U.S. operations of Foreign GSIBs—their national banks, Federal savings associations, Federal branches, Federal agencies, or subsidiaries of such entities. The final rule, like the proposed rule, covers only the U.S. operations of Foreign GSIBs. To provide the same treatment for foreign GSIBs and U.S. GSIBs, the final rule also excludes DPC subsidiaries, portfolio companies held under the Small Business Investment Act of 1956, and public welfare investments of foreign GSIBs.<sup>42</sup>

The final rule does not exempt U.S. Federal branches and agencies of Foreign GSIBs or U.S. subsidiaries of Foreign GSIBs that are not held under an IHC pursuant to a FRB order, as requested by certain commenters. As with the coverage of subsidiaries of U.S. GSIBs, coverage of the U.S. operations of foreign GSIBs will enhance the prospects for an orderly resolution of the Foreign GSIB and its U.S. operations. In particular, covering QFCs that involve any U.S. subsidiary or Federal branch or agency of a Foreign GSIB will reduce the potentially disruptive cancellation of those QFCs if the Foreign GSIB or any of its subsidiaries enters resolution, including resolution under the U.S. Bankruptcy Code or the U.S. Special Resolution Regimes.<sup>43</sup>

#### *C. Covered QFCs (Sections 47.4(a), 47.5(a), 47.7, and 47.8)*

##### 1. General Definition

**Proposal.** The proposed rule required covered banks to ensure that each “covered QFC” conforms to the requirements of sections 47.4 and 47.5. These sections required that a covered QFC (1) contain contractual stay-and-transfer provisions similar to those

imposed under Title II of the Dodd-Frank Act and the FDI Act, and (2) limit the exercise of default rights based on the insolvency of an affiliate of the covered bank. A “covered QFC” was generally defined as any QFC that a covered bank enters, executes, or otherwise becomes party to. A party to a QFC included a party acting as agent under the QFC. “Qualified financial contract” or “QFC” was defined to have the same meaning as in Section 210(c)(8)(D) of Title II of the Dodd-Frank Act and would include derivatives, swaps, repurchase, reverse repurchase, and securities lending and borrowing transactions.<sup>44</sup>

**Comments.** The application of the proposed rule's requirements to a “covered QFC” was one of the most commented upon aspects of the proposed rule. Certain commenters argued that the definition of QFC in Title II of the Dodd-Frank Act was overly broad and imprecise and could include agreements that market participants may not expect to be subject to the stay-and-transfer provisions of the U.S. Special Resolution Regimes. More generally, commenters argued that the proposed definition of QFC was too broad and would capture contracts that do not present any obstacles to an orderly resolution. Commenters urged the OCC to exclude a variety of types of QFCs from the requirements of the final rule. In particular, a number of commenters urged the OCC to exclude QFCs that do not contain any transfer restrictions or default rights, because these types of QFCs do not give rise to the risk that counterparties will exercise their contractual rights in a manner that is inconsistent with the provisions of the U.S. Special Resolution Regimes.

Commenters named several examples of contracts that fall into this category, including cash market securities transactions, certain spot foreign exchange (FX) transactions (including securities conversion transactions), retail brokerage agreements, retirement/Individual Retirement Account (IRA) account agreements, margin agreements, options agreements, FX forward master agreements, and delivery versus payment client agreements. Commenters contended that these types of QFCs number in the millions at some firms and that remediating these contracts to include the express provisions required by the final rule would require an enormous client outreach effort that would be extremely burdensome and costly while providing no meaningful

resolution benefits. For example, commenters pointed out that for certain types of transactions, such as cash securities transactions, FX spot transactions, and retail QFCs, such a requirement could require an overhaul of existing market practice and documentation that affects hundreds of thousands, if not millions, of transactions occurring on a daily basis and significant education of the general market.

Commenters also urged the OCC to exclude QFCs that do not contain any default or cross-default rights but that may contain transfer restrictions. Commenters contended that examples of these types of agreements included investment advisory account agreements with retail customers, which contain transfer restrictions as required by Section 205(a)(2) of the Investment Advisers Act of 1940, but no direct default or cross-default rights; underwriting agreements;<sup>45</sup> and client onboarding agreements. A few commenters provided prime brokerage or margin loan agreements as examples of transactions that generally do not have default or cross-default rights but may have transfer restrictions. Another commenter also requested the exclusion of securities market transactions that generally settle in the short term, do not impose ongoing or continuing obligations on either party after settlement, and do not typically include default rights.<sup>46</sup> In these cases, commenters contended that remediation of these agreements would be burdensome with no meaningful resolution benefits.

Commenters also argued for the exclusion of a number of other types of contracts from the definition of covered QFC in the final rule. In particular, a number of commenters urged the OCC to exclude contracts issued in the capital markets or related to a capital market issuance, like warrants or a certificate representing a call option, typically on a security or a basket of securities. Although warrants issued in capital markets may contain direct default and cross-default rights as well

<sup>45</sup> However, some commenters noted that underwriting, purchase, subscription, or placement agency agreements may contain rights that could be construed as direct default rights or cross-default rights.

<sup>46</sup> In the alternative, the commenter requested that such securities market transactions be excluded to the extent they are cleared, processed, and settled through (or subject to the rules of) financial market utilities through expansion of the proposed exemption for transactions with central counterparties. This aspect of the comment is addressed in the subsequent section discussing requests for expansion of the proposed exemption for transactions with central counterparties.

<sup>42</sup> See final rule § 47.3(b)(3)(ii)-(iv).

<sup>43</sup> The laws and regulations imposed in non-U.S. jurisdictions that commenters noted were similar to the requirements of the proposed rule do not address resolution under U.S. insolvency or the U.S. Special Resolution Regimes.

<sup>44</sup> 81 FR 55381, 55399 (August 19, 2016); 12 U.S.C. 5390(c)(8)(D).

as transfer restrictions, commenters argued that remediation of outstanding warrant agreements would be difficult, if not impossible, since remediation would require the affirmative vote of a substantial number of separate voting groups of holders to amend the terms of the instruments and that obtaining such consent could be expensive due to “hold-out” premiums. Commenters also argued that since these instruments are traded in the markets, it is not possible for an issuer to ascertain whether a particular investor in such instruments has also entered into other QFCs with the dealer or any of its affiliates (or vice versa) for purposes of complying with the proposed mechanism for remediation of existing QFCs.

Commenters argued that issuers would be able to comply if the final rule’s requirements applied only on a prospective basis with respect to new issuances, since new investors could be informed of the terms of the warrant at the time of purchase and no after-the-fact consent would be required, as is the case with existing outstanding warrants. Commenters expressed the view that prospective application of the final rule’s requirements to warrants would allow time for firms to develop new warrant agreements and warrant certificates, to engage in client outreach efforts, and to make any appropriate public disclosures. Commenters suggested that the requirements of the final rule should only apply to such instruments issued after the effective date of the final rule and that the compliance period for such new issuances be extended to allow time to establish new issuance programs that comply with the final rule’s requirements. Other examples of contracts in this category given by commenters include contracts with special purpose vehicles that are multi-issuance note platforms, which commenters urged would be difficult to remediate for similar reasons to warrants other than on a prospective basis.

Commenters also urged the exclusion of contracts for the purchase of commodities in the ordinary course of business (e.g., utility and gas energy supply contracts) or physical delivery commodity contracts more broadly.<sup>47</sup> In

general, commenters argued that exempting these contracts would not increase systemic risk but would help ensure the smooth operation of utilities and the physical commodities markets.<sup>48</sup> Commenters indicated that failure to make commodity deliveries on time can result in the accrual of damages and penalties beyond the accrual of interest (e.g., demurrage and other fines in shipping) and that counterparties may not be able to obtain appropriate compensation for amendment of default rights due to the difficulty of pricing the risk associated with an operational failure due to the failure to deliver a commodity on time. Commenters also contended that agreements with power operators governed by regulatory tariffs would be difficult, if not impossible, to remediate.<sup>49</sup>

**Final Rule.** The final rule applies to any “covered QFC,” which generally is defined as any “in-scope QFC” that a covered entity enters into, executes, or to which the covered entity otherwise becomes a party.<sup>50</sup> As under the proposed rule, “qualified financial

agreements and futures account agreements); and (vi) public utility contracts.

<sup>48</sup> One commenter also argued that utility and gas supply contracts are covered sufficiently in Section 366 of the U.S. Bankruptcy Code. This section of the U.S. Bankruptcy Code places restrictions on the ability of a utility to “alter, refuse, or discontinue service to, or discriminate against, the trustee or the debtor solely on the basis of the commencement of a case under [the U.S. Bankruptcy Code] or that a debt owed by the debtor to such utility for service rendered before the order for relief was not paid when due.” 11 U.S.C. 366. The purpose and effect of § 47.5 of the final rule and Section 366 of the U.S. Bankruptcy Code are different and therefore do not serve as substitutes. Section 366 of the U.S. Bankruptcy Code does not address cross-defaults or provide additional clarity regarding the application of the U.S. Special Resolution Regimes. Similarly, § 47.5 of the final rule does not prevent a covered entity from entering into a covered QFC that allows the counterparty to exercise default rights once a covered entity that is a direct party either enters bankruptcy or fails to pay or perform under the QFC.

<sup>49</sup> One commenter also requested exclusion of overnight transactions, particularly overnight repurchase agreements, arguing that such transactions present little risk of creating negative liquidity effects and that an express exclusion for such transactions may increase the likelihood that such contracts would remain viable funding sources in times of liquidity stress. Although the final rule does not exempt overnight repo transactions, the final rule may have limited if any effect on such transactions. As described below, the final rule provides a number of exemptions that may apply to overnight repo and similar transactions. Moreover, the restrictions on default rights in § 47.5 of the final rule do not apply to any right under a contract that allows a party to terminate the contract on demand or at its option at a specified time, or from time to time, without the need to show cause. See final rule § 47.2 (defining “default right”). Therefore, § 47.5 does not restrict the ability of QFCs, including overnight repos, to terminate at the end of the term of the contract.

<sup>50</sup> See final rule § 47.3(c).

contract” or “QFC” is defined in the final rule as in Section 210(c)(8)(D) of Title II of the Dodd-Frank Act and includes swaps, repo and reverse repo transactions, securities lending and borrowing transactions, commodity contracts, and forward agreements.<sup>51</sup> Parties that enter into contracts with covered entities have been potentially subject to the stay-and-transfer provisions of Title II of the Dodd-Frank Act since its enactment. Consistent with Title II, the final rule does not exempt QFCs involving physical commodities. However, as explained below, the final rule responds to concerns regarding the smooth operation of physical commodities end users and markets by allowing counterparties to terminate QFCs based on the failure to pay or perform.

In response to concerns raised by commenters, the final rule exempts QFCs that have no transfer restrictions or default rights, as these QFCs have no provisions that the rule is intended to address. The final rule effects this exemption by limiting the scope of QFCs potentially subject to the rule to those QFCs that explicitly restrict the transfer of a QFC from a covered bank or explicitly provide default rights that may be exercised against a covered bank (in-scope QFCs).<sup>52</sup> This change addresses a major concern raised by commenters regarding the overbreadth of the definition of “covered QFC” in the proposed rule. The change also mitigates the burden of complying with the proposed rule without undermining its purpose by not requiring covered banks to conform contracts that do not contain the types of default rights and transfer restrictions that the final rule is intended to address. The OCC has declined, however, to exclude QFCs that have transfer restrictions (but no default rights or cross-default rights), as requested by certain commenters, as such QFCs would have provisions (i.e., transfer restrictions) that are subject to the requirements of the final rule and could otherwise impede the orderly resolution of a covered entity or its affiliate.

The final rule provides that a covered bank is not required to conform certain investment advisory contracts described by commenters (i.e., investment advisory contracts with retail advisory customers<sup>53</sup> of the covered bank that

<sup>51</sup> See final rule § 47.2. See also 12 U.S.C. 5390(c)(8)(D).

<sup>52</sup> See final rule § 47.3(d).

<sup>53</sup> See final rule § 47.8(c)(1). The final rule defines retail customer or counterparty by reference to the Board’s Regulation WW. See 12 CFR 249.3; see also FR 2052a, <https://www.federalreserve.gov/>

<sup>47</sup> For example, some commenters urged the exclusion of all contracts requiring physical delivery between commercial entities in the course of regulatory business such as (i) contracts subject to a Federal Energy Regulatory Commission-filed tariff; (ii) contracts that are traded in markets overseen by independent system operators or regional transmission operators; (iii) retail electric contracts; (iv) contracts for storage or transportation of commodities; (v) contracts for financial services with regulated financial entities (e.g., brokerage

only contain the transfer restrictions required by Section 205(a) of the Investment Advisers Act). The final rule also exempts existing warrants evidencing a right to subscribe or to otherwise acquire a security of a covered bank or its affiliate.<sup>54</sup> The final rule excludes these types of agreements since there is persuasive evidence that these types of contracts would be burdensome to conform and that it is unlikely that excluding such contracts from the requirements of the final rule would impair the orderly resolution of a GSIB.<sup>55</sup>

The final rule also provides the OCC with authority to exempt one or more covered banks from conforming certain contracts or types of contracts to the final rule after considering, in addition to any other factor the OCC deems relevant, the burden the exemption would relieve and the potential impact of the exemption on the resolvability of the covered bank or its affiliates.<sup>56</sup> Covered banks that request that the OCC exempt additional contracts from the final rule should be prepared to provide information in support of their requests. The OCC expects to consult as appropriate with the FRB and FDIC during its consideration of any such request.

## 2. Definition of Counterparty

*Proposal.* As noted above, the proposed rule applied to any “covered QFC,” generally defined as a QFC that a covered entity enters after the effective date and a QFC entered earlier, but only if the covered entity or its affiliate enters a new QFC with the same person or an affiliate of the same person.<sup>57</sup> “Affiliate” in the proposed rule was defined in the same manner as under the BHC Act to mean any company that controls, is controlled by, or is under common control with another company.<sup>58</sup> As noted above, “control” under the BHC Act means the power to vote 25 percent or more of any class of voting securities; control in any manner the election of a majority of the directors or trustees; or exercise of a controlling influence over the management or policies.<sup>59</sup>

*reportforms/forms/FR\_2052a20161231\_f.pdf.* Covered entities should be familiar with this definition and its application.

<sup>54</sup> See final rule § 47.8(c)(2). Warrants issued after the effective date of the final rule are not excluded from the requirements of the final rule.

<sup>55</sup> These exemptions are not interpretations of the definition of QFC.

<sup>56</sup> See final rule § 47.8(d).

<sup>57</sup> See proposed rule § 47.4(a). For convenience, this preamble generally refers to “a covered entity’s QFCs” or “QFCs to which a covered entity is party” as shorthand to encompass this definition. [EDIT]

<sup>58</sup> See 12 CFR 252.2 (defining “affiliate”).

<sup>59</sup> See 12 U.S.C. 1841(k).

*Comments.* Commenters argued that requiring remediation by a covered bank of an existing QFC if any entity in the GSIB group entered into a new QFC with an affiliate of the counterparty would make compliance with the proposed rule overly burdensome.<sup>60</sup> Commenters pointed out that this requirement would demand that the GSIB and the covered bank track each counterparty’s organizational structure by relying on information provided by counterparties, which would subject counterparties to enhanced tracking and reporting burdens. Commenters requested that the phrase “or affiliate of the same person” be deleted from the definition of covered QFC and argued that such a modification would not undermine the ultimate goals of the rule since existing QFCs with the counterparty’s affiliate would still have to be remediated if the covered entity or its affiliate entered into a new QFC with that counterparty affiliate. In the alternative, commenters argued that an affiliate of a counterparty be established by reference to financial consolidation principles rather than BHC Act control, since counterparties may not be familiar with BHC Act control. Commenters argued that many counterparties are not regulated BHCs and would be unfamiliar with BHC Act control. Some commenters also argued that a new QFC with one fund in a fund family should not result in other funds in the fund family being required to conform their pre-existing QFCs with the covered bank or an affiliate.

*Final Rule.* The final rule’s definition of “covered QFC” has been substantially modified to address the concerns raised by commenters with respect to the remediation of existing QFCs. In particular, the final rule provides that a covered QFC includes a QFC that the covered bank entered, executed, or otherwise became a party to before January 1, 2019, if the covered bank or any affiliate that is a covered entity (under the FRB final rule), covered bank, or covered FSI (under the FDIC final rule) also enters, executes, or otherwise becomes a party to a QFC with the same person or a consolidated affiliate of the same person on or after January 1, 2019.<sup>61</sup>

With respect to counterparties, the final rule has been changed to define “consolidated affiliate” by reference to

<sup>60</sup> One commenter believed that the burden of conforming contracts with all affiliates of a counterparty would be too great, whether defined in terms of BHC Act control or financial consolidation principles, even though the burden would be reduced by definition in terms of financial consolidation principles.

<sup>61</sup> See final rule § 47.3(c).

financial consolidation principles, as generally reflected by U.S. GAAP or International Financial Reporting Standards (IFRS)<sup>62</sup> instead of by reference to the BHC Act. As commenters pointed out, counterparties will already track and monitor financially consolidated affiliates under either U.S. GAAP or IFRS. Moreover, exposures to a non-consolidated affiliate may be captured as a separate counterparty (e.g., when the non-consolidated affiliate enters a new QFC with the covered bank or an affiliate of the covered bank that is either a covered bank, covered entity under FRB final rule, or a covered FSI under the FDIC final rule). As a consequence, modifying the coverage of affiliates in this manner addresses concerns raised by commenters regarding burden while still providing sufficient incentives to remediate existing covered QFCs.

As discussed, the definition of “covered QFC” is intended to limit the restrictions of the final rule to those financial transactions whose disorderly unwind has substantial potential to frustrate the orderly resolution of a GSIB. By adopting the Dodd-Frank Act’s definition of QFC, with the modifications described above, the final rule generally extends stay-and-transfer protections to the same types of transactions as Title II of the Dodd-Frank Act. In this way, the final rule enhances the prospects for an orderly resolution in bankruptcy and under the U.S. Special Resolution Regimes.

## 3. Exclusion of Cleared QFCs and Financial Market Utilities

*Proposal.* The proposed rule excluded from the definition of “covered QFC” all QFCs that are cleared through a central counterparty (CCP). The proposed rule, however, did not exclude from the definition of “covered QFC” QFCs that are cleared, processed, or settled through the facilities of a financial market utility (FMU). The proposed rule noted that the OCC was continuing to consider the appropriate treatment of centrally cleared QFCs, in light of differences between cleared and uncleared QFCs with respect to contractual arrangements, counterparty credit risk, default management, and supervision.

*Comments.* Commenters generally expressed support for the exclusion of QFCs that are cleared through a CCP, but some commenters requested that the OCC broaden this exclusion in the final rule. In particular, a number of commenters urged the OCC to exclude the “client-facing leg” of a cleared swap

<sup>62</sup> See final rule § 47.2.

where a clearing member faces a CCP on one leg of the transaction and faces the client on an otherwise identical offsetting transaction.<sup>63</sup> One commenter requested the OCC confirm its understanding that “FCM agreements,” which the commenter defined as futures and cleared swaps agreements with a futures commission merchant (FCM), are excluded because FCM agreements “are only QFCs to the extent that they relate to futures and swaps and, since futures and cleared swaps are excluded, the FCM [a]greements are also excluded.”<sup>64</sup> The commenter requested, in the alternative, that the final rule expressly exclude such agreements.

A few commenters requested that the OCC modify the definition of “central counterparty,” which was defined by reference to the FRB Regulation YY<sup>65</sup> to mean “a counterparty (for example, a clearing house) that facilitates trades between counterparties in one or more financial markets by either guaranteeing trades or novating trades” in the proposed rule.<sup>66</sup> These commenters

<sup>63</sup> Commenters argued that, in the European-style principal-to-principal clearing model, the clearing member faces the CCP on one swap (the “CCP-facing leg”), and the clearing member, frequently a covered bank or covered entity (under the FRB Proposed Rule), faces the client on an otherwise identical, offsetting swap (the “client-facing leg”). Under the proposed rule, only the CCP-facing leg of the transaction was excluded, even though the client-facing leg is necessary to the mechanics of clearing and is only entered into by the clearing member to effectuate the cleared transaction. Commenters argued that the proposed rule thus treated two pieces of the same transaction differently, which could result in an imbalance in insolvency or resolution and that the possibility of such an imbalance for the clearing member could expose the clearing member to unnecessary and undesired market risk. Commenters urged the OCC to adopt the same approach taken under § 2 of the Universal Protocol, which allows the client-facing leg of the cleared swap with the clearing member that is a covered bank or covered entity to be closed out substantially contemporaneously with the CCP-facing leg in the event the CCP were to take action to close out the CCP-facing leg.

Some commenters requested clarification that transactions between a covered bank or covered entity client and its clearing member (as opposed to transactions where the covered bank or covered entity is the clearing member) would be subject to the rule’s requirements, since this would be consistent with the Universal Protocol. As explained in this section, the exemption in the final rule regarding CCPs does not depend on whether the covered bank or covered entity is a clearing member or a client. A covered QFC—generally a QFC to which a covered bank or covered entity is a party—is exempted from the requirements of the final rule if a CCP is also a party.

<sup>64</sup> Letter to Legislative and Regulatory Affairs Division, Office of the Comptroller of the Currency, from James M. Cain, Sutherland Asbill & Brennan LLP, writing on behalf of the eleven Federal Home Loan Banks, at 2–3 (October 18, 2016).

<sup>65</sup> In order to minimize the number of cross references in the definition section, where feasible, the rule replaces cross references with the actual text of the definition.

<sup>66</sup> 12 CFR 217.2.

argued that a CCP does far more than “facilitate” or “guarantee” trades and that a CCP “interposes itself between counterparties to contacts traded in one or more financial markets, becoming the buyer to every seller and the seller to every buyer and thereby ensuring the performance of open contracts.”<sup>67</sup> As an alternative definition of CCP, these commenters suggested the final rule should define CCP to mean: “an entity (for example, a clearinghouse or similar facility, system, or organization) that, with respect to an agreement, contract, or transaction: (i) Enables each party to the agreement contract, or transaction to substitute, through novation or otherwise, the credit of the CCP for the credit of the parties; and (ii) arranges or provides, on a multilateral basis, for the settlement or netting of obligations resulting from such agreements, contracts, or transactions executed by participants in the CCP.”<sup>68</sup>

Commenters also urged the OCC to exclude from the requirements of the final rule all QFCs that are cleared, processed, or settled through the facilities of an FMU, as defined in Section 803(6) of the Dodd-Frank Act,<sup>69</sup> or that are entered into subject to the rules of an FMU.<sup>70</sup> For example, commenters argued that QFCs with FMUs, such as the provision of an extension of credit by a central securities depository (CSD) to a covered bank that is a member of the CSD in connection with the settlement of securities transactions, should be excluded from the requirements of the final rule. Commenters contended that, similar to CCPs, the relationship between a covered entity and FMU is governed by the rules of the FMU and that there are no market alternatives to continuing to transact with FMUs. Commenters argued that FMUs generally should be excluded for the same reasons as CCPs and that a broader

<sup>67</sup> Letter to Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, from Walt L. Lukken, President and CEO, Futures Industry Association, at 8 (October 17, 2016) (citing Principles of Financial Market Infrastructures (April 2012), published by the Committee on Payment and Settlement Systems and the International Organization of Securities Commissions, at 9).

<sup>68</sup> *Id.* at 9.

<sup>69</sup> 12 U.S.C. 5462(6). In general, Title VIII of the Dodd-Frank Act defines “financial market utility” to mean any person that manages or operates a multilateral system for the purpose of transferring, clearing, or settling payments, securities, or other financial transactions among financial institutions or between financial institutions and the person. *Id.*

<sup>70</sup> As discussed, one commenter who recommended an exclusion of securities market transactions that generally settle in the short term, do not impose ongoing or continuing obligations on either party after settlement, and do not typically include the default rights targeted by the proposed rule, requested this treatment in the alternative.

exemption to cover FMUs would serve to mitigate the systemic risk of a GSIB in distress, an underlying objective of the rule’s requirements. Commenters contended that such an exclusion would be consistent with the treatment of FMUs under regulation adopted by the United Kingdom (U.K.) and Germany. Some commenters also requested that related or underlying agreements to CCP-cleared QFCs and QFCs entered into with other FMUs also be excluded, since such agreements “form an integrated whole with [those] QFCs” and such an exemption would facilitate the continued expansion of the clearing and settlement framework and the benefits of such a framework.<sup>71</sup> One commenter urged that the final rule should not in any manner restrict an FMU’s ability to close out a defaulting clearing member’s portfolio, including potential liquidation of cleared contracts.

**Final Rule.** The issues that the final rule is intended to address with respect to non-cleared QFCs may also exist in the context of centrally cleared QFCs. However, clearing through a CCP provides unique benefits to the financial system while presenting unique issues related to the cancellation of cleared contracts. Accordingly, the OCC continues to believe it is appropriate to exclude centrally cleared QFCs, in light of differences between cleared and non-cleared QFCs with respect to contractual arrangements, counterparty credit risk, default management, and supervision. The OCC has not extended the exclusion for CCPs to the client-facing leg of a cleared transaction because bilateral trades between a GSIB and a non-CCP counterparty are the types of transactions that the final rule intends to address and because nothing in the final rule would prohibit a covered entity clearing member and a client from agreeing to terminate or novate a trade to balance the clearing member’s exposure. The final rule continues to define central counterparty as a counterparty that facilitates trades between counterparties in one or more financial markets by either guaranteeing trades or novating contracts, which is a broad definition used in the regulatory

<sup>71</sup> Letter to Legislative and Regulatory Affairs Division, Office of the Comptroller of the Currency, from Larry E. Thompson, Vice Chairman and General Counsel, The Depository Trust & Clearing Corporation, at 2 (October 17, 2016); Letter to Robert deV. Frierson, Secretary, Board of Governors of the Federal Reserve System, from Larry E. Thompson, Vice Chairman and General Counsel, The Depository Trust & Clearing Corporation, at 6 (August 5, 2016).

capital rules<sup>72</sup> that should be familiar to market participants.

The final rule also makes clear that, if one or more FMUs are the only counterparties to a covered QFC, the covered bank is not required to conform the covered QFC to the final rule.<sup>73</sup> Therefore, an FMU's default rights and transfer restrictions under the covered QFC are not affected by the final rule. However, this exclusion would not include a covered QFC with a non-FMU counterparty, even if the QFC is settled by an FMU or if the FMU is a party to such QFC, because the final rule is intended to address default rights of non-FMU parties. For example, if two covered banks engage in a bilateral QFC that is facilitated by an FMU, and in the course of this facilitation each covered entity maintains a QFC solely with the FMU, then the final rule would not apply to each QFC between the FMU and each covered bank but the requirements of the final rule would apply to the bilateral QFC between the two covered banks. This approach ensures that QFCs that are directly with FMUs are treated in a manner similar to transactions between covered entities and CCPs, but also ensures that QFCs conducted by covered banks that are related to the direct QFC with the FMU remain subject to the final rule's requirements.

The final rule does not explicitly exclude futures and cleared swaps agreements with a FCM, as requested by a commenter. The nature and scope of the requested exclusion is unclear, and therefore, it is unclear whether the exclusion would be necessary, on the one hand, or overbroad, on the other hand. However, the final rule makes a number of other clarifications and exemptions that may help address the

commenter's concern regarding FCM agreements.

#### 4. Exclusion of Certain QFCs Under Foreign Bank Multi-Branch Master Agreements

**Proposed Rule.** To avoid imposing unnecessary restrictions on QFCs that are not closely connected to the United States, the proposed rule excluded from the definition of "covered QFC" certain QFCs of Foreign GSIBs that lack a close connection to the Foreign GSIB's U.S. operations.<sup>74</sup> The proposed definition of "QFC" included master agreements that apply to QFCs.<sup>75</sup> Master agreements are contracts that contain general terms that the parties wish to apply to multiple transactions between them; having executed the master agreement, the parties can then include those terms in future contracts through reference to the master agreement. Moreover, the Dodd-Frank Act's definition of "qualified financial contract," which was proposed, treats master agreements for QFCs together with all supplements to the master agreement (including underlying transactions) as a single QFC.<sup>76</sup>

Foreign GSIBs have master agreements that permit transactions to be entered into both at a Federal branch or agency of the Foreign GSIB and at a non-U.S. location of the Foreign GSIB (such as a foreign branch). Notwithstanding the proposed rule's general treatment of a master agreement and all QFCs thereunder as a single QFC, the proposed rule would have excluded QFCs under such a "multi-branch master agreement" that are not booked at a covered bank and for which no payment or delivery may be made at a covered bank.<sup>77</sup> Under the proposed rule, a multi-branch master agreement was a covered QFC with respect to QFC transactions that are booked at a covered

bank or for which payment or delivery may be made at a covered bank.

**Comments.** Commenters expressed support for this exclusion, but requested that the requirement exclude from the definition of covered QFC those transactions under master agreements where payments and deliveries may be made by or to the Federal branch or agency so long as the transactions or assets are not booked in the Federal branch or agency. These commenters argued that the ability to make payments or deliveries alone does not make a QFC sufficiently closely connected to the United States to raise the concerns about resolution that the proposed rule was intended to address. Commenters also argued that the requirement to include new contractual terms in a QFC where payment or delivery may occur in the United States would require Foreign GSIBs to amend many additional QFCs booked abroad, many of which must also be amended to comply with contractual stay requirements of the Foreign GSIBs' home country regulatory regimes. Commenters argued that amending such QFCs under multi-branch master agreements that are not booked in the United States would require some Foreign GSIBs to amend thousands of contracts at significant cost and would impose a disproportionate burden on Foreign GSIBs as compared to U.S. GSIBs. These commenters argued this would impose a significant burden on non-U.S. covered banks with no benefit to U.S. financial stability, as these QFCs would not be expected to be subject to a U.S. resolution regime.

One commenter also recommended that multi-branch master agreements be treated as a single QFC, rather than requiring the application of different requirements to different transactions thereunder, so as to align the proposed rule's requirements with current industry-standard documentation and to avoid additional implementation hurdles and costs. The commenter recommended that the entirety of a multi-branch master agreement and underlying transactions be a covered QFC if a new QFC with the counterparty or its consolidated affiliates is booked to the Federal branch or agency after the compliance date or if a new QFC is entered into with an affiliate of the Federal branch or agency that is also subject to the requirements.

**Final Rule.** The final rule has been modified to address the concerns raised by commenters. In particular, the final rule is modified to provide that, with respect to a Federal branch or agency of a Foreign GSIB, a Foreign GSIB multi-branch master agreement that is a

<sup>72</sup> See final rule § 47.2. The proposed rule defined CCP by cross reference to the definition in the FRB Proposed Rule, which in turn cross referenced the definition in the FRB Regulation Q (Capital Adequacy Regulations). The definition in Regulation Q (12 CFR 217.2) is the common definition of CCP also used in the OCC capital adequacy rule (12 CFR 3.2). For ease of reference, the final rule replaces these cross references with the text of the definition of CCP used in 12 CFR 3.2 and 217.2.

<sup>73</sup> See final rule § 47.8(a)(2). In response to commenters, the final rule uses the definition of FMU in Title VIII of the Dodd-Frank Act and may apply, for purposes of the final rule, to entities regardless of jurisdiction. The definition of FMU in the final rule includes a broader set of entities, in addition to CCPs. However, the definition in the final rule does not include depository institutions that are engaged in carrying out banking-related activities, including providing custodial services for tri-party repurchase agreements. The definition also explicitly excludes certain types of entities (e.g., registered futures associations, swap data repositories) and other types of entities that perform certain functions for or related to FMUs (e.g., FCMs).

<sup>74</sup> See proposed rule § 47.8.

<sup>75</sup> See proposed rule § 47.2.

<sup>76</sup> 12 U.S.C. 5390(c)(8)(D)(viii); see also 12 U.S.C. 1821(e)(8)(D)(vii); 109 H. Rpt. 31, Pt. 1 (April 8, 2005) (explaining that a "master agreement for one or more securities contracts, commodity contracts, forward contracts, repurchase agreements or swap agreements will be treated as a single QFC under the [FDI Act] or the [Federal Credit Union Act] (but only with respect to the underlying agreements are themselves QFCs)").

<sup>77</sup> See proposed rule § 47.8. With respect to a Federal branch or agency of a Foreign GSIB, a multi-branch master agreement that is a covered QFC solely because the master agreement permits agreements or transactions that are QFCs to be entered into at one or more Federal branches or agencies of the Foreign GSIB was considered a covered QFC for purposes of the proposed rule only with respect to such agreements or transactions booked at such Federal branches and agencies or for which a payment or delivery may be made at such Federal branches or agencies.

covered QFC solely because the master agreement permits agreements or transactions that are QFCs to be entered into at one or more Federal branches or agencies of the Foreign GSIB will be considered a covered QFC for purposes of this final rule only with respect to such agreements or transactions booked at such Federal branches and agencies.<sup>78</sup> The final rule does not provide that such an agreement will be a covered QFC solely because payment or delivery may be made at such Federal branch or agency. These modifications will avoid imposing unnecessary restrictions on QFCs that are not closely connected to the United States and will mitigate burden and reduce costs on Foreign GSIBs without undermining the purpose of the final rule. The purpose of this exclusion is to help ensure that, where a Foreign GSIB has a multi-branch master agreement, the Foreign GSIB will only have to conform those QFCs entered into under the multi-branch master agreement that could have the most direct effect on the covered Federal branch or agency of the Foreign GSIB and that could therefore have the most direct effect on the resolution of the Foreign GSIB and the financial stability of the United States.

The final rule does not, as requested by one commenter, deem the entirety of a multi-branch master agreement to be a covered QFC if a new QFC with the counterparty (or its consolidated affiliate) is booked to the covered entity or its affiliate. Many commenters supported excluding transactions from multi-branch master netting agreements that are not closely connected to the United States. In contrast to the proposed rule and these comments, the modification requested by this commenter would require transactions that are not booked in the United States or otherwise connected to the United States to be conformed to the requirements of the final rule. The commenter's concerns regarding costs associated with potentially breaking netting sets may nonetheless be addressed through adherence to the Universal Protocol or the U.S. Protocol, which are discussed below.

##### 5. QFCs With Central Banks and Sovereign Entities

**Proposed Rule.** Section 47.7 of the proposed rule provided that a covered bank would not be required to conform covered QFCs to which a CCP was a party. However, central banks and sovereign entities are not included in the proposed rule's definition of CCP consistent with Title II of the Dodd-

Frank Act and the FDI Act. Therefore, covered QFCs entered into with sovereign entities and central banks would be required to adhere to the conformance requirements of § 47.6 of the proposed rule.

**Comments.** Commenters urged the OCC to exclude QFCs with central bank and sovereign counterparties from the final rule. Commenters argued that sovereign entities might not be willing to agree to limitations on their QFC default rights and noted that other countries' measures, such as those of the United Kingdom and Germany, consistent with their governing laws, exclude central banks and sovereign entities. Commenters contended that central banks and sovereign entities are sensitive to financial stability concerns and resolvability goals, thus reducing the concern that they would exercise default rights in a way that would undermine resolvability of a GSIB or financial stability. Commenters indicated it was unclear whether central banks or sovereign entities would be permitted under applicable statutes to enter into QFCs with limited default rights, but did not provide specific examples of such statutes.<sup>79</sup> Commenters further noted that these entities did not participate in the development of the Universal Protocol and that the Universal Protocol does not provide a viable mechanism for compliance with the final rule by these entities.

**Final Rule.** The OCC continues to believe that covering QFCs with sovereign entities and central banks under the final rule is an important requirement and has not modified the final rule to address the requests made by commenters. Excluding QFCs with sovereign entities and central banks would be inconsistent with Title II of the Dodd-Frank Act and the FDI Act. Moreover, the mass termination of such QFCs has the potential to undermine the resolution of a GSIB and the financial stability of the United States. The final rule provides covered banks two years to conform covered QFCs with sovereign entities and central banks (as well as certain other counterparties, as discussed below). This additional time should provide covered banks sufficient time to develop separate conformance

mechanisms for sovereign entities and central banks, if necessary.

##### D. Definition of "Default Right"

**Proposed Rule.** As discussed previously, a party to a QFC generally has a number of rights that it can exercise if its counterparty defaults on the QFC by failing to meet certain contractual obligations. These rights are generally, but not always, contractual in nature. One common default right is a setoff right which is the right to reduce the total amount that the non-defaulting party must pay by the amount that its defaulting counterparty owes. A second common default right is the right to liquidate pledged collateral and use the proceeds to pay the defaulting party's net obligation to the non-defaulting party. Other common rights include the ability to suspend or delay the non-defaulting party's performance under the contract or to accelerate the obligations of the defaulting party.

Finally, the non-defaulting party typically has the right to terminate the QFC, meaning that the parties would not make payments that would have been required under the QFC in the future. The phrase "default right" in § 47.2 of the proposed rule was broadly defined to include these common rights as well as "any similar rights." Additionally, the definition included all such rights regardless of source, including rights existing under contract, statute, or common law.

However, the proposed definition excluded two rights that are typically associated with the business-as-usual functioning of a QFC. First, same-day netting that occurs during the life of the QFC in order to reduce the number and amount of payments each party owes the other was excluded from the definition of "default right."<sup>80</sup> Second, contractual margin requirements that arise solely from the change in the value of the collateral or the amount of an economic exposure were also excluded from the definition.<sup>81</sup> The effect of these exclusions was to leave such rights unaffected by the proposed rule. The exclusions were appropriate because the proposed rule is intended to improve resolvability by addressing default rights that could disrupt an orderly resolution, and not to interrupt the parties' business-as-usual dealings under a QFC.

However, certain QFCs are also commonly subject to rights that would increase the amount of collateral or margin that the defaulting party (or a guarantor) must provide upon an event

<sup>79</sup> These commenters argued that, to the extent central banks and sovereign entities are unable or unwilling to agree to limitations on their QFC default rights, application of the proposed rule's requirements to QFCs with these entities creates a significant disincentive for these entities to enter into QFCs with covered banks, resulting in the loss of valuable counterparties in a way that will hinder market liquidity and covered entity risk management.

<sup>80</sup> See Proposed Rule § 47.2.

<sup>81</sup> See *id.*

<sup>78</sup> See final rule § 47.7.

of default. The financial impact of such default rights on a covered bank could be similar to the impact of the liquidation and acceleration rights discussed previously. Therefore, the proposed definition of “default right” included such rights (with the exception discussed in the previous paragraph for margin requirements based solely on the value of collateral or the amount of an economic exposure).<sup>82</sup>

Finally, contractual rights to terminate without the need to show cause, including rights to terminate on demand and rights to terminate at contractually specified intervals, were excluded from the definition of “default right” for purposes the proposed rule’s restrictions on cross-default rights (§ 47.5 of the proposed rule).<sup>83</sup> This was consistent with the proposed rule’s objective of restricting only default rights that are related, directly or indirectly, to the entry into resolution of an affiliate of the covered bank, while leaving other default rights unrestricted.

*Comments.* Commenters expressed support for a number of aspects of the definition of default rights. For example, a number of commenters supported the proposed exclusion from the definition of “default right” of contractual rights to terminate without the need to show cause, noting that such rights exist for a variety of reasons and that reliance on these rights is unlikely to result in a fire sale of assets during a GSIB resolution. At least one commenter requested that this exclusion be expanded to include force majeure events. Commenters also expressed support for the exclusion for what commenters referred to as “business-as-usual” payments associated with a QFC. However, these commenters requested clarification that certain “business-as-usual” actions would not be included in the definition of default right, such as payment netting, posting and return of collateral, procedures for the substitution of collateral and modification to the terms of the QFC, and also requested clarification that the definition of “default right” would not include off-setting transactions to third parties by the non-defaulting counterparty. One commenter urged that, if the OCC’s goal is to provide that a party cannot enforce a provision that requires more margin because of a credit downgrade but may demand more margin for market price changes, the rule should state so explicitly. Another commenter expressed concern that the definition of default right in the proposed rule would permit a defaulting covered bank to

demand collateral from its QFC counterparty as margin due to a market price change, but would not allow the non-covered counterparty to demand collateral from the covered bank.

*Final Rule.* The final rule retains the same definition of “default right” as that of the proposed rule.<sup>84</sup> The OCC believes that the definition of default right is sufficiently clear and that additional modifications are not needed to address the concerns raised by commenters. The final rule does not adopt a particular exclusion for force majeure events, as requested by certain commenters, as it is not clear—without reference to particular contractual provisions—what this term would encompass. Moreover, it should be clear that events typically considered to be captured by force majeure clauses (e.g., natural disasters) would not be related, directly or indirectly, to the resolution of an affiliate.<sup>85</sup>

“Business-as-usual” rights regarding changes in collateral or margin would not be included within the definition of default right to the extent that the right or operation of a contractual provision arises solely from either a change in the value of collateral or margin or a change in the amount of an economic exposure. In response to commenters’ requests for clarification, this exception includes changes in margin due to changes in market price, but does not include changes due to counterparty credit risk (e.g., credit rating downgrades). Therefore, the right of either party to a covered QFC to require margin due to changes in market price would be unaffected by the definition of default right. Moreover, default rights that arise before a covered bank or its affiliate enters resolution, and that would not be affected by the stay-and-transfer provisions of the U.S. Special Resolution Regimes also would not be affected.

With respect to transactions with third parties, the final rule, like the proposed rule, does not require covered banks to address default rights in QFCs solely between parties that are not covered banks (e.g., off-setting transactions to third parties by the non-defaulting counterparty, to the extent none are covered banks).

#### *E. Required Contractual Provisions Related to U.S. Special Resolution Regimes (§ 47.4)*

*Proposed Rule.* The proposed rule generally would have required a covered QFC to explicitly provide both (a) that the transfer of the QFC (and any

interest or obligation in or under it and any property collateralizing it) from the covered bank to a transferee would be effective to the same extent as it would be under the U.S. Special Resolution Regimes if the covered QFC were governed by the laws of the United States or of a state of the United States and (b) that default rights with respect to the covered QFC that could be exercised against a covered bank could be exercised to no greater extent than they could be exercised under the U.S. Special Resolution Regimes if the covered QFC were governed by the laws of the United States or of a state of the United States.<sup>86</sup> The proposed rule would define the term “U.S. Special Resolution Regimes” to mean the FDI Act<sup>87</sup> and Title II of the Dodd-Frank Act,<sup>88</sup> along with regulations issued under those statutes.<sup>89</sup>

*Comments.* A number of commenters noted that the wording of these requirements in proposed § 47.4 was confusing and could be read to be inconsistent with the intent of the section. In response to these comments, the final rule makes clearer that the substantive restrictions apply only in the event the covered bank (or, in the case of the requirement regarding default rights, its affiliate) becomes subject to a proceeding under a U.S. Special Resolution Regime.<sup>90</sup>

A number of commenters argued that QFCs should be exempt from the requirements of § 47.4 of the proposed rule if the QFC is governed by U.S. law. An example of such a QFC provided by commenters includes the standard form repurchase and securities lending agreement published by the Securities Industry and Financial Markets Association. These commenters argued that counterparties to such agreements are already required to observe the stay-and-transfer provisions of the FDI Act and Title II of the Dodd-Frank Act, as mandatory provisions of U.S. Federal law, and that requiring an amendment of these types of QFCs to include the express provisions required under § 47.4 would be redundant and would not provide any material resolution benefit, but would significantly increase the remediation burden on covered banks.

Other commenters suggested a three-prong test of “nexus with the United States” for purposes of recognizing an exclusion from the express acknowledgment of the requirements of § 47.4 of the proposed rule. In

<sup>82</sup> See *id.*

<sup>83</sup> See Proposed Rule §§ 47.2 and 47.5.

<sup>84</sup> See final rule § 47.2.

<sup>85</sup> See final rule § 47.5(b).

<sup>86</sup> See Proposed Rule § 47.4.

<sup>87</sup> 12 U.S.C. 1811–1835a.

<sup>88</sup> 12 U.S.C. 5381–5394.

<sup>89</sup> See Proposed Rule § 47.2.

<sup>90</sup> See *id.*

particular, these commenters argued that the presence of two factors, in addition to the contract being governed by U.S. law, would provide greater certainty that courts would apply the stay-and-transfer provisions of the FDI Act and Title II of the Dodd-Frank Act: (1) If a contract is entered into between entities organized in the United States; and (2) to the extent the GSIB's obligations under the QFC are collateralized, if the collateral is held with a U.S. custodian or depository pursuant to an account agreement governed by U.S. law.<sup>91</sup> Other commenters contended that only whether the contract is under U.S. law, and not the location of the counterparty or the collateral, is relevant to the analysis of whether the FDI Act and the Dodd-Frank Act would govern the contract. Commenters also requested that if the first additional factor (*i.e.*, that the QFC be entered into between entities organized in the United States) were to be included within the exception, it should be broadened to include counterparties that have principal places of business or that are otherwise domiciled in the United States.

Commenters also argued that it would be more appropriate for Congress to act to obtain cross-border recognition of U.S. Special Resolution Regimes, rather than for the OCC to do so through this final rule.

**Final Rule.** The requirements of the final rule seek to provide certainty that all covered QFCs would be treated the same way in the context of a resolution of a covered bank under the Dodd-Frank Act or the FDI Act. The stay-and-transfer provisions of the U.S. Special Resolution Regimes should be enforced with respect to all contracts of any U.S. GSIB entity that enters resolution under a U.S. Special Resolution Regime, as well as all transactions of the subsidiaries of such an entity. Nonetheless, it is possible that a court in a foreign jurisdiction would decline to enforce those provisions. In general, the requirement that the effect of the statutory stay-and-transfer provisions be incorporated directly into the QFC contractually helps to ensure that a court in a foreign jurisdiction would enforce the effect of those provisions, regardless of whether the court would otherwise have decided to enforce the U.S. statutory provisions.<sup>92</sup> Further, the

knowledge that a court in a foreign jurisdiction would reject the purported exercise of default rights in violation of the required contractual provisions would deter counterparties of covered banks, covered entities (under the FRB final rule), or covered FSIs (under the FDIC final rule), from attempting to exercise such rights.

In response to comments, the final rule exempts from the requirements of § 47.4 a covered QFC that meets two requirements.<sup>93</sup> First, the covered QFC must state that it is governed by the laws of the United States or a State of the United States.<sup>94</sup> It has long been clear that the laws of the United States and the laws of a State of the United States both include U.S. Federal law, such as the U.S. Special Resolution Regimes.<sup>95</sup> Therefore, this requirement ensures that contracts that meet this exemption also contain language that helps ensure that foreign courts will enforce the stay-and-transfer provisions of the U.S. Special Resolution Regimes. Second, the QFC counterparty to the covered bank must be organized under the laws of the United States or a State,<sup>96</sup> have its principal place of business<sup>97</sup> located in the United States, or be a Federal branch or agency.<sup>98</sup>

Resolution Actions" (November 3, 2015), <http://www.fsb.org/wp-content/uploads/Principles-for-Cross-border-Effectiveness-of-Resolution-Actions.pdf>.

<sup>93</sup> See final rule § 47.4(a).

<sup>94</sup> However, a contract that explicitly provides that one or both of the U.S. Special Resolution Regimes, including a broader set of laws that includes a U.S. Special Resolution Regime, is excluded from the laws governing the QFC would not meet this exemption under the final rule. For example, a covered QFC would not meet this exemption if the contract stated that it was governed by the laws of the state of New York but also stated that it was not governed by U.S. Federal law. In contrast, a contract that stated that it was governed by the laws of the state of New York but opted out of a specific, non-mandatory Federal law (*e.g.*, the Federal Arbitration Act) would meet this exemption. *Cf. Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468 (1989).

<sup>95</sup> Although many QFCs only explicitly state that the contract is governed by the laws of a specific State of the United States, it has been made clear on numerous occasions that the laws of each State include Federal law. *See, e.g., Hauenstein v. Lynham*, 100 U.S. 483, 490 (1979) (stating that federal law is "as much a part of the law of every State as its own local laws and the Constitution"); *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 157 (1982) (same); *Testa v. Katt*, 330 U.S. 386, 393 (1947) ("For the policy of the federal Act is the prevailing policy in every state.").

<sup>96</sup> The final rule defines "State" means any state, commonwealth, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, or the United States Virgin Islands. *See* final rule § 47.2.

<sup>97</sup> *See Hertz Corp. v. Friend*, 559 U.S. 77 (2010) (describing the appropriate test for principal place of business).

<sup>98</sup> *See* final rule § 47.4(a).

Similarly, a counterparty that is an individual must be domiciled in the United States.<sup>99</sup> This requirement helps ensure that the FDIC will be able to quickly and easily enforce the stay-and-transfer provisions of the U.S. Special Resolution Regimes.<sup>100</sup> This exemption is expected to significantly reduce the burden associated with complying with the final rule while continuing to provide assurance that the stay-and-transfer provisions of the U.S. Special Resolution Regimes may be enforced.

This section of the final rule is consistent with efforts by regulators in other jurisdictions to address similar risks by requiring that financial firms within their jurisdictions ensure that the effect of the similar provisions under these foreign jurisdictions' respective special resolution regimes would be enforced by courts in other jurisdictions, including the United States. For example, the U.K.'s Prudential Regulation Authority (PRA) recently required certain financial firms to ensure that their counterparties to newly created obligations agree to be subject to stays on early termination that are similar to those that would apply upon a U.K. firm's entry into resolution if the financial arrangements were governed by U.K. law.<sup>101</sup> Similarly, the German parliament passed a law in November 2015 requiring German financial institutions to have provisions in financial contracts that are subject to the law of a country outside of the European Union that acknowledge the provisions regarding the temporary suspension of termination rights and accept the exercise of the powers regarding such temporary suspension under the German special resolution regime.<sup>102</sup> Additionally, the Swiss

<sup>99</sup> *See id.*

<sup>100</sup> *See, e.g., Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *Hertz Corp. v. Friend*, 559 U.S. 77 (2010).

<sup>101</sup> *See* PRA Rulebook: CRR Firms and Non-Authorised Persons: Stay in Resolution Instrument 2015, (November 12, 2015), <http://www.bankofengland.co.uk/prd/Documents/publications/ps/2015/ps2515app1.pdf>; *see also* Bank of England, Prudential Regulation Authority, "Contractual stays in financial contracts governed by third-country law" (PS25/15), (Nov. 2015), <http://www.bankofengland.co.uk/prd/Documents/publications/ps/2015/ps2515.pdf>. These PRA rules apply to PRA-authorized banks, building societies, PRA-designated investment firms, and their qualifying parent undertakings, including U.K. financial holding companies and U.K. mixed financial holding companies.

<sup>102</sup> *See* Gesetz zur Sanierung und Abwicklung von Instituten und Finanzgruppen, Sanierungs- und Abwicklungsgesetz [SAG] [German Act on the Reorganisation and Liquidation of Credit Institutions], December 10, 2014, § 60a, <https://www.gesetze-im-internet.de/bundesrecht/sag/gesamt.pdf>, as amended by Gesetz zur Anpassung

<sup>91</sup> These commenters noted that it would be unlikely that any court interpreting a QFC governed by U.S. law could have a reasonable basis for disregarding the stay-and-transfer provisions of the FDI Act or Title II of the Dodd-Frank Act.

<sup>92</sup> *See generally* Financial Stability Board, "Principles for Cross-border Effectiveness of

Federal Council requires that banks “ensure at both the individual institution and group level that new agreements or amendments to existing agreements which are subject to foreign law or envisage a foreign jurisdiction are agreed only if the counterparty recognizes a postponement of the termination of agreements in accordance with” the Swiss special resolution regime.<sup>103</sup> Japan’s Financial Services Agency also revised its supervisory guidelines for major banks to require those banks to ensure that the effect of the statutory stay decision and statutory special creditor protections under Japanese resolution regimes extends to contracts governed by foreign laws.<sup>104</sup>

As discussed in Section III.A. of this preamble, the OCC believes it is appropriate to adopt this final rule in order to promote the safety and soundness of the Federal banking system, and as a consequence, U.S. financial stability, by improving the resolvability and resilience of national banks, FSAs, and Federal branches and agencies, pursuant to its existing statutory authorities. Because of the current risk that the stay-and-transfer provisions of U.S. Special Resolution Regimes may not be recognized under the laws of other jurisdictions, § 47.4 of the final rule requires similar contractual recognition to help ensure that courts in foreign jurisdictions will recognize these provisions.

This requirement advances the goal of the final rule of removing QFC-related obstacles to the orderly resolution of covered banks, and by extension their associated GSIBs. As discussed above, restrictions on the exercise of QFC default rights are an important prerequisite for an orderly GSIB resolution. Congress recognized the importance of such restrictions when it enacted the stay-and-transfer provisions of the U.S. Special Resolution Regimes. As demonstrated by the 2007–2009

financial crisis, the modern financial system is global in scope, and covered banks are party to large volumes of QFCs with connections to foreign jurisdictions. The stay-and-transfer provisions of the U.S. Special Resolution Regimes would not achieve their purpose of facilitating orderly resolution in the context of the failure of a GSIB with large volumes of QFCs, if such QFCs could escape the effect of those provisions. To remove doubt about the scope of coverage of these provisions, the requirements of § 47.4 of the final rule would ensure that the stay-and-transfer provisions apply as a matter of contract to all covered QFCs, wherever the transaction. This will advance the resolvability goals of the Dodd-Frank Act and the FDI Act and improve the resiliency of covered banks subject to the requirements.

#### *F. Prohibited Cross-Default Rights (§ 47.5)*

##### 1. Definitions

*Proposed Rule and Final Rule.* Section 47.5 of the final rule, like the proposed rule, pertains to cross-default rights in QFCs between covered banks and their counterparties, many of which are subject to credit enhancements (such as guarantees) provided by an affiliate of the covered bank. Because credit enhancements on QFCs are themselves “qualified financial contracts” under the Dodd-Frank Act’s definition of that term (which this final rule adopts), the final rule includes the following additional definitions in order to precisely describe the relationships to which this section applies. These definitions are the same as under the proposed rule since no comments were received on these definitions.

First, the final rule distinguishes between a credit enhancement and a “direct QFC,” which is defined as any QFC that is not a credit enhancement. The final rule also defines “direct party” to mean a covered bank that itself is a party to the direct QFC, as distinct from an entity that provides a credit enhancement. In addition, the final rule defines “affiliate credit enhancement” to mean “a credit enhancement that is provided by an affiliate of the party to the direct QFC that the credit enhancement supports,” as distinct from a credit enhancement provided by either the direct party itself or by an unaffiliated party. Moreover, the final rule defines “covered affiliate credit enhancement” to mean an affiliate credit enhancement provided by a covered bank, or a covered entity under the FRB final rule, and defines “covered affiliate support provider” to mean the

affiliate of the covered bank that provides the covered affiliate credit enhancement. Finally, the final rule defines the term “supported party” to mean any party that is the beneficiary of the covered affiliate support provider’s obligations under a covered affiliate credit enhancement (that is, the QFC counterparty of a direct party, assuming that the direct QFC is subject to a covered affiliate credit enhancement).

##### 2. General Prohibition

*Proposed Rule.* Subject to certain exceptions discussed below, the proposed rule generally prohibited a covered bank from being a party to a covered QFC that allows for the exercise of any default right that is related, directly or indirectly, to the entry into resolution of an affiliate of the covered bank. The proposed rule also generally prohibited a covered bank from being party to a covered QFC that would prohibit the transfer of any credit enhancement applicable to the QFC (such as another entity’s guarantee of the covered bank’s obligations under the QFC), along with associated obligations or collateral, upon the entry into resolution of an affiliate of the covered bank.<sup>105</sup>

*Comments.* One commenter expressed strong support for these provisions.<sup>106</sup> Another commenter expressed support for this provision as currently limited in scope under the proposed rule to prohibited cross-default rights and requested that the scope not be expanded.

A number of commenters representing counterparties to covered banks objected to § 47.5 of the proposed rule and requested the elimination of this provision. These commenters expressed concern about limitations on counterparties’ exercise of default rights during insolvency proceedings and argued that rights should not be taken away from contracting parties other than where limitation of such rights is necessary for public policy reasons and the resolution process is controlled by a

des nationalen Bankenabwicklungsrechts an den Einheitlichen Abwicklungsmechanismus und die europäischen Vorgaben zur Bankenabgabe, November 2, 2015, Artikel 1(17).

<sup>103</sup> See Verordnung über die Finanzmarktinfrastrukturen und das Marktverhalten im Effekten- und Derivatehandel [FinfraV] [Ordinance on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading] Nov. 25, 2015, amending Bankenverordnung vom 30. April 2014 [BankV] [Banking Ordinance of 30 April 2014] April 30, 2014, SR 952.02, art. 12 paragraph 2bis, translation at <http://www.news.admin.ch/NSBSubscriber/message/attachments/42659.pdf>; see also Erläuterungsbericht zur Verordnung über die Finanzmarktinfrastrukturen und das Marktverhalten im Effekten- und Derivatehandel (November 25, 2015) (providing commentary).

<sup>104</sup> See Section III–11 of Comprehensive Guidelines for Supervision of Major Banks, etc., <http://www.fsa.go.jp/common/law/guide/city.pdf>.

<sup>105</sup> This prohibition would be subject to an exception that would allow supported parties to exercise default rights with respect to a QFC if the supported party would be prohibited from being the beneficiary of a credit enhancement provided by the transferee under any applicable law, including the Employee Retirement Income Security Act of 1974 and the Investment Company Act of 1940. This exception is substantially similar to an exception to the transfer restrictions in section 2(f) of the ISDA 2014 Resolution Stay Protocol (2014 Protocol) and the ISDA 2015 Universal Resolution Stay Protocol, which was added to address the concerns expressed by asset managers during the drafting of the 2014 Protocol.

<sup>106</sup> This commenter also expressed support for Congressional amendment of the U.S. Bankruptcy Code.

regulatory authority with particular expertise in the resolution of the type of entity subject to the proceedings. Certain commenters argued that eliminating cross-default termination rights undermines the ability of QFC counterparties to effectively manage and mitigate their exposure to market and credit risk to a GSIB and interferes with market forces. One commenter similarly argued that, unless appropriate measures to strengthen the financial condition and creditworthiness of a failing GSIB during and after the temporary stay are taken, the stay will only expose QFC counterparties to an additional 48 hours of credit risk exposure without achieving the orderly resolution goals of the proposed rule.

Another commenter argued that non-defaulting counterparties should not be prevented from filing proofs of claim or other pleadings in a bankruptcy case during the stay period, since bankruptcy deadlines might pass and leave the counterparty unable to collect the unsecured creditor dividend. Commenters contended that restrictions on cross-default rights may lead to procyclical behavior with asset managers moving funds away from covered entities as soon as those entities show signs of distress, and perhaps even in normal situations, and would disadvantage non-GSIB parties (e.g., end users who rarely receive initial margin from GSIB counterparties and are less well protected against a GSIB default).<sup>107</sup>

Some commenters argued that, if these rights must be restricted by law, Congress should impose such restrictions and that the requirements of the proposed rule circumvented the legislative process by creating a de facto amendment to the U.S. Bankruptcy Code that forecloses countless QFC counterparties from exercising their rights of cross-default protection under Section 362 of the U.S. Bankruptcy Code. Some of these commenters argued that parties cannot by contract alter the U.S. Bankruptcy Code's provisions, such as the administrative priority of a claim in bankruptcy, and one commenter suggested that non-covered bank counterparties may challenge the legality of contractual stays on the exercise of default rights if a GSIB becomes distressed. Certain commenters

also questioned the OCC's ability to rely on its authority under the National Bank Act in imposing these requirements over QFC counterparties not subject to its supervision and argued that making Title II resolution possible under the U.S. Bankruptcy Code was not an appropriate justification for the proposed rule. Other commenters, however, argued that the provisions of the proposed rule were necessary to address systemic risks posed by the exemption for QFCs in the U.S. Bankruptcy Code.

As an alternative to eliminating the proposed rule's requirements to remediate cross-default rights, these commenters expressed the view that, if the OCC adopts the proposed rule as final, the final rule should at least contain those minimum creditor protections established by the Universal Protocol. Certain commenters also argued that this provision in the proposed rule was overly broad in that it covered not only U.S. Federal resolution and insolvency proceedings but also State and foreign resolution and insolvency proceedings.<sup>108</sup> Certain commenters also urged the OCC to provide a limited exception to these restrictions, if retained in the final rule, to help ensure the continued functioning of physical commodities markets.<sup>109</sup>

<sup>108</sup> Certain commenters also indicated that these provisions should only apply to U.S. Special Resolution Regimes, which provide certain protections for counterparties, or, at most, to U.S. Special Resolution Regimes, resolution under the Securities Investor Protection Act, and insolvency under Chapter 11 of the U.S. Bankruptcy Code. That commenter noted that liquidation and insolvency under Chapter 7 of the Bankruptcy Code do not seek to preserve the GSIB as a viable entity, which is an objective of this proposal. As discussed later, the rule seeks to facilitate the resolution of a GSIB outside of U.S. Special Resolution Regimes, including under the U.S. Bankruptcy Code, and is intended to facilitate other approaches to GSIB resolution. Therefore, the final rule applies these provisions in the same way as the proposed rule. In addition, the additional creditor protections for supported parties under the final rule permit contractual requirements that any transferee not be in bankruptcy proceedings and that the credit support provider not be in bankruptcy proceedings other than a Chapter 11 proceeding. See final rule § 47.5(f).

<sup>109</sup> In particular, these commenters requested that, when a covered bank defaults on any physical delivery obligation to any counterparty following the insolvency of an affiliate of a covered bank, its counterparties with obligations to deliver or take delivery of physical commodities within a short time frame after the default should be able to immediately terminate all trades (both physical and financial) with the covered bank. The final rule, like the proposed rule, allows covered QFCs to permit a counterparty to exercise its default rights under a covered QFC if the covered bank has failed to pay or perform its obligations under the covered QFC. See final rule § 47.5(d). The final rule, like the proposed rule, also allows covered QFCs to permit a counterparty to exercise its default rights under

Some commenters argued that the OCC should eliminate the stay on default rights that are related "indirectly" to an affiliate of the direct party becoming subject to insolvency proceedings, claiming it is unclear what constitutes a right related "indirectly" to insolvency and noting that any default right exercised by a counterparty after an affiliate of that counterparty enters resolution could arguably be motivated by the affiliate's entry into resolution.

*Final Rule.* The final rule retains the same scope as the proposed rule. A primary purpose of the proposed restrictions is to facilitate the resolution of a GSIB outside of Title II, including under the U.S. Bankruptcy Code. As discussed in the Background section, the potential for the mass exercise of QFC default rights is a major reason why the failure of a global systemically important BHC could have a severe negative impact on financial stability and on the Federal banking system. In the context of an SPOE resolution, if the global systemically important BHC's entry into resolution triggers the mass exercise of cross-default rights by the subsidiaries' QFC counterparties of the covered QFCs against the covered bank, then the national bank or FSA could themselves experience financial distress or failure. Moreover, the mass exercise of covered QFC default rights would entail asset fire sales, which could affect other U.S. financial companies and undermine financial stability of the U.S. financial system. Similar disruptive results can occur with an MPOE resolution of an affiliate of an otherwise performing covered bank that triggers default rights on QFCs against the performing covered bank.

In an SPOE resolution, this damage can be avoided if actions of the following two types are prevented: The exercise of direct default rights against the top-tier holding company that has entered resolution, and the exercise of cross-default rights against the national bank and FSA subsidiaries and other operating subsidiaries based on their parent BHC entry into resolution. Direct default rights against the national bank or FSA subsidiary would not be exercisable, because that subsidiary

a covered QFC if the covered bank has failed to pay or perform on other contracts between the same parties and the failure gives rise to a default right in the covered QFC. See *id.* These exceptions should help reduce credit risk and ensure the smooth operation of the physical commodities markets without permitting one failure to pay or perform by a covered entity to allow a potentially large number of its counterparties that are not directly affected by the failure to exercise their default rights and thereby endanger the viability of the covered bank.

<sup>107</sup> One commenter stated that, to the extent the final rule prevents an insurer from terminating QFC transactions upon the credit rating downgrade of a GSIB counterparty, the insurer may be in violation of State insurance laws that typically impose strict counterparty credit rating guidelines and limits. This commenter did not give any specific examples of such laws. Counterparties, including insurance companies, should evaluate and comply with all relevant applicable requirements.

would continue normal operations and would not enter resolution. In an MPOE resolution, this damage occurs from the exercise of default rights against a performing entity based on the failure of an affiliate.

Title II of the Dodd-Frank Act's stay-and-transfer provisions would address both direct default rights and cross-default rights. But, as explained in the Background section, no similar statutory provisions would apply to a resolution under the U.S. Bankruptcy Code. The final rule attempts to address these obstacles to orderly resolution under the U.S. Bankruptcy Code by extending the stay-and transfer-provisions to any type of resolution. Similarly, the final rule would facilitate a transfer of the GSIB parent's interests in its subsidiaries, along with any credit enhancements it provides for those subsidiaries, to a solvent financial company by prohibiting covered banks from having QFCs that would allow the QFC counterparty to prevent such a transfer or to use it as a ground for exercising default rights.

Accordingly, the final rule is intended to enhance the potential for orderly resolution of a GSIB under the U.S. Bankruptcy Code, the FDI Act, or similar resolution proceedings. In doing so, the proposed rule would advance the Dodd-Frank Act's goal of making the orderly resolution of a covered bank workable under the U.S. Bankruptcy Code.<sup>110</sup>

Likewise, the final rule retains the prohibition against contractual provisions that permit the exercise of default rights that are indirectly related to the resolution of an affiliate. QFCs may include a number of default rights triggered by an event that is not the resolution of an affiliate but is caused by the resolution, such as a credit rating downgrade in response to the resolution. A primary purpose of the final rule is to prevent early terminations caused by the resolution of an affiliate. A regulation that specifies each type of early termination provision that should be stayed would be over-inclusive, under-inclusive, and easy to evade. Similarly, a stay of default rights that are only directly related to the resolution of an affiliate could increase the likelihood of litigation to determine if the relationship between the default right and the affiliate resolution was sufficient to be considered "directly" related. The final rule attempts to decrease such uncertainty and litigation risk by including default rights that are related (*i.e.*, directly or indirectly) to the resolution of an affiliate.

Moreover, the final rule does not affect parties' rights under the U.S. Bankruptcy Code. As explained above, the final rule does not prohibit a covered QFC from permitting the exercise of default rights against a covered entity that has entered bankruptcy proceedings.<sup>111</sup> Therefore, counterparties to a covered entity in bankruptcy would be able to exercise their existing contractual default rights to the full extent permitted under any applicable safe harbor to the automatic stay of the U.S. Bankruptcy Code.

The final rule could also prevent the disorderly failure of the national bank or FSA subsidiary and allow it to continue normal operations. In addition, while it may be in the individual interest of any given counterparty to exercise any available contractual rights to run on the national bank or FSA subsidiary, the mass exercise of such rights could harm the collective interest of all the counterparties by causing the subsidiary to fail. Therefore, like the automatic stay in bankruptcy, which also serves to maximize creditors' ultimate recoveries by preventing a disorderly liquidation of the debtor, the proposed rule would mitigate this collective action problem to the benefit of the creditors and counterparties of covered banks by preventing a disorderly resolution. And because many of these counterparties and creditors are themselves covered banks, or other systemically important financial firms, improving outcomes for these creditors and counterparties would further protect the safety and soundness of the Federal banking system and financial stability of the United States.

### 3. General Creditor Protections

*Proposed Rule and Final Rule.* While the proposed restrictions would facilitate orderly resolution, they would also have the effect of diminishing the ability of the counterparties of the covered banks to include protections for themselves in covered QFCs. In order to reduce this effect, the final rule, like the proposed rule, includes several significant exceptions to the proposed restrictions. These permitted creditor protections are intended to allow creditors to exercise cross-default rights outside of an orderly resolution of a GSIB, and therefore would not be expected to undermine such a resolution.

First, in order to ensure that the proposed prohibitions would apply only to cross-default rights (and not direct default rights), the final rule would provide that a covered QFC may permit

the exercise of default rights based on the direct party's entry into a resolution proceeding.<sup>112</sup> This provision helps to ensure that, if the direct party to a QFC were to enter bankruptcy, its QFC counterparties could exercise any relevant direct default rights. Thus, direct QFC counterparties of a covered bank's subsidiary or affiliate would not risk the delay and expense associated with becoming involved in a bankruptcy proceeding, and would be able to take advantage of default rights that would fall within the U.S. Bankruptcy Code's safe harbor provisions.

The final rule also allows covered QFCs to permit the exercise of default rights based on the failure of (1) the direct party, (2) a covered affiliate support provider, or (3) a transferee that assumes a credit enhancement to satisfy its payment or delivery obligations under the direct QFC or credit enhancement. Moreover, the final rule would allow covered QFCs to permit the exercise of a default right in one QFC that is triggered by the direct party's failure to satisfy its payment or delivery obligations under another contract between the same parties. This exception takes appropriate account of the interdependence that exists among the contracts in effect between the same counterparties.

As explained in the proposed rule, the exceptions in the final rule for the

<sup>112</sup> See final rule § 47.5(d)(1). The proposed rule exempted from this creditor protection provision proceedings under a U.S. or foreign special resolution regime. As explained in the proposed rule, special resolution regimes typically stay direct default rights, but may not stay cross-default rights. For example, as discussed above, the FDI Act stays direct default rights, *see* 12 U.S.C. 1821(e)(10)(B), but does not stay cross-default rights, whereas the Dodd-Frank Act's OLA stays direct default rights and cross-defaults arising from a parent's receivership, *see* 12 U.S.C. 5390(c)(10)(B) and 5390(c)(16). The proposed exemption of special resolution regimes from the creditor protection provisions was intended to help ensure that special resolution regimes that do not stay cross-defaults, such as the FDI Act, would not disrupt the orderly resolution of a GSIB under the U.S. Bankruptcy Code or other ordinary insolvency proceedings.

One commenter requested the OCC revise this provision to clarify that default rights based on a covered bank or an affiliate entering resolution under the FDI Act or Title II of the Dodd-Frank Act are not prohibited but instead are merely subject to the terms of such regimes. The commenter requested the OCC clarify that such default rights are permitted so long as they are subject to the provisions of the FDI Act or Title II of the Dodd-Frank Act as required under § 47.5. The final rule eliminates this proposed exemption for special resolution regimes because the rule separately addresses cross-defaults arising from the FDI Act and because foreign special resolution regimes, along with efforts in other jurisdictions to contractually recognize stays of default rights under those regimes, should reduce the risk that such a regime should pose to the orderly resolution of a GSIB under the U.S. Bankruptcy Code or other ordinary insolvency proceedings.

<sup>110</sup> See 12 U.S.C. 5365(d).

<sup>111</sup> See final rule § 47.5(d)(1).

creditor protections described are intended to help ensure that the proposed rule permits a covered bank's QFC counterparties to protect themselves from imminent financial loss and does not create a risk of delivery gridlocks or daisy-chain effects, in which a covered bank's failure to make a payment or delivery when due leaves its counterparty unable to meet its own payment and delivery obligations. The daisy-chain effect would be prevented because the covered bank's counterparty would be permitted to exercise its default rights, such as by liquidating collateral. These exceptions are generally consistent with the treatment of payment and delivery obligations under the U.S. Special Resolution Regimes.<sup>113</sup>

These exceptions also help to ensure that the counterparties of a covered bank's subsidiaries or affiliates would not risk the delay and expense associated with becoming involved in a bankruptcy proceeding, since, unlike a typical creditor of an entity that enters bankruptcy, the QFC counterparty would retain its ability under the U.S. Bankruptcy Code's safe harbors to exercise direct default rights. This should further reduce the counterparty's incentive to run. Reducing incentives to run in the period leading up to resolution promotes orderly resolution because a QFC creditor run (such as a mass withdrawal of repo funding) could lead to a disorderly resolution and pose a threat to financial stability.

#### 4. Additional Creditor Protections for Supported QFCs

*Proposed Rule and Final Rule.* The final rule, like the proposed rule, allows the inclusion of additional creditor protections for a non-defaulting counterparty that is the beneficiary of a credit enhancement from an affiliate of the covered bank that is also a covered bank under the final rule or a covered entity under the FRB final rule. The final rule would allow these creditor protections in recognition of the supported party's interest in receiving the benefit of its credit enhancement. The OCC, FRB, and FDIC believe that these creditor protections would not undermine an SPOE resolution of a GSIB.<sup>114</sup>

Where a covered QFC is supported by a covered affiliate credit enhancement,<sup>115</sup> the covered QFC and

the credit enhancement would be permitted to allow the exercise of default rights under the circumstances after the expiration of a stay period. Under the final rule, the applicable stay period would begin when the credit support provider enters resolution and would end at the later of 5:00 p.m. (eastern time) on the next business day and 48 hours after the entry into resolution. This portion of the final rule is similar to the stay treatment provided in a resolution under the OLA or the FDI Act.<sup>116</sup>

Under the final rule, contractual provisions may permit the exercise of default rights at the end of the stay period if the covered affiliate credit enhancement has not been transferred away from the covered affiliate support provider and that support provider becomes subject to a resolution proceeding other than a proceeding under Chapter 11 of the U.S. Bankruptcy Code.<sup>117</sup> Covered QFCs may also permit the exercise of default rights at the end of the stay period if the transferee (if any) of the credit enhancement enters a resolution proceeding, protecting the supported party from a transfer of the credit enhancement to a transferee that is unable to meet its financial obligations.

QFCs may also permit the exercise of default rights at the end of the stay period if the original credit support provider does not remain, and no transferee becomes obligated to the same (or substantially similar) extent as the original credit support provider was obligated immediately prior to entering a resolution proceeding (including a Chapter 11 proceeding) with respect to (a) the covered affiliate credit enhancement, (b) all other covered affiliate credit enhancements provided by the credit support provider on any other covered QFCs between the same parties, and (c) all credit enhancements provided by the credit support provider between the direct party and affiliates of the direct party's QFC counterparty. Such creditor protections are permitted to prevent the support provider or the transferee from "cherry picking" by

would not apply with respect to a credit enhancement provided by a non-U.S. entity of a foreign GSIB, which would not be a covered bank or covered entity.

<sup>116</sup> See U.S.C. 1821(e)(10)(B)(I), 5390(c)(10)(B)(i), 5390(c)(16)(A). While the stay period is similar to the stay periods that would be imposed by the U.S. Special Resolution Regimes, it could run longer than those stay periods under some circumstances.

<sup>117</sup> Chapter 11 (11 U.S.C. 1101–1174) is the portion of the U.S. Bankruptcy Code that provides for the reorganization of the failed company, as opposed to its liquidation, and, relative to special resolution regimes, is generally well-understood by market participants.

assuming only those QFCs of a given counterparty that are favorable to the support provider or transferee. Title II of the Dodd-Frank Act and the FDI Act contain similar provisions to prevent cherry picking.

Finally, if the covered affiliate credit enhancement is transferred to a transferee, then the non-defaulting counterparty could exercise default rights at the end of the stay period unless either (a) all of the support provider's ownership interests in the direct party are also transferred to the transferee or (b) reasonable assurance is provided that substantially all of the support provider's assets (or the net proceeds from the sale of those assets) will be transferred to the transferee in a timely manner. These conditions would help to assure the supported party that the transferee generally would be at least as financially capable of providing the credit enhancement as the covered affiliate support provider.

*Comments.* Commenters generally expressed strong support for these exclusions but also requested that these exclusions be broadened in a number of ways. Some commenters urged the OCC to broaden the exclusions to permit, after the trigger of the stay-and-transfer provisions, the exercise of default rights by a counterparty against a direct counterparty or covered support provider with respect to any default right under the QFC (other than a default right explicitly based on the failure of an affiliate) and not just with respect to defaults resulting from payment or delivery failure or the direct party becoming subject to certain resolution or insolvency proceedings (e.g., failure to maintain a license or certain capital level, materially breaching its representations under the QFC). Some commenters contended that, at a minimum, the final rule should provide for creditor protections that meet the minimum standards set forth by the Universal Protocol. One commenter specifically identified three creditor protections found in the Universal Protocol that it argued the OCC should include in § 47.5: (1) Priority rights in a bankruptcy proceeding against the transferee or original credit support provider (if the QFC providing credit support was not transferred); (2) a right to submit claims in the insolvency proceeding of the insolvent credit support provider if the transferee becomes insolvent; and (3) the ability to declare a default and close out of both the original QFC with the direct counterparty as well as QFCs with the transferee if the transferee defaults under the transferred QFC or under any other QFC with the non-

<sup>113</sup> See 12 U.S.C. 1821(e)(8)(G)(ii), 5390(c)(8)(F)(ii) (suspending payment and delivery obligations for one business day or less).

<sup>114</sup> See 81 FR 29169 (May 11, 2016).

<sup>115</sup> Note that the final rule would not apply with respect to credit enhancements that are not covered affiliate credit enhancements. In particular, it

defaulting counterparty, subject to the contractual terms and consistent with applicable law. Another commenter argued for creditor protections not found in the Universal Protocol, including that the transferee be required to be a U.S. person and be registered with and licensed by the primary regulator of either the direct counterparty or transferor entity.

The final rule does not include the additional creditor protections of the Universal Protocol or other creditor protections requested by commenters. As explained in the proposed rule and below, the additional creditor protections of the Universal Protocol do not appear to materially diminish the prospects for an orderly resolution of a GSIB because the Universal Protocol includes a number of desirable features that the final rule otherwise lacks.<sup>118</sup> Providing additional circumstances under which default rights may be exercised during and immediately after the stay period, in the absence of any counterbalancing benefits to resolution, would increase the risk of a disorderly resolution of a GSIB in contravention of the purposes of this final rule.

One commenter also argued that transfer should be limited to a bridge bank under the FDI Act or a bridge financial company under Title II of the Dodd-Frank Act to ensure that the transferee is more likely to be able to satisfy the obligations of a credit support provider and is subject to regulatory oversight. Section 47.5 of the final rule permits QFCs to include provisions allowing a counterparty to exercise its default rights against a direct party that enters resolution under the FDI Act or Title II of the Dodd-Frank Act, other than the limited case contemplated by § 47.5(h) of the final rule. The OCC is not adopting the proposed additional creditor protection because it would defeat in large part the purpose of § 47.5 and potentially create confusion regarding the requirements and purposes of sections 47.4 and 47.5 of the final rule.<sup>119</sup>

A few commenters expressed concern that the additional creditor protections applied only to QFCs supported by a credit enhancement provided by a “covered affiliate support provider” (i.e., an affiliate that is a covered entity,

covered bank, or covered FSI) and noted that Foreign GSIBs often will have their QFCs supported by a non-U.S. affiliate that is not a covered entity, covered bank, or covered FSI. Such non-U.S. affiliate credit supporter providers would not be able to rely on the additional creditor protections for supported QFCs. As the FRB Proposed Rule explained, “[s]uch credit enhancements [are] excluded in order to help ensure that the resolution of a non-[U.S.] entity would not negatively affect the financial stability of the United States by allowing for the exercise of default rights against a covered entity [or in the case of the OCC Proposed Rule, the covered bank].”<sup>120</sup>

One commenter requested clarification that the creditors of a non-U.S. credit support provider are permitted to exercise any and all rights against that non-U.S. credit support provider that they could exercise under the non-U.S. resolution regime applicable to that non-U.S. credit support provider. In general, covered banks may be entities organized or operating in the United States or, with respect to U.S. GSIBs, abroad. The final rule, like the proposed rule, is limited to QFCs to which a covered bank is a party. Section 47.5 of the final rule generally prohibits QFCs to which a covered bank is a party from allowing the exercise of cross-default rights of the covered QFC, regardless of whether the affiliate entering resolution and/or the credit support provider is organized or operates in the United States.

Another commenter expressed concern that the proposed § 47.5(g)(3) (§ 47.5(f)(3) of the final rule) would provide a right without a remedy because, if the covered affiliate credit support provider is no longer obligated and no transferee has taken on the obligation, the non-covered entity counterparty may have only a breach of contract claim against an entity that has transferred all of its assets to a third party. The creditor protections of § 47.5, if triggered, permit contractual provisions allowing the exercise of existing default rights against the direct party to the covered QFC, as well as any

existing rights against the credit enhancement provider. Another commenter suggested revising proposed § 47.5(g) (§ 47.5(f) of the final rule) to clarify that, for a covered direct QFC supported by a covered affiliate credit enhancement, the covered direct QFC and the covered affiliate credit enhancement may permit the exercise of a default right after the stay period that is related, directly or indirectly, to the covered affiliate support provider entering into resolution proceedings. This reading is incorrect and revising the final rule as requested would largely defeat the purpose of § 47.5 of the final rule by merely delaying QFC termination en masse.

Some commenters also requested specific provisions related to physical commodity contracts, including a provision that would allow regulators to override a stay if necessary to avoid disruption of the supply or prevent exacerbation of price movements in a commodity or a provision that would allow the exercise of default rights of counterparties delivering or taking delivery of physical commodities if a covered bank defaults on any physical delivery obligation to any counterparty. As noted above, QFCs may permit a counterparty to exercise its default rights immediately, even during the stay period, if the covered bank fails to pay or perform on the covered QFC with the counterparty (or another contract between the same parties that gives rise to a default under the covered QFC).

#### 5. Creditor Protections Related to FDI Act Proceedings

*Proposed Rule and Final Rules.* In the case of a covered QFC that is supported by a covered affiliate credit enhancement, both the covered QFC and the credit enhancement would be permitted to allow the exercise of default rights related to the credit support provider’s entry into resolution proceedings under the FDI Act<sup>121</sup> only under the following circumstances: (a) After the FDI Act stay period,<sup>122</sup> if the credit enhancement is not transferred under the relevant provisions of the FDI Act<sup>123</sup> and associated regulations, and (b) during the FDI Act stay period, to the extent that the default right permits the supported party to suspend performance under the covered QFC to the same

<sup>120</sup> 81 FR 29169, 29180 n.92 (May 11, 2016) (“Note that the exception in § 252.84(g) of the [FRB Proposed Rule] would not apply with respect to credit enhancements that are not covered affiliate credit enhancements. In particular, it would not apply with respect to a credit enhancement provided by a non-U.S. entity of a [F]oreign GSIB, which would not be a covered entity under the proposal. Such credit enhancements would be excluded in order to help ensure that the resolution of a non-U.S. entity would not negatively affect the financial stability of the United States by allowing for the exercise of default rights against a covered entity.”). See also FRB final rule § 252.84(f).

<sup>121</sup> As discussed, the FDI Act stays direct default rights against the failed depository institution but does not stay the exercise of cross-default rights against its affiliates.

<sup>122</sup> Under the FDI Act, the relevant stay period runs until 5:00 p.m. (eastern time) on the business day following the appointment of the FDIC as receiver. 12 U.S.C. 1821(e)(10)(B)(i).

<sup>123</sup> 12 U.S.C. 1821(e)(9)–(10).

<sup>118</sup> See 81 FR 55381, 55394 (August 19, 2016).

<sup>119</sup> To the extent the commenter’s reference to “bridge financial company” was not only to a bridge financial company under Title II of the Dodd-Frank Act, the requested amendment would not appear to provide a meaningful reduction in credit risk to counterparties compared to the creditor protections permitted under § 47.5 of the final rule and those available under the Universal Protocol and U.S. Protocol, discussed below.

extent as that party would be entitled to do if the covered QFC were with the credit support provider itself and were treated in the same manner as the credit enhancement. This provision is intended to ensure that a QFC counterparty of a subsidiary of a covered bank that goes into FDI Act receivership can receive the same level of protection that the FDI Act provides to QFC counterparties of the covered bank itself. No comments were received on this aspect of the proposed rule, and the final rule remains unchanged.

## 6. Prohibited Terminations

**Proposed Rule.** In case of a legal dispute as to a party's right to exercise a default right under a covered QFC, the proposed rule required that a covered QFC must provide that, after an affiliate of the direct party has entered a resolution proceeding, (a) the party seeking to exercise the default right shall bear the burden of proof that the exercise of that right is indeed permitted by the covered QFC and (b) the party seeking to exercise the default right must meet a "clear and convincing evidence" standard, a similar standard,<sup>124</sup> or a more demanding standard.

This proposed requirement was intended to prevent QFC counterparties from circumventing the limitations on resolution-related default rights in this proposal by exercising other contractual default rights in instances where such QFC counterparty cannot demonstrate that the exercise of such other contractual default rights is unrelated to the affiliate's entry into resolution.

**Comments.** A few commenters requested guidance on how to satisfy the burden of proof of clear and convincing evidence so that they may avoid seeking such clarity through litigation. Other commenters urged that this standard was not appropriate and should be eliminated. In particular, a number of commenters expressed concern that the burden of proof requirements, which are more stringent than the burden of proof requirements for typical contractual disputes adjudicated in a court, unduly hamper the creditor protections of counterparties and impose a burden directly on non-covered entities, who should be able to exercise default rights if it is commercially reasonable in the context. One commenter contended that

this burden, combined with the stay on default rights related "indirectly" to an affiliate entering insolvency proceedings, effectively prohibits counterparties from exercising any default rights during the stay period. These commenters argued that it is inappropriate for the OCC by regulation to alter the burden of proof for contractual disputes. One commenter suggested that, in a scenario involving a master agreement with some transactions out of the money and others in the money, the defaulting GSIB will have a lower burden of proof for demonstrating that it is owed money than for demonstrating that it owes money, should the non-GSIB counterparty exercise its termination rights. Certain commenters suggested instead that the final rule shift the burden and adopt a rebuttable presumption that the non-defaulting counterparty's exercise of default rights is permitted under the QFC unless the defaulting covered entity demonstrates otherwise. One commenter requested that the burden of proof not apply to the exercise of direct default rights.

**Final Rule.** The final rule retains the proposed burden of proof requirements. The requirement is based on a primary goal of the final rule—to avoid the disorderly termination of QFCs in response to the failure of an affiliate of a GSIB. The requirement accomplishes this goal by making clear that a party that exercises a default right when an affiliate of its direct party enters receivership of insolvency proceedings is unlikely to prevail in court unless there is clear and convincing evidence that the exercise of the default right against a covered entity is not related to the insolvency or resolution proceeding. The requirement therefore should discourage the impermissible exercise of default rights without prohibiting the exercise of all default rights. Moreover, the burden of proof requirement should not discourage the exercise of default rights after or in response to a failure to satisfy a creditor protection provision (e.g., direct default rights); such a failure should be easily evidenced, even under a heightened burden of proof, such that clarification through court proceedings should not be necessary.

## 7. Agency Transactions

**Proposed Rule.** In addition to entering into QFCs as principal, GSIBs may engage in QFCs as agent for other principals. For example, a GSIB subsidiary may enter into a master securities lending arrangement with a foreign bank as agent for a U.S.-based pension fund. The GSIB would document its role as agent for the

pension fund, often through an annex to the master agreement, and would generally provide to its customer (the principal party) a securities replacement guarantee or indemnification for any shortfall in collateral in the event of the default of the foreign bank.<sup>125</sup> A covered bank may also enter into a QFC as principal where there is an agent acting on its behalf or on behalf of its counterparty.

The proposed rule would have applied to a covered QFC regardless of whether the covered bank or the covered bank's direct counterparty is acting as a principal or as an agent. The proposed rule did not distinguish between agents and principals with respect to default rights or transfer restrictions applicable to covered QFCs. The proposed rule would have limited default rights and transfer restrictions that the principal and its agent may have against a covered bank consistent with the U.S. Special Resolution Regimes. The proposed rule would have ensured that, subject to the enumerated creditor protections, neither the agent nor the principal could exercise cross-default rights under the covered QFC against the covered bank based on the resolution of an affiliate of the covered bank.<sup>126</sup>

**Comments.** Commenters argued that the provisions of sections 47.4 and 47.5 that relate to transactions entered into by the covered bank as agent should exclude QFCs where the covered bank or its affiliate does not have any liability (including contingent liability) under or in connection with the contract, or any payment or delivery obligations with respect thereto. Commenters also argued that the proposed agent provisions should not apply to circumstances where the covered bank acts as agent for a counterparty whose transactions are excluded from the requirements of the final rule.<sup>127</sup> Commenters provided as an example where an agent simply executes an agreement on behalf of the principal but bears no liability thereunder, such as where an

<sup>125</sup> The definition of QFC under Title II of the Dodd-Frank Act includes security agreements and other credit enhancements as well as master agreements (including supplements). 12 U.S.C. 5390(c)(8)(D).

<sup>126</sup> Under the proposed rule, if a covered bank (acting as agent) is a direct party to a covered QFC, then the general prohibitions of § 47.5(d) would only affect the substantive rights of the agent's principal(s) to the extent that the covered QFC provides default rights based directly or indirectly on the entry into resolution of an affiliate of the covered bank (acting as agent).

<sup>127</sup> Commenters argued this should be the case even where an agent has entered an umbrella master agreement on behalf of more than one principal, but only with respect to the contract of any principals that are excluded counterparties.

<sup>124</sup> The reference to a "similar" burden of proof is intended to allow covered QFCs to provide for the application of a standard that is analogous to clear and convincing evidence in jurisdictions that do not recognize that particular standard. A covered QFC would not be permitted to provide for a lower standard.

investment manager signs an agreement on behalf of a client. Commenters noted that such agreements could contain events of default relating to the insolvency of the agent or an affiliate of the agent but that such default rights would be difficult to track and that close-out of such QFCs would not result in any loss or liquidity impact to the agent. Rather, early termination under the agreements would subject the cash and securities of the principals—not the agent—to realization and liquidation. Therefore, the agent would not be exposed to the liquidity and asset fire sale risks the proposed rule was intended to address.

Commenters contended that the requirement to conform QFCs with all affiliates of a counterparty when an agent is acting on behalf of the counterparty would be particularly burdensome, as the agent may not have information about the counterparty's affiliates or their contracts with covered entities. Commenters also requested clarification that conformance is not required of contracts between a covered entity as agent on behalf of a non-U.S. affiliate of a Foreign GSIB that would not be a covered bank under the proposed rule, since default rights related to the non-U.S. operations of Foreign GSIBs are not the focus of the rule and do not bear a sufficient connection to U.S. financial stability to warrant the burden and cost of compliance.

One commenter also urged that securities lending authorization agreements (SLAAs) should be exempt from the final rule. The commenter explained that SLAAs are banking services agreements that establish an agency relationship with the lender of securities and an agent, and may be considered credit enhancements for securities lending transactions (and therefore QFCs) because the SLAAs typically require the agent to indemnify the lender for any shortfall between the value of the collateral and the value of the securities in the event of a borrower default. The commenter explained that SLAAs typically do not contain provisions that may impede the resolution of a GSIB, but may contain termination rights or contractual restrictions on assignability. However, the commenter argued that the beneficiaries under SLAAs lack the incentive to contest the transfer of the SLAA to a bridge institution in the event of GSIB insolvency.

**Final Rule.** To respond to concerns raised by commenters, the agency provisions of the proposed rule have been modified in the final rule. The final rule provides that a covered bank

does not become a party to a QFC solely by acting as agent to a QFC.<sup>128</sup> Therefore, an in-scope QFC would not be a covered QFC solely because a covered bank was acting as the agent of a principal with respect to the QFC.<sup>129</sup> For example, the final rule would not require a covered bank to conform a master securities lending arrangement (or the transactions under the agreement) to the requirements of the final rule if the only obligations of the covered bank under the agreement are to act as an agent on behalf of one or more principals. This modification should address many of the concerns raised by commenters.

The final rule does not specifically exempt SLAAs because the agreements provide the beneficiaries with contractual rights that may hinder the orderly resolution of a GSIB and because it is unclear how such beneficiaries would act in response to the failure of their agent. More generally, the final rule does not exempt a QFC with respect to which an agent also acts in another capacity, such as guarantor. Continuing the example regarding the covered bank acting as agent with respect to a master securities lending agreement, if the covered entity also provided a SLAA that included the typical indemnification provision discussed above, the agency exemption of the final rule would not exclude the SLAA but would still exclude the master securities lending agreement. This is because the covered bank is acting solely as agent with respect to the master securities lending agreement but is acting as agent and guarantor with respect to the SLAA. However, SLAAs would be exempted under the final rule to the extent that they are not “in-scope QFCs” or otherwise meet the exemptions for covered QFCs of the final rule.

#### 8. Enforceability

**Proposed Rule and Final Rule.** Commenters also requested that the final rule should clarify that obligations under a QFC would still be enforceable even if its terms do not comply with the requirements of the final rule, similar to assurances provided in respect of the U.K. rule and German legislation. The enforceability of a contract is beyond the scope of this final rule.

<sup>128</sup> See final rule § 47.3(e)(1).

<sup>129</sup> Such a QFC would nonetheless be a covered QFC with respect to a principal that also was a covered entity. In response to comments, the OCC notes that covered banks do not include non-U.S. subsidiaries of a Foreign GSIB.

#### 9. Interaction With Other Regulatory Requirements

**Proposed Rule and Final Rule.** Certain commenters requested clarification that amending covered QFCs as required by this final rule should not trigger other regulatory requirements for covered banks, such as the swap margin requirements issued by the OCC, other prudential regulators (FRB, FDIC, Farm Credit Administration, and Federal Housing Financing Agency), and the U.S. Commodity Futures Trading Commission (CFTC). In particular, commenters urged that amending a swap to conform to this final rule should not jeopardize the status of the swap as a legacy swap for purposes of the swap margin requirements for non-cleared swaps.

These issues are outside the scope of this final rule as they relate to the requirements of another rule issued by the OCC jointly with the other prudential regulators, as well as a rule issued by the CFTC. As commenters pointed out, addressing such issues may require consultation with the other prudential regulators as well as the CFTC and the U.S. Securities and Exchange Commission to determine the impact of the amendments required by this final rule for purposes of the regulatory requirements under Title VII of the Dodd-Frank Act. However, as the proposed rule noted, the OCC is considering an amendment to the definition of “eligible master netting agreement” to account for the restrictions on covered QFCs and is consulting with the other prudential regulators and the CFTC on this aspect of the final rule.<sup>130</sup> The OCC does not expect that compliance with this final rule would trigger the swap margin requirements for non-cleared swaps.

#### 10. Compliance With the Universal Protocol

**Proposed Rule.** The proposed rule allowed covered banks to conform covered QFCs to the requirements of the proposed rule through adherence to the Universal Protocol. The Universal Protocol has two primary operative provisions, Section 1 and Section 2. Under Section 1, adhering parties essentially “opt in” to the U.S. Special Resolution Regimes and certain other special resolution regimes. Therefore, Section 1 is generally responsive to the concerns addressed in § 47.4 of the proposed rule. Under Section 2, adhering parties essentially forego, subject to the creditor protections of Section 2, cross-default rights and

<sup>130</sup> See 81 FR 55381, 55396 (August 19, 2016).

transfer restrictions on affiliate credit enhancements. Therefore, Section 2 is generally responsive to the concerns addressed in § 47.5 of the proposed rule.

The proposed rule noted that, while the scope of the stay-and-transfer provisions of the Universal Protocol are narrower than the stay-and-transfer provisions that would have been required under the proposed rule, and the Universal Protocol provides a number of creditor protection provisions that would not otherwise have been available under the proposed rule, the Universal Protocol includes a number of desirable features that the proposed rule lacked. The proposed rule explained that “when an entity (whether or not it is a covered bank) adheres to the [Universal] Protocol, it necessarily adheres to the [Universal] Protocol with respect to all covered entities that have also adhered to the [Universal] Protocol rather than one or a subset of covered entities (as the [proposed rule] may otherwise permit). . . . By allowing for all covered QFCs to be modified by the same contractual terms, this ‘all-or-none’ feature would promote transparency, predictability and equal treatment with respect to default rights of non-defaulting parties.”<sup>131</sup> This “all-or-none” feature is referred to as “universal adherence” in the remainder of this preamble. The proposed rule explained that the Universal Protocol included other favorable features, which include that it amends all existing transactions of adhering parties, does not provide the counterparty with default rights in addition to those provided under the underlying QFC, applies to all QFCs, and includes resolution under bankruptcy as well as U.S. and certain non-U.S. Special Resolution Regimes. Because the features of the Universal Protocol, considered together, appeared to increase the likelihood that the resolution of a GSIB under a range of scenarios could be carried out in an orderly manner, the proposal stated that QFCs amended by the Universal Protocol would have been consistent with the proposal, notwithstanding differences from § 47.5 of the proposed rule.

#### *Comments and Final Rule.*

Commenters generally supported the proposed rule’s provisions to allow covered banks to comply with the requirements of the proposed rule through adherence to the Universal Protocol. For the reasons discussed in this preamble and in the proposed rule, the final rule continues to allow covered

banks to comply with the rule through adherence to the Universal Protocol and makes other modifications to the proposed rule to address comments.

A few commenters requested that the final rule clarify two technical aspects of adherence to the Universal Protocol. These commenters requested confirmation that adherence to the Universal Protocol would also satisfy the requirements of § 47.4. The commenters also requested confirmation that QFCs that incorporate the terms of the Universal Protocol by reference also would be deemed to comply with the terms of the proposed alternative method of compliance.<sup>132</sup> By clarifying § 47.6(a), the final rule confirms (1) that adherence to the Universal Protocol is deemed to satisfy the requirements of § 47.4 of the final rule (as well as § 47.5) and (2) that conformance of a covered QFC through the Universal Protocol includes incorporation of the terms of the Universal Protocol by reference by protocol adherents. This clarification also applies to the U.S. Protocol, discussed below.

One commenter indicated that many non-covered entity counterparties do not have ISDA master agreements for physically-settled forward and commodity contracts and, therefore, compliance with the proposed rule’s requirements through adherence to the Universal Protocol would entail substantial time and educational effort. As in the proposed rule, the final rule simply permits adherence to the Universal Protocol as one method of compliance with the final rule’s requirements, and parties may meet the final rule’s requirements through bilateral negotiation, if they choose. Moreover, the Securities Financing Transaction Annex and Other Agreements Annex of the Universal Protocol, which are specifically

<sup>132</sup> “As between two Adhering Parties, the [Universal Protocol] only amends agreements between the Adhering Parties that have been entered into as of the date that the Adhering Parties adhere (as well as any subsequent transactions thereunder), but it does not amend agreements that Adhering Parties enter into after that date. . . . If Adhering Parties wish for their future agreements to be subject to the terms of the [Universal Protocol] or a Jurisdictional Module Protocol under the ISDA JMP, it is expected that they would incorporate the terms of the [relevant protocol] by reference into such agreements.” Letter to Robert deV. Frierson, Secretary, Board of Governors of the Federal Reserve System, from Katherine T. Darras, ISDA General Counsel, The International Swaps and Derivatives Association, Inc., at 8–9 (August 5, 2016). This commenter noted that incorporation by reference was consistent with the proposed rule and asked that the text of the final rule be clarified. *Id.* at 9. Given the OCC’s intent to ensure that the substantive requirements of its final rule are consistent with those of the FRB and FDIC, the OCC has reviewed this letter to the extent applicable to the OCC’s final rule.

identified in the proposed and final rule, are designed to amend QFCs that are not ISDA master agreements.

#### 11. Compliance With the U.S. Protocol

*Proposed Rule and Comments.* In addition to the Universal Protocol, many commenters argued that the final rule should allow compliance with the final rule through a yet-to-be-created “U.S. Jurisdictional Module to the ISDA Resolution Stay Jurisdictional Modular Protocol” (an “approved U.S. JMP”) that is generally the same but narrower in scope than the Universal Protocol.<sup>133</sup> Many non-GSIB commenters argued that they were not involved with the drafting of the Universal Protocol and that an approved U.S. JMP would create a level playing field between those that were involved in the drafting and those that were not. In general, commenters identified two aspects of the Universal Protocol that they argued should be narrowed in the approved U.S. JMP: The scope of the special resolution regimes and the universal adherence feature of the Universal Protocol.

With respect to the scope of the special resolution regimes of the Universal Protocol, commenters’ concern focused on the special resolution regimes of “Protocol-eligible Regimes.” Some commenters also expressed concern with the scope of “Identified Regimes” of the Universal Protocol.

The Universal Protocol defines “Identified Regimes” as the special resolution regimes of France, Germany, Japan, Switzerland, and the United Kingdom, as well as the U.S. Special Resolution Regimes. The Universal Protocol defines “Protocol-eligible Regimes” as resolution regimes of other jurisdictions specified in the protocol that satisfies the requirements of the Universal Protocol. The Universal Protocol provides a “Country Annex,” which is a mechanism by which individual adherents to the Universal Protocol may agree that a specific jurisdiction satisfies the requirements of a “Protocol-eligible Regime.” The Universal Protocol referred to in the proposed rule did not include any Country Annex for any Protocol-eligible Regime.<sup>134</sup>

<sup>133</sup> Commenters argued that approval of the approved U.S. JMP should not require satisfaction of the administrative requirements of § 47.6, since the OCC has already conducted that analysis in deciding to provide a safe harbor for the Universal Protocol.

<sup>134</sup> The proposed rule defined the Universal Protocol as the “ISDA 2015 Universal Resolution Stay Protocol, including the Securities Financing Transaction Annex and Other Agreements Annex, published by the International Swaps and

Continued

<sup>131</sup> 81 FR 55381, 55394 (August 19, 2016).

Commenters requested the final rule include a safe harbor for an approved U.S. JMP that does not include Protocol-eligible Regimes. Commenters argued that many counterparties may not be able to adhere to the Universal Protocol because they would not be able to adhere to a Protocol-eligible Regime in the absence of law or regulation mandating such adherence, as it would force counterparties to give up default rights in jurisdictions where that is not yet legally required.<sup>135</sup> In support of their argument, commenters cited their fiduciary duties to act in the best interests of their clients or shareholders. Commenters also argued that an approved U.S. JMP should not include Identified Regimes and noted that the other Identified Regimes have already adopted measures to require contractual recognition of their special resolution regimes.<sup>136</sup>

With respect to the universal adherence feature of the Universal Protocol, commenters argued that universal adherence imposed significant monitoring burdens since new adherents may join the Universal Protocol at any time. To address this concern, some commenters requested that an approved U.S. JMP allow a counterparty to adhere on a firm-by-firm or entity-by-entity basis. Other commenters suggested, or supported approval of, an approved U.S. JMP in which a counterparty would adhere to all current covered entities under the final rule (to be identified on a “static list”) and would adhere to new covered entities on an entity-by-entity basis. This static list, commenters argued,

Derivatives Association, Inc., as of May 3, 2016, and minor or technical amendments thereto.” See proposed rule § 47.6(a). As of May 3, 2016, ISDA had not published any Country Annex for a Protocol-eligible Regime and such publication would not be a minor or technical amendment to the Universal Protocol. Consistent with the proposed rule, the final rule does not define the Universal Protocol to include any Country Annex. However, the final rule does not penalize adherence to any Country Annex. A covered QFC that is amended by the Universal Protocol—but not a Country Annex—will be deemed to conform to the requirements of the final rule. In addition, a covered QFC that is amended by the Universal Protocol—including one or more Country Annexes—is also deemed to conform to the requirements of the final rule. See final rule § 47.6(a)(2).

<sup>135</sup> The Protocol-eligible Regime requirements of the Universal Protocol do not include a requirement that a law or regulation, such as the final rule, require parties to contractually opt in to the regime.

<sup>136</sup> One commenter requested clarification that a QFC of a covered bank with a non-U.S. credit support provider for the covered bank complies with the requirements of the final rule to the extent the covered bank has adhered to the relevant jurisdictional modular protocol for the jurisdiction of the non-U.S. credit support provider. The jurisdictional modular protocols for other countries do not satisfy the requirements of the final rule.

would retain the “universal adherence mechanics” of the Universal Protocol and allow market participants to fulfill due diligence obligations related to compliance. Commenters also argued that universal adherence would be overbroad because the Universal Protocol could amend QFCs to which a covered bank was not a party. Certain commenters argued that adhering with respect to any counterparty would also be inconsistent with their fiduciary duties.

**Final Rule.** In response to comments and to further facilitate compliance, the final rule provides that covered QFCs amended through adherence to the Universal Protocol or a new (and separate) protocol (the “U.S. Protocol”) would be deemed to conform to the covered QFCs to the requirements of the final rule.<sup>137</sup> The U.S. Protocol may differ (and is required to differ) from the Universal Protocol in certain respects, as discussed below, but otherwise must be substantively identical to the Universal Protocol.<sup>138</sup> Therefore, the reasons for deeming covered QFCs amended by the Universal Protocol to conform to the final rule, discussed above and in the proposed rule, apply to the U.S. Protocol.

Consistent with the proposed rule<sup>139</sup> and requests by commenters, the U.S. Protocol may limit the application of the provisions the Universal Protocol identifies as Section 1 and Section 2 to only covered banks.<sup>140</sup> As requested by commenters, this limitation on the scope of the U.S. Protocol may ensure that the U.S. Protocol would only amend covered QFCs under this final rule or the substantively identical final rules issued by the FRB and FDIC, and not also QFCs outside the scope of the final rules of the OCC, FRB, and FDIC

<sup>137</sup> The final rule also provides that the OCC may determine otherwise based on specific facts and circumstances. See final rule § 47.6(a).

<sup>138</sup> Commenters expressed support for having the U.S. Protocol apply to both existing and future QFCs. One commenter requested that an approved U.S. JMP should apply only to QFCs governed by non-U.S. law because the U.S. Special Resolution Regimes already apply to QFCs governed by U.S. law. As discussed, the final rule does not exempt a QFC solely because the QFC explicitly states that it is governed by U.S. law. Moreover, such a limited application would reduce the desirable additional benefits of the Universal Protocol as discussed.

<sup>139</sup> The proposed rule explained that a “jurisdictional module for the United States that is substantively identical to the [Universal] Protocol in all respects aside from exempting QFCs between adherents that are not covered entities or covered banks would be consistent with the current proposal.”

<sup>140</sup> The final rule does not require the U.S. Protocol to retain the same section numbering as the Universal Protocol. The final rule allows the U.S. protocol to have minor and technical differences from the Universal Protocol. See final rule § 47.6(a)(3)(ii)(E).

(i.e., QFCs between parties that are not covered entities, covered banks, or covered FSIs).

The final rule also provides that the U.S. Protocol is required to include the U.S. Special Resolution Regimes and the other Identified Regimes but is not required to include Protocol-eligible Regimes.<sup>141</sup> As noted, the Universal Protocol, as defined in the proposed rule, did not include any Country Annex for a Protocol-eligible Regime; the only special resolution regimes specifically identified in the Universal Protocol, as defined in the proposed rule, were the U.S. Special Resolution Regimes and the other Identified Regimes. As explained in the proposed rule, inclusion of the Identified Regimes should help facilitate the resolution of a GSIB across a broader range of circumstances. Inclusion of the Identified Regimes in the U.S. Protocol also should support laws and regulations similar to the final rule and help encourage GSIB entities in the United States to adhere to a protocol that includes all Identified Regimes. However, the final rule does not require the U.S. Protocol to include Protocol-eligible Regimes, including definitions and adherence mechanisms related to Protocol-eligible Regimes.<sup>142</sup> Inclusion of only the Identified Regimes in the U.S. Protocol, considered in light of the other benefits to the resolution of GSIBs provided by the Universal Protocol and U.S. Protocol as well as commenters’ concerns with potential adherence to Protocol-eligible Regimes, should sufficiently advance the objective of the final rule to increase the likelihood that a resolution of a GSIB could be carried out in an orderly manner under a range of scenarios.

The final rule does not permit the U.S. Protocol to permit parties to adhere on a firm-by-firm or entity-by-entity basis because such adherence mechanisms requested by commenters would obviate one of the primary benefits of the Universal Protocol: universal adherence. Similarly, the final rule does not permit adherence to a “static list” of all current covered entities, which other commenters requested.<sup>143</sup> Although the static list

<sup>141</sup> See final rule § 47.6(a)(3)(ii)(A). The U.S. Protocol is likewise not required to include definitions and adherence mechanisms related to Protocol-eligible Regimes. The final rule allows the U.S. Protocol to include minor and technical differences from the Universal Protocol and, similarly, differences necessary to conform to the U.S. Protocol to the substantive differences allowed or required from the Universal Protocol. See final rule § 47.6(a)(3)(ii)(E).

<sup>142</sup> See final rule § 47.6(a)(3)(ii)(A).

<sup>143</sup> The final rule, however, does not prohibit the creation of a dynamic list identifying all current

would initially provide for universal adherence, the static list would not provide for universal adherence with respect to entities that became covered entities after the static list was finalized. To help ensure that the additional creditor protections of the Universal Protocol and U.S. Protocol continue to be justified, both protocols must ensure that the desirable features of the protocols, including universal adherence, continue to be present as GSIBs acquire subsidiaries with existing QFCs and existing organizations become designated as GSIBs.

The final rule also addresses provisions that allow an adherent to elect that Section 1 and/or Section 2 of the Universal Protocol do not apply to the adherent's contracts.<sup>144</sup> The Universal Protocol refers to these provisions as "opt-outs." The proposed rule explained that adherence to the Universal Protocol was an alternative method of compliance with the proposed rule and that covered QFCs that were not amended by the Universal Protocol must otherwise conform to the proposed rule. In other words, the proposed rule would have required that a covered QFC be conformed regardless of the method the covered bank and counterparty chooses to conform the QFC.<sup>145</sup>

Consistent with the basic purposes of the final rule, the U.S. Protocol must require that opt-outs exercised by its adherents will only be effective to the extent that the affected covered QFCs otherwise conform to the requirements of the final rule. Therefore, the U.S. Protocol allows counterparties to exercise available opt-out rights in a manner that also allows covered banks to ensure that their covered QFCs continue to conform to the requirements of the final rule.

The final rule also provides that, under the U.S. Protocol, the opt-out in Section 4(b)(i)(A) of the attachment to the Universal Protocol (Sunset Opt-out)<sup>146</sup> must not apply with respect to the U.S. Special Resolution Regimes because the opt-out is no longer relevant with respect to the U.S. Special Resolution Regimes. This final rule, along with the substantively identical

rules expected to be issued by the FRB and FDIC, should prevent exercise of the Sunset Opt-out with respect to the U.S. Special Resolution Regimes under the Universal Protocol. Inapplicability of this opt-out with respect to U.S. Special Resolution Regimes in the U.S. Protocol should provide additional clarity to adherents that the U.S. Protocol will continue to provide for universal adherence after January 1, 2018.

The final rule also expressly addresses a provision in the Universal Protocol that concerns the client-facing leg of a cleared transaction. As discussed above, the final rule, like the proposed rule, does not exempt the client-facing leg of a cleared transaction. Therefore, the U.S. Protocol must not include the exemption in Section 2 of the Universal Protocol regarding the client-facing leg of the transaction.<sup>147</sup>

#### *G. Process for Approval of Enhanced Creditor Protections (§ 47.6)*

##### **1. Requests for Approval of Enhanced Creditor Protections**

**Proposed Rule.** As discussed previously, the proposed restrictions would leave many creditor protections that are commonly included in QFCs unaffected. The proposed rule would have also allowed any covered bank to submit to the OCC a request to approve as compliant with the proposed rule one or more QFCs that contain additional creditor protections—that is, creditor protections that would be impermissible under the proposed restrictions set forth previously. A covered bank making such a request would have been required to explain how its request is consistent with the purposes of the proposed rule, including an analysis of the contractual terms for which approval is requested in light of a range of factors that are laid out by the proposed rule and intended to facilitate the OCC's consideration of whether permitting the contractual terms would be consistent with the proposed restrictions. The proposed rule noted that the OCC expected to consult with the FDIC and FRB during its consideration of a request under this section.

The first two factors concerned the potential impact of the requested

creditor protections on GSIB resilience and resolvability. The next four concerned the scope of the covered bank's request: Adoption on an industry-wide basis, coverage of existing and future transactions, coverage of one or multiple QFCs, and coverage of some or all covered banks. Creditor protections that may be applied on an industry-wide basis may help to ensure that impediments to resolution are addressed on a uniform basis, which could increase market certainty, transparency, and equitable treatment. Creditor protections that apply broadly to a range of QFCs and covered banks would increase the chance that all of a GSIB's QFC counterparties would be treated the same way during a resolution of that GSIB and may improve the prospects for an orderly resolution of that GSIB. By contrast, covered bank requests that would expand counterparties' rights beyond those afforded under existing QFCs would conflict with the proposed rule's goal of reducing the risk of mass unwinds of GSIB QFCs. The proposed rule also included three factors that focus on the creditor protections specific to supported parties. The proposed rule noted that the OCC may weigh the appropriateness of additional protections for supported QFCs against the potential impact of such provisions on the orderly resolution of a GSIB.

In addition to analyzing the request under the enumerated factors, a covered bank requesting that the OCC approve enhanced creditor protections would have been required to submit a legal opinion stating that the requested terms would be valid and enforceable under the applicable law of the relevant jurisdictions, along with any additional relevant information requested by the OCC.

Under the proposed rule, the OCC could have approved a request for an alternative set of creditor protections if the terms of that QFC, as compared to a covered QFC containing only the limited exceptions discussed previously, would promote the orderly resolution of federally chartered or licensed institutions or their affiliates, prevent or mitigate risks to the financial stability of the United States or the Federal banking system that could arise from the failure of a global systemically important BHC or global systemically important FBO, and protect the safety and soundness of covered banks to at least the same extent. The proposed request-and-approval process improved flexibility by allowing for an industry-proposed alternative to the set of creditor protections permitted by the proposed rule while ensuring that any

<sup>144</sup> "Covered Parties," as would be defined in the U.S. Protocol, to facilitate due diligence and provide additional clarity to the market. See final rule § 47.6(a)(3)(ii)(E) (allowing minor and technical differences from the Universal Protocol).

<sup>145</sup> Section 4(b) of the Universal Protocol.

<sup>146</sup> Under the final rule, if an adherent to the Universal Protocol or U.S. Protocol exercises an available opt-out, covered banks with covered QFCs affected by the exercise would be required to otherwise conform the covered QFCs to the requirements of the final rule.

<sup>147</sup> See § 4(b)(i)(A) of the Universal Protocol.

<sup>147</sup> Section 2 of the Universal Protocol provides an exemption for any client-facing leg of a cleared transaction. See section 2(k) of the Universal Protocol and the definition of "Cleared Client Transaction." The final rule does not amend the proposed rule's treatment of QFCs that are "Cleared Client Transactions" under the Universal Protocol, but requires that the provisions of that section must not apply with respect to the U.S. Protocol. See final rule § 47.6(a)(3)(ii)(D).

approved alternative would serve the proposed rule's policy goals to at least the same extent.

**Comments.** Commenters requested that this approval process be made less burdensome and more flexible and urged for additional clarifications on the process for submitting and approving such requests (e.g., whether approvals would be published in the **Federal Register**). For example, commenters requested the final rule include a reasonable timeline (e.g., 180 days) by which the OCC would approve or deny a request. Certain commenters urged that counterparties and trade groups, in addition to covered banks, should be permitted to make such requests. One commenter noted that the proposed rule's approval process would have created a free-rider problem, where parties that submit enhanced creditor protection conditions for OCC approval bear the full cost of learning which remedies are available for creditors while other parties will gain that information for free. Commenters contended that the provision requiring a "written legal opinion verifying the proposed provisions and amendments would be valid and enforceable under applicable law of the relevant jurisdictions" should be eliminated as unnecessary.<sup>148</sup> Additionally, commenters urged that the provision should be broadened to allow approvals of provisions not directly related to enhanced creditor protections.

**Final Rule.** The final rule clarifies that the OCC could approve an alternative proposal of additional creditor protections as compliant with sections 47.4 and 47.5 of the final rule, but the OCC has not otherwise modified these provisions of the proposal in response to changes requested by commenters. The provisions contain flexibility and guidance on the process for submitting and approving enhanced creditor protections. The final rule directly places requirements only on covered banks, and thus only covered banks are eligible to submit requests pursuant to these provisions. In response to commenters' concerns, the OCC notes that the final rule does not prevent multiple covered banks from presenting one request and does not prevent covered banks from seeking the input of counterparties when developing a request. The final rule does not provide a maximum time to review proposals

because proposals could vary greatly in complexity and novelty. The final rule also maintains the provision requiring a written legal opinion, which helps ensure that proposed provisions are valid and enforceable under applicable law. The final rule does not expand the approval process beyond additional creditor protections; however, revisions to aspects of the final rule may be made through the rulemaking process.

## 2. Compliance With the International Swaps and Derivatives Association (ISDA) 2015 Universal Resolution Stay Protocol and U.S. Protocol

**Proposed Rule and Final Rule.** In lieu of the process for the approval of enhanced creditor protections that are described previously, a covered bank would be permitted to comply with the proposed rule by amending a covered QFC through adherence to the ISDA 2015 Universal Resolution Stay Protocol (including immaterial amendments to the Protocol).<sup>149</sup> The Protocol "enables parties to amend the terms of their financial contracts to contractually recognize the cross-border application of special resolution regimes applicable to certain financial companies and support the resolution of certain financial companies under the [U.S.] Bankruptcy Code."<sup>150</sup> The Protocol amends ISDA Master Agreements, which are used for derivatives transactions. Market participants also may amend their master agreements for securities financing transactions by adhering to the Securities Financing Transaction Annex<sup>151</sup> to the Protocol and may amend all other QFCs by adhering to the Other Agreements Annex. Thus, a covered bank would be able to comply with the proposed rule with respect to all of its covered QFCs

<sup>149</sup> International Swaps and Derivatives Association, Inc., "ISDA 2015 Universal Resolution Stay Protocol" (November 4, 2015), available at <http://assets.isda.org/media/ac6b533f-3/5a7c32f8-pdf/>. The Protocol was developed by a working group of member institutions of the ISDA, in coordination with the FRB, the FDIC, the OCC, and foreign financial supervisory agencies. ISDA is expected to supplement the Protocol with ISDA Resolution Stay Jurisdictional Modular Protocols for the United States and other jurisdictions. A U.S. module that is the same in all respects to the Protocol aside from exempting QFCs between adherents that are not covered banks would be consistent with the current proposed rule.

<sup>150</sup> Protocol Press Release at <http://www2.isda.org/functional-areas/protocol-management/protocol/22>.

<sup>151</sup> The Securities Financing Transaction Annex was developed by the International Capital Markets Association, the International Securities Lending Association, and the Securities Industry and Financial Markets Association, in coordination with the ISDA.

through adherence to the Protocol and the annexes.

The Protocol has the same general objective as the proposed rule, which is to make GSIB entities more resolvable by amending their contracts to, in effect, contractually recognize the applicability of special resolution regimes (including the OLA and the FDI Act) and to restrict cross-default provisions to facilitate orderly resolution under the U.S. Bankruptcy Code. The provisions of the Protocol largely track the requirements of the proposed rule.<sup>152</sup> However, the Protocol does have a narrower scope than the proposed rule,<sup>153</sup> and it allows for somewhat stronger creditor protections than would otherwise be permitted under the proposed rule.<sup>154</sup>

The Protocol also includes a feature, not included in the proposed rule, that compensates for the Protocol's narrower scope and allowance for stronger creditor protections: When an entity

<sup>152</sup> For example, sections 2(a) and 2(b) of the Protocol impose general prohibitions on cross-default rights based on the entry of an affiliate of the direct party into the most common U.S. resolution proceedings, including resolution under the U.S. Bankruptcy Code. By allowing the exercise of "Performance Default Rights" and "Unrelated Default Rights," as those terms are defined in § 6 of the Protocol, sections 2(a) and 2(b) also generally permit the creditor protections that would be allowed under the proposed rule. Section 2(f) of the Protocol overrides certain contractual provisions that would block the transfer of a credit enhancement to a transferee entity. Section 2(i), complemented by the Protocol's definition of the term "Unrelated Default Rights," provides that a party seeking to exercise permitted default rights must bear the burden of establishing by clear and convincing evidence that those rights may indeed be exercised.

<sup>153</sup> The restrictions on default rights imposed by section 2 of the Protocol apply only when an affiliate of the direct party enters "U.S. Insolvency Proceedings," which is defined to include proceedings under Chapters 7 and 11 of the Bankruptcy Code, the FDI Act, and the Securities Investor Protection Act. By contrast, § 47.4 of the proposed rule would apply broadly to default rights related to affiliates of the direct party "becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding," which encompasses proceedings under State and foreign law.

<sup>154</sup> For example, the Protocol allows a non-defaulting party to exercise cross-default rights based on the entry of an affiliate of the direct party into certain resolution proceedings if the direct party's U.S. parent has not gone into resolution. See paragraph (b) of the Protocol's definition of "Unrelated Default Rights"; see also sections 1 and 3(b) of the Protocol. As another example, if the affiliate credit support provider that has entered bankruptcy remains obligated under the credit enhancement, rather than transferring it to a transferee, then the Protocol's restrictions on the exercise of default rights continue to apply beyond the stay period only if the Bankruptcy Court issues a "Creditor Protection Order." Such an order would, among other things, grant administrative expense status to the non-defaulting party's claims under the credit enhancement. See sections 2(b)(i)(B) and 2(b)(iii)(B) of the Protocol and the Protocol's definitions of "Creditor Protection Order" and "DIP Stay Conditions."

<sup>148</sup> One commenter also suggested permitting amendments to QFCs to be accomplished through a confirmation document for a new agreement or by email instead of a formal amendment of the QFC signed by the parties. The final rule does not prescribe a specific method for amending covered QFCs.

(whether or not it is a covered bank) adheres to the Protocol, it necessarily adheres to the Protocol with respect to all covered entities that have also adhered to the Protocol.<sup>155</sup> Thus, if all covered banks adhere to the Protocol, any other entity that chooses to adhere will simultaneously adhere with respect to all covered entities and covered banks. By allowing for all covered QFCs to be modified by the same contractual terms, this “all-or-none” feature would promote transparency, predictability, and equal treatment with respect to counterparties’ default rights during the resolution of a GSIB entity and thereby advance the proposed rule’s objective of increasing the likelihood that such a resolution could be carried out in an orderly manner.

Like § 47.5 of the proposed rule, Section 2 of the Protocol was developed to increase GSIB resolvability under the Bankruptcy Code and other U.S. insolvency regimes. The Protocol does allow for somewhat broader creditor protections than would otherwise be permitted under the proposed rule, but, consistent with the Protocol’s purpose, those additional creditor protections would not materially diminish the prospects for the orderly resolution of a GSIB. And the Protocol carries the desirable all-or-none feature, which would further increase a GSIB entity’s resolvability and which the proposed rule otherwise lacks. For these reasons, and consistent with the broad policy objective of enhancing the stability of the U.S. financial system by increasing the resolvability of systemically important financial companies in the United States, this provision of the proposed rule is adopted by this final rule, to allow a covered bank to bring its covered QFCs into compliance by amending them through adherence to the Protocol (and, as relevant, the annexes to the Protocol).

#### *H. Transition Periods (Sections 47.4 and 47.5)*

**Proposed Rule.** Under the proposed rule, compliance would be required on the first day of the first calendar quarter that begins at least one year after the issuance of the final rule (effective date).<sup>156</sup> Moreover, the proposed rule

required a covered bank to bring preexisting covered QFCs entered into prior to the effective date into compliance with the proposed rule no later than the first date on or after the effective date on which the covered bank enters into a new covered QFC with the counterparty to the preexisting covered QFC or with an affiliate of that counterparty. Thus, under the proposed rule, a covered bank would not be required to conform a preexisting QFC if that covered bank (or any affiliate of that covered bank) does not enter into any new QFCs with the same counterparty or an affiliate of that counterparty on or after the effective date.

**Comments.** A number of commenters urged the OCC to adopt a phased-in approach to compliance that would extend the compliance deadline for covered QFCs with certain types of counterparties in order to allow time for necessary client outreach and education, especially for non-GSIB counterparties that may be unfamiliar with the Universal Protocol or the final rule’s requirements. These commenters contended that the original compliance period of one year should be limited to counterparties that are banks, broker-dealers, swap dealers, security-based swap dealers, major swap participants, and major security-based swap participants. These commenters urged that the compliance period for QFCs with asset managers, commodity pools, private funds, and other entities that are predominantly engaged in activities that are financial in nature within the meaning of Section 4(k) of the BHC Act should be extended for six months after the date of the original compliance period identified in the proposed rule. Finally, these commenters argued that the compliance period for QFCs with all other counterparties should be extended for 12 months after the date of the original compliance period identified in the proposed rule as these counterparties are likely to be least familiar with the requirements of the final rule.

One commenter suggested that the final rule should take effect no sooner than one year from the date that an approved U.S. JMP is published and available for adherence, including any additional time it might take to seek the OCC’s approval of it. Certain commenters requested that the compliance deadline for covered QFCs entered into by an agent on behalf of a

principal be extended by six months as well. Other commenters, however, cautioned against an approach that would impose different deadlines with respect to different classes of QFCs, as opposed to counterparty types, since the main challenge in connection with the remediation is the need for outreach to and education of counterparties. These commenters contended that once a counterparty has become familiar with the requirements of the rule and the terms of the required amendments, it would be more efficient to remediate all covered QFCs with the counterparty at the same time.

A number of commenters also requested that the OCC confirm that entities that are acquired by a GSIB, and thereby become new covered banks, have until the first day of the first calendar quarter immediately following one year after becoming covered banks to conform their existing QFCs. Commenters argued that this would allow the GSIB to conform existing QFCs in an orderly fashion without impairing the ability of covered bank and the affiliates of the covered bank to engage in corporate activities. These commenters also requested clarification that, during that conformance period, affiliates of covered banks would not be prohibited from entering into new transactions or QFCs with counterparties of the newly acquired entity if the existing covered banks otherwise comply with the final rule’s requirements.

Some commenters urged the OCC to exclude existing contracts from the final rule’s requirements and only apply the rule on a prospective basis. Certain commenters opposed application of the requirements of the rule to existing QFCs, requesting instead that the final rule only apply to QFCs entered into after the effective date of any final rule and that all pre-existing QFCs not be subject to the rule’s requirements. Commenters suggested that end users of QFCs with GSIB affiliates might not have entered into existing contracts without the default rights prohibited in the proposed rule and that revising existing QFCs would be time-consuming and expensive. Commenters pointed out that this treatment would be consistent with the final rules in the U.K. and the statutory requirements adopted by Germany.

**Final Rule.** The effective date for the final rule is January 1, 2018. However, in order to reduce the compliance burden of the final rule, the OCC has adopted a phased-in compliance schedule, as requested by commenters. The final rule provides that a covered bank must conform a covered QFC to

<sup>155</sup> Under section 4(a) of the Protocol, the Protocol is generally effective as between any two adhering parties, once the relevant effective date has arrived. Under section 4(b)(ii), an adhering party that is not a covered bank may choose to opt out of section 2 of the Protocol with respect to its contracts with any other adhering party that is also not a covered bank. However, the Protocol will apply to relationships between any covered bank that adheres and any other adhering party.

<sup>156</sup> Under section 302(b) of the Riegle Community Development and Regulatory Improvement Act of

1994, new regulations that impose requirements on insured depository institutions generally must “take effect on the first day of a calendar quarter which begins on or after the date on which the regulations are published in final form.” 12 U.S.C. 4802(b).

the requirements of this final rule by the first day of the calendar quarter immediately following one year from the January 1, 2018, effective date of the final rule with respect to covered QFCs with other covered entities, covered banks, or covered FSIs (referred to as the “first compliance date” for the purposes of this preamble).<sup>157</sup> This provision allows the counterparties that should be most familiar with the requirements of the final rule over one year to conform with the final rule’s requirements. Moreover, this is a relatively small number of counterparties that would need to modify their QFCs in the first year following the January 1, 2018, effective date of the final rule, and many covered entities, covered banks, and covered FSIs with covered QFCs have already adhered to the Universal Protocol.

The final rule provides additional time for compliance with the requirements for other types of counterparties. In particular, for other types of financial counterparties<sup>158</sup> (other than small financial institutions),<sup>159</sup> the final rule provides 18 months from the January 1, 2018, effective date of the final rule for compliance with its requirements, as requested by commenters.<sup>160</sup> For community banks and other non-financial counterparties, the final rule provides two years from the January 1, 2018, effective date of the final rule for compliance with its requirements, as requested by commenters.<sup>161</sup> Adopting a phased-in compliance approach based on the type (and, in some cases, size) of the counterparty will allow market participants time to adjust to the new requirements and make required changes to QFCs in an orderly manner. It will also give time for development of the U.S. Protocol or any other protocol

that would meet the requirements of the final rule.

The OCC is giving this additional time for compliance to respond to concerns raised by commenters. The OCC encourages covered banks to start planning and outreach efforts early in order to come into compliance with the final rule in the time frames provided. The OCC believes that this additional time for compliance should also address concerns raised by commenters regarding the burden of conforming existing contracts by allowing firms additional time to conform all covered QFCs to the requirements of the final rule.

Although the phased-in compliance period does not contain special rules related to acting as an agent as requested by certain commenters, the final rule has been modified as described above to clarify that a covered bank does not become a party to a QFC solely by acting as agent with respect to the QFC.<sup>162</sup>

National banks, FSAs, and Federal branches and agencies that are covered banks when the final rule is effective on January 1, 2018, would be required to comply with the requirements of the final rule beginning on the first compliance date. Thus, a covered bank would be required to ensure that covered QFCs entered into on or after the first compliance date comply with the final rule’s requirements but would be given more time to conform such covered QFCs with counterparties (or other parties to the QFC) that are not a covered entity, covered bank, or covered FSI.<sup>163</sup> Moreover, a covered bank would be required to bring an in-scope QFC entered into prior to the first compliance date into compliance with the final rule no later than the applicable date of the tiered compliance dates (discussed previously) if the covered bank or an affiliate (that is also a covered entity, covered bank, or covered FSI) enters into a new covered QFC with the counterparty to the pre-existing covered QFC or a consolidated affiliate of the counterparty on or after the first compliance date.<sup>164</sup> Thus, consistent with the proposed rule, a covered bank would not be required to conform a pre-existing QFC if that covered bank and its affiliate that is a covered entity, covered bank, or covered FSI do not enter into any new QFCs with the same counterparty or its consolidated affiliates on or after the first compliance date.

In addition, a national bank, FSA or Federal branch or agency that becomes

a covered bank after the January 1, 2018, effective date of the final rule (referred to as a “new covered bank” for purposes of this preamble) generally has the same period of time to comply as a national bank, FSA, or Federal branch or agency that is a covered bank on the January 1, 2018, effective date (*i.e.*, compliance will phase in over a two-year period based on the type of counterparty).<sup>165</sup> The final rule also clarifies that a covered QFC, with respect to a new covered bank, means an in-scope QFC that the new covered bank becomes a party to (1) on the date the covered bank first becomes a covered bank, and (2) before that date, if the covered bank or one of its affiliates that is a covered entity, covered bank, or covered FSI also enters, executes, or otherwise becomes a party to a QFC with the same counterparty or a consolidated affiliate of the counterparty after that date.<sup>166</sup> Under the final rule, a national bank, FSA, or Federal branch or agency that is a covered bank on the January 1, 2018, effective date of the final rule (referred to as an “existing covered bank” for purposes of this preamble) and becomes an affiliate of a new covered bank generally must conform any existing but non-conformed in-scope QFC that the existing covered bank continues to have with a counterparty after the applicable initial compliance date by the date the new covered bank enters a QFC with the same counterparty (or any of its consolidated affiliates) or within a reasonable period thereafter. Acquisitions of new entities are planned in advance and should include preparing to comply with applicable laws and regulations.

The OCC does not believe it is appropriate to exclude all pre-existing QFCs because of the current and future risk that existing covered QFCs pose to the orderly resolution of a covered bank. Moreover, application of different default rights to existing and future transactions within a netting set could cause the netting set to be broken, which commenters noted could increase burden to both parties to the netting set.<sup>167</sup> Therefore, the final rule requires an existing QFC between a covered bank and a counterparty to be conformed to the requirements of the final rule if the covered bank (or an affiliate that is a covered entity, covered bank, or covered FSI) enters into another QFC with the

<sup>157</sup> See final rule § 47.3(f)(1)(i). The definition of covered QFC of the final rule has been revised to make clear that, consistent with the proposed rule, a covered QFC is a QFC that the covered bank becomes a party to on or after the first day of the calendar quarter immediately following one year from the January 1, 2018, effective date of this final rule. See final rule § 47.3(c). As discussed above, a covered bank’s in-scope QFC that is entered into before this date may also be a covered QFC if the covered bank or any affiliate that is a covered entity, covered bank, or covered FSI also becomes a party to a QFC with the same counterparty or a consolidated affiliate of the same counterparty on or after the first compliance date. See *id.*

<sup>158</sup> See final rule § 47.2 (defining “financial counterparty”).

<sup>159</sup> The final rule defines small financial institution as an insured bank, insured savings association, farm credit system institution, or credit union with assets of \$10,000,000,000 or less. See final rule § 47.2.

<sup>160</sup> See final rule § 47.3(f)(1)(ii).

<sup>161</sup> See final rule § 47.3(f)(1)(iii).

<sup>162</sup> See final rule § 47.3(e)(1).

<sup>163</sup> See final rule § 47.3(c)(1) and (f)(1).

<sup>164</sup> See *id.*

<sup>165</sup> See final rule § 47.3(f)(2).

<sup>166</sup> See final rule § 47.3(c)(2).

<sup>167</sup> The requirements of the final rule, particularly those of § 47.5, may have a different impact on netting, including close-out netting, than the U.K. and German requirements cited by commenters.

counterparty or its consolidated affiliate on or after the first day of the calendar quarter immediately following one year from the January 1, 2018, effective date of the final rule. Subject to any compliance date applicable to the covered bank, the OCC expects a covered bank to conform existing QFCs that become covered QFCs within a reasonable period.

By permitting a covered bank to remain a party to noncompliant QFCs entered into before the effective date unless the covered bank or any affiliate (that is also a covered entity, covered bank, or covered FSI) enters into new QFCs with the same counterparty or its affiliates, the final rule strikes a balance between ensuring QFC continuity if the GSIB were to fail and ensuring that covered banks and their existing counterparties can manage any compliance costs and disruptions associated with conforming existing QFCs by refraining from entering into new QFCs. The requirement that a covered bank ensure that all existing QFCs with a particular counterparty and its affiliates are compliant before it or any affiliate of the covered bank (that is also a covered entity, covered bank, or covered FSI) enters into a new QFC with the same counterparty or its affiliates after the January 1, 2018, effective date will provide covered banks with an incentive to seek the modifications necessary to ensure that their QFCs with their most important counterparties are compliant. Moreover, the volume of noncompliant covered QFCs outstanding can be expected to decrease over time and eventually to reach zero. In light of these considerations, and to avoid creating potentially inappropriate compliance costs with respect to existing QFCs with counterparties that, together with their consolidated affiliates, do not enter into new covered QFCs with the GSIB on or after the first day of the calendar quarter that is one year from the January 1, 2018, effective date of the final rule, it would be appropriate to permit a limited number of noncompliant QFCs to remain outstanding, in keeping with the terms described above. Moreover, the final rule also excludes existing warrants and retail investment advisory agreements to address concerns raised by commenters and mitigate burden.<sup>168</sup> The OCC will monitor covered banks' levels of noncompliant QFCs and evaluate the risk, if any, that they pose to the safety and soundness of the Federal banking system, and indirectly, to GSIBs or to U.S. financial stability.

#### *I. Revisions to Certain Definitions in the OCC's Capital and Liquidity Rules*

The regulatory capital rules, as implemented by the OCC, FRB, and FDIC, permit a bank to measure exposure from certain types of financial contracts on a net basis and recognize the risk-mitigating effect of financial collateral for other types of exposures, provided that the contracts are subject to a "qualifying master netting agreement," a collateral agreement, eligible margin loan, or repo-style transaction (collectively referred to as netting agreements) that provides for certain rights upon a counterparty default. With limited exception, to qualify for netting treatment, a qualifying netting agreement must permit a bank to terminate, apply close-out netting, and promptly liquidate or set-off collateral upon an event of default of the counterparty (default rights), thereby reducing its counterparty exposure and market risks. Measuring the amount of exposure of these contracts on a net basis, rather than a gross basis, results in a lower measure of exposure, and thus, a lower capital requirement.

An exception to the immediate close-out requirement is made for the stay of default rights if the financial company is in receivership, conservatorship, or resolution under Title II of the Dodd-Frank Act, or the FDI Act. Accordingly, transactions conducted under netting agreements where default rights may be stayed under Title II of the Dodd-Frank Act or the FDI Act would not be disqualified from netting treatment.

On December 30, 2014, the OCC and the FRB issued a joint interim final rule (effective January 1, 2015) that amended the definitions of "qualifying master netting agreement," "collateral agreement," "eligible margin loan," and "repo-style transaction," in the OCC and FRB regulatory capital rules, and "qualifying master netting agreement" in the OCC and FRB liquidity coverage ratio (LCR) rules to expand the exception to the immediate close-out requirement to ensure that the current netting treatment under the regulatory capital, liquidity, and lending limits rules<sup>169</sup> for over-the-counter (OTC) derivatives, repo-style transactions, eligible margin loans, and other

collateralized transactions would be unaffected by the adoption of various foreign special resolution regimes through the ISDA Protocol. In particular, the interim final rule amended these definitions to provide that a relevant netting agreement or collateral agreement may provide for a limited stay or avoidance of rights where the agreement is subject by its terms to, or incorporates, certain resolution regimes applicable to financial companies, including Title II of the Dodd-Frank Act, the FDI Act, or any similar foreign resolution regime that provides for limited stays substantially similar to the stay for qualified financial contracts provided in Title II of the Dodd-Frank Act or the FDI Act.

Section 47.4 of the proposed rule essentially limits the default rights exercisable against a covered bank to the same stay-and-transfer restrictions imposed under the U.S. Special Resolution Regime against a direct counterparty. Section 47.4 of the proposed rule mirrors the contractual stay-and-transfer restrictions reflected in the ISDA Protocol with one notable difference. While adoption of the ISDA Protocol is voluntary, covered banks subject to the proposed rule must conform their covered QFCs to the stay-and-transfer restrictions in § 47.4.

With respect to limitations on cross-default rights in proposed § 47.5, the OCC proposed additional conforming amendments in order to maintain the existing netting treatment for covered QFCs for purposes of the regulatory capital, liquidity, and lending limits rules. Specifically, the OCC is proposed to amend the definition of "qualifying master netting agreement," as well as to make conforming amendments to "collateral agreement," "eligible margin loan," and "repo-style transaction," in the regulatory capital rules in part 3, and "qualifying master netting agreement" in the LCR rules in part 50 to ensure that the regulatory capital, liquidity, and lending limits treatment of OTC derivatives, repo-style transactions, eligible margin loans, and other collateralized transactions would be unaffected by the adoption of proposed § 47.5. Without these proposed amendments, covered banks that amend their covered QFCs to comply with this final rule would no longer be permitted to recognize covered QFCs as subject to a qualifying master netting agreement or satisfying the criteria necessary for the current regulatory capital, liquidity, and lending limits treatment, and would be required to measure exposure from these contracts on a gross, rather than net,

<sup>169</sup> The impact of these amendments to these definition on the legal lending limits requirements for national banks and FSAs is indirect. The definition of qualifying master netting agreement used in the legal lending limit rules is defined by cross-reference to the definition in regulatory capital requirements. See 12 CFR 32.2(u) (Definition of "qualifying master netting agreement" cross-referencing 12 CFR 3.2); see also 79 FR 78287, 78292 (December 30, 2014).

<sup>168</sup> See final rule § 47.8(c).

basis. This result would undermine the proposed requirements in § 47.5. The OCC does not believe that the disqualification of covered QFCs from master netting agreements would accurately reflect the risk posed by these OTC derivatives transactions.

Although the proposed rule reformats some of the definitions in parts 3 and 50 to include the text from the interim final rule, the proposed amendments did not alter the substance or effect of the prior amendment adopted by the interim final rule.

The rule establishing margin and capital requirements for covered swap entities (swap margin rule) defines the term “eligible master netting agreement” in a manner similar to the definition of “qualifying master netting agreement.” Thus, it may also be appropriate to amend the definition of “eligible master netting agreement” to account for the proposed restrictions on covered entities’ QFCs.

#### IV. Regulatory Analysis

##### *Effective Date*

The APA requires that a substantive rule must be published not less than 30 days before its effective date, unless, among other things, the rule grants or recognizes an exemption or relieves a restriction.<sup>170</sup> Section 302 of the Riegle Community Development and Regulatory Improvement Act of 1994 (RCDRIA) requires that regulations imposing additional reporting, disclosure, or other requirements on insured depository institutions take effect on the first day of the calendar quarter after publication of the final rule, unless, among other things, the agency determines for good cause that the regulations should become effective before such time.<sup>171</sup> The January 1, 2018 effective date of this final rule meets both the APA and RCDRIA effective date requirements, as it will take effect at least 30 days after its publication date of November 29, 2017 and on the first day of the calendar quarter following publication, January 1, 2018.

Section 302 of the RCDRIA also requires the OCC to consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations.<sup>172</sup> The OCC has considered comment on these

matters in other sections of this **SUPPLEMENTARY INFORMATION** section.

##### *Paperwork Reduction Act*

In accordance with section 3512 of the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521) (as amended), the OCC may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. Certain provisions of the final rule contain “collection of information” requirements within the meaning of the PRA. The information collection requirements contained in this final rule were submitted to OMB for review at the proposed rule stage. OMB instructed the OCC to (i) examine public comment in response to the information collection requirements found in the proposed rule; and (ii) describe in the supporting statement for the final rule any public comments received and why any recommendations were or were not incorporated. The OCC received no comments regarding the information collection requirements contained in the proposed rule.

Comments continue to be invited on:

(a) Whether the collections of information are necessary for the proper performance of the OCC’s functions, including whether the information has practical utility;

(b) The accuracy of the estimates of the burden of the information collections, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the information collections on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

All comments will become a matter of public record. Comments are solicited on aspects of this final rule that may affect reporting, recordkeeping, or disclosure requirements and burden estimates. Because paper mail in the Washington, DC area and at the OCC is subject to delay, commenters are encouraged to submit comments by email, if possible. Comments may be sent to: Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, Attention: 1557–0339, 400 7th Street SW., Suite 3E–218, Washington, DC 20219. In

addition, comments may be sent by fax to (571) 465–4326 or by electronic mail to [prainfo@occ.treas.gov](mailto:prainfo@occ.treas.gov). You may personally inspect and photocopy comments at the OCC, 400 7th Street SW., Washington, DC 20219. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649–6700 or, for persons who are deaf or hearing impaired, TTY, (202) 649–5597. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect and photocopy comments.

All comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

Additionally, please send a copy of your comments by mail to: OCC Desk Officer, 1557–0339, U.S. Office of Management and Budget, 725 17th Street NW., #10235, Washington, DC 20503 or by email to: [oira\\_submission@omb.eop.gov](mailto:oira_submission@omb.eop.gov).

*Title of Information Collection:* Mandatory Contractual Stay Requirements for Qualified Financial Contracts.

*Affected Public:* Businesses or other for-profit.

*Respondents:* National banks or FSAs that have more than \$700 billion in total assets as reported in their most recent Call Reports; national banks or FSAs (including any subsidiary of a national bank or FSA) that are subsidiaries of a global systemically important BHC that has been designated pursuant to 252.82 of the FRB’s Regulation YY; national banks or FSAs (including any subsidiary of a national bank or FSA) that are subsidiaries of a global systemically important FBO designated pursuant to section 252.87 of the FRB’s Regulation YY; and Federal branches and agencies (including any U.S. subsidiary of a Federal branch or agency) of a global systemically important FBO that has been designated pursuant to section 252.87 of the FRB’s Regulation YY.

*Abstract:* Section 47.6(b)(1) provides that a covered bank may request that the OCC approve as compliant with the requirements of §§ 47.4 and 47.5 provisions of one or more forms of covered QFCs, or amendments to one or more forms of covered QFCs, with enhanced creditor protection conditions. The request must include: (1) An analysis of the proposal under each consideration of the relevance of creditor protection provisions; (2) a

<sup>170</sup> 5 U.S.C. 553(d)(1).

<sup>171</sup> 12 U.S.C. 4802.

<sup>172</sup> 12 U.S.C. 4802.

written legal opinion verifying that proposed provisions or amendments would be valid and enforceable under applicable law of the relevant jurisdictions, including, in the case of proposed amendments, the validity and enforceability of the proposal to amend the covered QFCs; and (3) any additional information relevant to its approval that the OCC requests.

*Burden Estimates:*

*Estimated Number of Respondents:*

44.

*Estimated Burden per Respondent:* 40 hours.

*Total Estimated Burden:* 1,760 hours.

*Regulatory Flexibility Act*

Pursuant to the Regulatory Flexibility Act (RFA), an agency must prepare a regulatory flexibility analysis for all proposed and final rules that describes the impact of the rule on small entities.<sup>173</sup> Under section 605(b) of the RFA, this analysis is not required if the head of the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a short explanatory statement in the **Federal Register** along with its rule.

The OCC currently supervises approximately 956 small entities.<sup>174</sup> The scope of the final rule is limited to large banks and their affiliates (covered banks). Therefore, the final rule will not have a direct impact on OCC-supervised small entities. The final rule may indirectly have an impact on OCC-supervised small entities that are a party to a QFC with a covered bank. The OCC expects that any costs associated with this will be minimal. Therefore, the OCC certifies that this final rule does not have a significant economic impact on a substantial number of small entities supervised by the OCC. Accordingly, a regulatory flexibility analysis is not required.

*Unfunded Mandates Reform Act of 1995 Determination*

The OCC has analyzed the final rule under the factors in the Unfunded

Mandates Reform Act of 1995 (UMRA).<sup>175</sup> Under this analysis, the OCC considered whether the final rule includes a Federal 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 one year (adjusted annually for inflation). The UMRA does not apply to regulations that incorporate requirements specifically set forth in law.

The OCC finds that the rule does not trigger the UMRA cost threshold because we estimate that the UMRA cost is less than \$36 million. The OCC believes that the largest direct cost of implementing the final rule is the cost of amending contracts without an ISDA master agreement in place, which is estimated to range from approximately \$1.18 million to approximately \$35.4 million. Accordingly, the OCC has not prepared the written statement described in section 202 of the UMRA.

**List of Subjects**

*12 CFR Part 3*

Administrative practice and procedure, Capital, Federal savings associations, National banks, Reporting and recordkeeping requirements, Risk.

*12 CFR Part 47*

Administrative practice and procedure, Banks and banking, Bank resolution, Default rights, Federal savings associations, National banks, Qualified financial contracts, Reporting and recordkeeping requirements, Securities.

*12 CFR Part 50*

Administrative practice and procedure, Banks and banking, Liquidity, Reporting and recordkeeping requirements, Savings associations.

**Authority and Issuance**

For the reasons stated in the Supplementary Information, the Office of the Comptroller of the Currency is amending 12 CFR part 3, adding 12 CFR part 47, and amending 12 CFR part 50 as follows:

**PART 3—CAPITAL ADEQUACY STANDARDS**

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

**Authority:** 12 U.S.C. 93a, 161, 1462, 1462a, 1463, 1464, 1818, 1828(n), 1828 note, 1831n note, 1835, 3907, 3909, and 5412(b)(2)(B).

■ 2. Section 3.2 is amended by:

- a. Revising the definition of “collateral agreement”;
  - b. Revising paragraph (1)(iii) of the definition of “eligible margin loan”;
  - c. Revising the definition of “qualifying master netting agreement”; and
  - d. Revising paragraph (3)(ii)(A) of the definition of “repo-style transaction”.
- The revisions are set forth below:

**§ 3.2 Definitions.**

\* \* \* \* \*

*Collateral agreement* means a legal contract that specifies the time when, and circumstances under which, a counterparty is required to pledge collateral to a national bank or Federal savings association for a single financial contract or for all financial contracts in a netting set and confers upon the national bank or Federal savings association a perfected, first-priority security interest (notwithstanding the prior security interest of any custodial agent), or the legal equivalent thereof, in the collateral posted by the counterparty under the agreement. This security interest must provide the national bank or Federal savings association with a right to close-out the financial positions and liquidate the collateral upon an event of default of, or failure to perform by, the counterparty under the collateral agreement. A contract would not satisfy this requirement if the national bank's or Federal savings association's exercise of rights under the agreement may be stayed or avoided:

(1) Under applicable law in the relevant jurisdictions, other than:

(i) In receivership, conservatorship, or resolution under the Federal Deposit Insurance Act, Title II of the Dodd-Frank Act, or under any similar insolvency law applicable to GSEs, or laws of foreign jurisdictions that are substantially similar<sup>4</sup> to the U.S. laws referenced in this paragraph (1)(i) in order to facilitate the orderly resolution of the defaulting counterparty;

(ii) Where the agreement is subject by its terms to any of the laws referenced in paragraph (1)(i) of this definition; or

(2) Other than to the extent necessary for the counterparty to comply with the requirements of part 47, subpart I of part 252, and part 382 of this title 12, as applicable.

\* \* \* \* \*

*Eligible margin loan* \* \* \*

(1) \* \* \*

(iii) The extension of credit is conducted under an agreement that provides the national bank or Federal

<sup>4</sup> The OCC expects to evaluate jointly with the Board and FDIC whether foreign special resolution regimes meet the requirements of this paragraph.

<sup>173</sup> See 5 U.S.C. 601 *et seq.*

<sup>174</sup> The OCC bases its estimate of the number of small entities on the Small Business Administration's size thresholds for commercial banks and savings institutions, and trust companies, which are \$550 million and \$38.5 million, respectively. Consistent with the General Principles of Affiliation 13 CFR 121.103(a), the OCC counts the assets of affiliated financial institutions when determining if the OCC should classify an OCC-supervised institution as a small entity. The OCC uses December 31, 2016, to determine size because a “financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.” See footnote 8 of the U.S. Small Business Administration's Table of Size Standards.

<sup>175</sup> 2 U.S.C. 1531 *et seq.*

savings association the right to accelerate and terminate the extension of credit and to liquidate or set-off collateral promptly upon an event of default, including upon an event of receivership, insolvency, liquidation, conservatorship, or similar proceeding, of the counterparty, provided that, in any such case:

(A) Any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions, other than in receivership, conservatorship, or resolution under the Federal Deposit Insurance Act, Title II of the Dodd-Frank Act, or under any similar insolvency law applicable to GSEs,<sup>5</sup> or laws of foreign jurisdictions that are substantially similar<sup>6</sup> to the U.S. laws referenced in this paragraph (1)(iii)(A) in order to facilitate the orderly resolution of the defaulting counterparty; and

(B) The agreement may limit the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default of the counterparty to the extent necessary for the counterparty to comply with the requirements of part 47, subpart I of part 252, and part 382, of this title 12, as applicable.

\* \* \* \* \*

*Qualifying master netting agreement* means a written, legally enforceable agreement provided that:

(1) The agreement creates a single legal obligation for all individual transactions covered by the agreement upon an event of default following any stay permitted by paragraph (2) of this definition, including upon an event of receivership, conservatorship, insolvency, liquidation, or similar proceeding, of the counterparty;

(2) The agreement provides the national bank or Federal savings association the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default, including upon an event of receivership, conservatorship, insolvency, liquidation, or similar proceeding, of the

counterparty, provided that, in any such case:

(i) Any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions, other than:

(A) In receivership, conservatorship, or resolution under the Federal Deposit Insurance Act, Title II of the Dodd-Frank Act, or under any similar insolvency law applicable to GSEs, or laws of foreign jurisdictions that are substantially similar<sup>7</sup> to the U.S. laws referenced in this paragraph (2)(i)(A) in order to facilitate the orderly resolution of the defaulting counterparty; or

(B) Where the agreement is subject by its terms to, or incorporates, any of the laws referenced in paragraph (2)(i)(A) of this definition; and

(ii) The agreement may limit the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default of the counterparty to the extent necessary for the counterparty to comply with the requirements of part 47, subpart I of part 252, and part 382, of this title 12, as applicable.

\* \* \* \* \*

*Repo-style transaction* \* \* \*

(3) \* \* \*

(ii) \* \* \*

(A) The transaction is executed under an agreement that provides the national bank or Federal savings association the right to accelerate, terminate, and close-out the transaction on a net basis and to liquidate or set-off collateral promptly upon an event of default, including upon an event of receivership, insolvency, liquidation, or similar proceeding, of the counterparty, provided that, in any such case:

(1) Any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions, other than in receivership, conservatorship, or resolution under the Federal Deposit Insurance Act, Title II of the Dodd-Frank Act, or under any similar insolvency law applicable to GSEs, or laws of foreign jurisdictions that are substantially similar<sup>8</sup> to the U.S. laws referenced in this paragraph (3)(ii)(A)(1) in order to facilitate the orderly resolution of the defaulting counterparty; and

(2) The agreement may limit the right to accelerate, terminate, and close-out on a net basis all transactions under the

agreement and to liquidate or set-off collateral promptly upon an event of default of the counterparty to the extent necessary for the counterparty to comply with the requirements of part 47, subpart I of part 252, and part 382, of this title 12, as applicable; or

\* \* \* \* \*

## PART 47—MANDATORY CONTRACTUAL STAY REQUIREMENTS FOR QUALIFIED FINANCIAL CONTRACTS

■ 3. Add part 47 to read as follows:

## PART 47—MANDATORY CONTRACTUAL STAY REQUIREMENTS FOR QUALIFIED FINANCIAL CONTRACTS

Sec.

47.1 Authority and purpose.

47.2 Definitions.

47.3 Applicability.

47.4 U.S. special resolution regimes.

47.5 Insolvency proceedings.

47.6 Approval of enhanced creditor protection conditions.

47.7 Foreign bank multi-branch master agreements.

47.8 Exclusion of certain QFCs.

**Authority:** 12 U.S.C. 1, 93a, 481, 1462a, 1463, 1464, 1467a, 1818, 1828, 1831n, 1831o, 1831p–1, 1831w, 1835, 3102(b), 3108(a), 5412(b)(2)(B), (D)–(F).

### § 47.1 Authority and purpose.

(a) *Authority.* 12 U.S.C. 1, 93a, 1462a, 1463, 1464, 1467a, 1818, 1828, 1831n, 1831p–1, 1831w, 1835, 3102(b), 3108(a), 5412(b)(2)(B), (D)–(F).

(b) *Purpose.* The purpose of this part is to promote the safety and soundness of federally chartered or licensed institutions by mitigating the potential destabilizing effects of the resolution of a global systemically important banking entity on an affiliate that is a covered bank (as defined by this part) by requiring covered banks to include in financial contracts covered by this part certain mandatory contractual provisions relating to stays on acceleration and close out rights and transfer rights.

### § 47.2 Definitions.

As used in this part:

*Affiliate* means an affiliate as defined in 12 U.S.C. 1841(k) (Bank Holding Company Act).

*Central counterparty (CCP)* means a counterparty (for example, a clearing house) that facilitates trades between counterparties in one or more financial markets by either guaranteeing trades or novating contracts.

*Chapter 11 proceeding* means a proceeding under Chapter 11 of Title 11, United States Code (11 U.S.C. 1101–74).

<sup>5</sup> This requirement is met where all transactions under the agreement are (i) executed under U.S. law and (ii) constitute “securities contracts” under section 555 of the Bankruptcy Code (11 U.S.C. 555), qualified financial contracts under section 11(e)(8) of the Federal Deposit Insurance Act, or netting contracts between or among financial institutions under sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act or the Federal Reserve Board’s Regulation EE (12 CFR part 231).

<sup>6</sup> The OCC expects to evaluate jointly with the Board and FDIC whether foreign special resolution regimes meet the requirements of this paragraph.

<sup>7</sup> The OCC expects to evaluate jointly with the Board and FDIC whether foreign special resolution regimes meet the requirements of this paragraph.

<sup>8</sup> The OCC expects to evaluate jointly with the Board and FDIC whether foreign special resolution regimes meet the requirements of this paragraph.

*Consolidated affiliate* means an affiliate of another company that:

(1) Either consolidates the other company, or is consolidated by the other company, on financial statements prepared in accordance with U.S. Generally Accepted Accounting Principles, the International Financial Reporting Standards, or other similar standards;

(2) Is, along with the other company, consolidated with a third company on a financial statement prepared in accordance with principles or standards referenced in paragraph (1) of this definition; or

(3) For a company that is not subject to principles or standards referenced in paragraph (1) of this definition, if consolidation as described in paragraph (1) or (2) of this definition would have occurred if such principles or standards had applied.

*Control* has the same meaning as in 12 U.S.C. 1841 (Bank Holding Company Act).

*Covered entity* has the same meaning as in § 252.82(a) of this title (Federal Reserve Board Regulation YY) (12 CFR 252.82).

*Covered FSI* has the same meaning as in § 382.2(b) of this title (Federal Deposit Insurance Corporation) (12 CFR 382.2(b)).

*Default right* (1) Means, with respect to a QFC, any:

(i) Right of a party, whether contractual or otherwise (including, without limitation, rights incorporated by reference to any other contract, agreement, or document, and rights afforded by statute, civil code, regulation, and common law), to liquidate, terminate, cancel, rescind, or accelerate such agreement or transactions thereunder, set off or net amounts owing in respect thereto (except rights related to same-day payment netting), exercise remedies in respect of collateral or other credit support or property related thereto (including the purchase and sale of property), demand payment or delivery thereunder or in respect thereof (other than a right or operation of a contractual provision arising solely from a change in the value of collateral or margin or a change in the amount of an economic exposure), suspend, delay, or defer payment or performance thereunder, or modify the obligations of a party thereunder, or any similar rights; and

(ii) Right or contractual provision that alters the amount of collateral or margin that must be provided with respect to an exposure thereunder, including by altering any initial amount, threshold amount, variation margin, minimum transfer amount, the margin value of

collateral, or any similar amount, that entitles a party to demand the return of any collateral or margin transferred by it to the other party or a custodian or that modifies a transferee's right to reuse collateral or margin (if such right previously existed), or any similar rights, in each case, other than a right or operation of a contractual provision arising solely from a change in the value of collateral or margin or a change in the amount of an economic exposure;

(2) With respect to § 47.5, does not include any right under a contract that allows a party to terminate the contract on demand or at its option at a specified time, or from time to time, without the need to show cause.

*FDI Act proceeding* means a proceeding that commences upon the Federal Deposit Insurance Corporation being appointed as conservator or receiver under section 11 of the Federal Deposit Insurance Act (12 U.S.C. 1821).

*FDI Act stay period* means, in connection with an FDI Act proceeding, the period of time during which a party to a QFC with a party that is subject to an FDI Act proceeding may not exercise any right that the party that is not subject to an FDI Act proceeding has to terminate, liquidate, or net such QFC, in accordance with section 11(e) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)) and any implementing regulations.

*Financial counterparty* means a person that is:

(1)(i) A bank holding company or an affiliate thereof; a savings and loan holding company as defined in section 10(n) of the Home Owners' Loan Act (12 U.S.C. 1467a(n)); a U.S. intermediate holding company that is established or designated for purposes of compliance with § 252.153 of this title (Federal Reserve Board Regulation YY) (12 CFR 252.153); or a nonbank financial company supervised by the Federal Reserve Board under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5323);

(ii) A depository institution as defined in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)); an organization that is organized under the laws of a foreign country and that engages directly in the business of banking outside the United States; a Federal credit union or State credit union as defined in section 2 of the Federal Credit Union Act (12 U.S.C. 1752(1) and (6)); an institution that functions solely in a trust or fiduciary capacity as described in section 2(c)(2)(D) of the Bank Holding Company Act (12 U.S.C. 1841(c)(2)(D)); an industrial loan company, an industrial

bank, or other similar institution described in section 2(c)(2)(H) of the Bank Holding Company Act (12 U.S.C. 1841(c)(2)(H));

(iii) An entity that is state-licensed or registered as:

(A) A credit or lending entity, including a finance company, money lender; installment lender; consumer lender or lending company; mortgage lender, broker, or bank; motor vehicle title pledge lender; payday or deferred deposit lender; premium finance company; commercial finance or lending company; or commercial mortgage company; except entities registered or licensed solely on account of financing the entity's direct sales of goods or services to customers;

(B) A money services business, including a check casher; money transmitter; currency dealer or exchange; or money order or traveler's check issuer;

(iv) A regulated entity as defined in section 1303(20) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended (12 U.S.C. 4502(20)) or any entity for which the Federal Housing Finance Agency or its successor is the primary federal regulator;

(v) Any institution chartered in accordance with the Farm Credit Act of 1971, as amended (12 U.S.C. 2002 *et seq.*), that is regulated by the Farm Credit Administration;

(vi) Any entity registered with the Commodity Futures Trading Commission as a swap dealer or major swap participant pursuant to the Commodity Exchange Act of 1936 (7 U.S.C. 1 *et seq.*), or an entity that is registered with the U.S. Securities and Exchange Commission as a security-based swap dealer or a major security-based swap participant pursuant to the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*);

(vii) A securities holding company, with the meaning specified in section 618 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 1850a); a broker or dealer as defined in sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4)–(5)); an investment adviser as defined in section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)); an investment company registered with the U.S. Securities and Exchange Commission under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*); or a company that has elected to be regulated as a business development company pursuant to section 54(a) of the Investment Company Act of 1940 (15 U.S.C. 80a–53(a));

(viii) A private fund as defined in section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80–b–2(a)); an entity that would be an investment company under section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3) but for section 3(c)(5)(C); or an entity that is deemed not to be an investment company under section 3 of the Investment Company Act of 1940 pursuant to Investment Company Act Rule 3a–7 (17 CFR 270.3a–7) of the U.S. Securities and Exchange Commission;

(ix) A commodity pool, a commodity pool operator, or a commodity trading advisor as defined, respectively, in sections 1a(10), 1a(11), and 1a(12) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(10), 1a(11), and 1a(12)); a floor broker, a floor trader, or introducing broker as defined, respectively, in sections 1a(22), 1a(23) and 1a(31) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(22), 1a(23), and 1a(31)); or a futures commission merchant as defined in section 1a(28) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(28));

(x) An employee benefit plan as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income and Security Act of 1974 (29 U.S.C. 1002);

(xi) An entity that is organized as an insurance company, primarily engaged in writing insurance or reinsuring risks underwritten by insurance companies, or is subject to supervision as such by a State insurance regulator or foreign insurance regulator; or

(xii) An entity that would be a financial counterparty described in paragraphs (1)(i)–(xi) of this definition, if the entity were organized under the laws of the United States or any state thereof.

(2) The term “financial counterparty” does not include any counterparty that is:

- (i) A sovereign entity;
- (ii) A multilateral development bank;
- or
- (iii) The Bank for International Settlements.

*Financial market utility (FMU)* means any person, regardless of the jurisdiction in which the person is located or organized, that manages or operates a multilateral system for the purpose of transferring, clearing, or settling payments, securities, or other financial transactions among financial institutions or between financial institutions and the person, but does not include:

- (1) Designated contract markets, registered futures associations, swap data repositories, and swap execution facilities registered under the

Commodity Exchange Act (7 U.S.C. 1 *et seq.*), or national securities exchanges, national securities associations, alternative trading systems, security-based swap data repositories, and swap execution facilities registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), solely by reason of their providing facilities for comparison of data respecting the terms of settlement of securities or futures transactions effected on such exchange or by means of any electronic system operated or controlled by such entities, provided that the exclusions in paragraph (1) of this definition apply only with respect to the activities that require the entity to be so registered; or

(2) Any broker, dealer, transfer agent, or investment company, or any futures commission merchant, introducing broker, commodity trading advisor, or commodity pool operator, solely by reason of functions performed by such institution as part of brokerage, dealing, transfer agency, or investment company activities, or solely by reason of acting on behalf of a FMU or a participant therein in connection with the furnishing by the FMU of services to its participants or the use of services of the FMU by its participants, provided that services performed by such institution do not constitute critical risk management or processing functions of the FMU.

*Investment advisory contract* means any contract or agreement whereby a person agrees to act as investment adviser to or to manage any investment or trading account of another person.

*Master agreement* means a QFC of the type set forth in section 210(c)(8)(D)(ii)(XI), (iii)(IX), (iv)(IV), (v)(V), or (vi)(V) of Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5390(c)(8)(D)(ii)(XI), (iii)(IX), (iv)(IV), (v)(V), or (vi)(V)) or a master agreement that the Federal Deposit Insurance Corporation determines by regulation is a QFC pursuant to section 210(c)(8)(D)(i) of Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5390(c)(8)(D)(i)).

*Person* includes an individual, bank, corporation, partnership, trust, association, joint venture, pool, syndicate, sole proprietorship, unincorporated organization, or any other form of entity.

*Qualified financial contract (QFC)* has the same meaning as in section 210(c)(8)(D) of Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5390(c)(8)(D)).

*Retail customer or counterparty* means a customer or counterparty that is:

- (1) An individual;
- (2) A business customer, but solely if and to the extent that:

(i) The national bank, Federal savings association, or Federal branch or agency manages its transactions with the business customer, including deposits, unsecured funding, and credit facility and liquidity facility transactions, in the same way it manages its transactions with individuals;

(ii) Transactions with the business customer have liquidity risk characteristics that are similar to comparable transactions with individuals; and

(iii) The total aggregate funding raised from the business customer is less than \$1.5 million; or

(3) A living or testamentary trust that:

(i) Is solely for the benefit of natural persons;

(ii) Does not have a corporate trustee; and

(iii) Terminates within 21 years and 10 months after the death of grantors or beneficiaries of the trust living on the effective date of the trust or within 25 years, if applicable under state law.

*Small financial institution* means a company that:

(1) Is organized as a bank, as defined in section 3(a) of the Federal Deposit Insurance Act (12 U.S.C. 1813(a)), the deposits of which are insured by the Federal Deposit Insurance Corporation; a savings association, as defined in section 3(b) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)), the deposits of which are insured by the Federal Deposit Insurance Corporation; a farm credit system institution chartered under the Farm Credit Act of 1971 (12 U.S.C. 2002 *et seq.*); or an insured Federal credit union or State-chartered credit union under the Federal Credit Union Act (12 U.S.C. 1751 *et seq.*); and

(2) Has total assets of \$10,000,000,000 or less on the last day of the company's most recent fiscal year.

*State* means any state, commonwealth, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, or the United States Virgin Islands.

*Subsidiary of a covered bank* means any operating subsidiary of a national bank, Federal savings association, or Federal branch or agency as defined in § 5.34 of this chapter (national banks), or § 5.38 of this chapter (Federal savings associations), or any other entity owned or controlled by the covered bank that would be a subsidiary under 12 U.S.C. 1841 (Bank Holding Company Act).

*U.S. agency* has the same meaning as the term “agency” in 12 U.S.C. 3101(1).

*U.S. branch* has the same meaning as the term “branch” in 12 U.S.C. 3101(3).

*U.S. special resolution regimes* means the Federal Deposit Insurance Act (12 U.S.C. 1811–1835a) and regulations promulgated thereunder and Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5381–5394) and regulations promulgated thereunder.

#### **§ 47.3 Applicability.**

(a) *General requirement.* A covered bank must ensure that each covered QFC conforms to the requirements of §§ 47.4 and 47.5.

(b) *Covered bank*—(1) *Generally.* For purposes of this part, a covered bank is:

(i) A national bank or Federal savings association that has more than \$700 billion in total assets as reported on the national bank’s or Federal savings association’s most recent Consolidated Reports of Condition and Income (Call Report);

(ii) A national bank or Federal savings association that is a subsidiary of a global systemically important bank holding company that has been designated pursuant to § 252.82 of this title (Federal Reserve Board Regulation YY) (12 CFR 252.82);

(iii) A national bank or Federal savings association that is a subsidiary of a global systemically important foreign banking organization that has been designated pursuant to § 252.87 of this title (Federal Reserve Board Regulation YY) (12 CFR 252.87); or

(iv) A Federal branch or agency, as defined in subpart B of this chapter (governing Federal branches and agencies), of a global systemically important foreign banking organization that has been designated pursuant to § 252.87 of this title (Federal Reserve Board Regulation YY) (12 CFR 252.87).

(2) *Subsidiary of a covered bank.* This part applies to a subsidiary of a covered bank as provided under paragraph (b)(1) of this section. Specifically, the covered bank is required to ensure that a covered QFC to which the subsidiary of a covered bank is a party (as a direct counterparty or a support provider) satisfies the requirements of §§ 47.4 and 47.5 in the same manner and to the same extent applicable to the covered bank.

(3) *Subsidiaries not included as covered banks.* Notwithstanding paragraphs (b)(1) and (2) of this section, a covered bank does not include:

(i) A subsidiary that is owned by a covered bank in satisfaction of debt previously contracted in good faith pursuant to section 5137 of the Revised

Statutes (12 U.S.C. 29) (national bank) or section 5(c) of the Home Owners’ Loan Act (12 U.S.C. 1464) (Federal savings association);

(ii) A portfolio concern, as defined under 13 CFR 107.50, that is controlled by a small business investment company, as defined in section 103(3) of the Small Business Investment Act of 1958 (15 U.S.C. 662) (national banks), or under section 5(c) of the Home Owners’ Loan Act (12 U.S.C. 1464(c)) (Federal savings associations);

(iii) A subsidiary that is owned pursuant to paragraph (7) of section 5136 of the Revised Statutes (12 U.S.C. 24(Seventh)), or paragraph (11) of section 5136 of the Revised Statutes (12 U.S.C. 24(Eleventh)) (national banks), or § 5.59 of this chapter (12 CFR 5.59) (Federal savings associations) designed primarily to promote the public welfare, including the welfare of low- and moderate-income communities or families (such as providing housing, services or jobs).

(c) *Covered QFCs.* For purposes of this part, a covered QFC is:

(1) With respect to a covered bank that is a covered bank on January 1, 2018, an in-scope QFC that the covered bank:

(i) Enters, executes, or otherwise becomes a party to on or after January 1, 2019; or

(ii) Entered, executed, or otherwise became a party to before January 1, 2019, if the covered bank, or any affiliate that is a covered entity, covered bank, or covered FSI, also enters, executes, or otherwise becomes a party to a QFC with the same person or a consolidated affiliate of the same person on or after January 1, 2019.

(2) With respect to a covered bank that becomes a covered bank after January 1, 2018, an in-scope QFC that the covered bank:

(i) Enters, executes or otherwise becomes a party to on or after the later of the date the covered bank first becomes a covered bank and January 1, 2019; or

(ii) Entered, executed, or otherwise became a party to before the date identified in paragraph (c)(2)(i) of this section with respect to the covered bank, if the covered bank or any affiliate that is a covered entity, covered bank, or covered FSI, also enters, executes, or otherwise becomes a party to a QFC with the same person or consolidated affiliate of the same person on or after the date identified in paragraph (c)(2)(i) of this section with respect to the covered bank.

(d) *In-scope QFCs.* An in-scope QFC is a QFC that explicitly:

(1) Restricts the transfer of a QFC (or any interest or obligation in or under, or any property securing, the QFC) from a covered bank; or

(2) Provides one or more default rights with respect to a QFC that may be exercised against a covered bank.

(e) *Rules of construction.* For purposes of this part:

(1) A covered bank does not become a party to a QFC solely by acting as agent with respect to the QFC; and

(2) The exercise of a default right with respect to a covered QFC includes the automatic or deemed exercise of the default right pursuant to the terms of the QFC or other arrangement.

(f) *Initial applicability of requirements for covered QFCs.* (1) With respect to each of its covered QFCs, a covered bank that is a covered bank on January 1, 2018, must conform the covered QFC to the requirements of this part by:

(i) January 1, 2019, if each party to the covered QFC is a covered entity, covered bank, or covered FSI;

(ii) July 1, 2019, if each party to the covered QFC (other than the covered bank) is a financial counterparty that is not a covered entity, covered bank, or covered FSI; or

(iii) January 1, 2020, if a party to the covered QFC (other than the covered bank) is not described in paragraphs (f)(1)(i) or (f)(1)(ii) of this section, or if, notwithstanding paragraph (f)(1)(ii) of this section, a party to the covered QFC (other than the covered bank) is a small financial institution.

(2) With respect to each of its covered QFCs, a covered bank that is not a covered bank on January 1, 2018, must conform the covered QFC to the requirements of this part by:

(i) The first day of the calendar quarter immediately following one year after the date the covered bank first becomes a covered bank if each party to the covered QFC is a covered entity, covered bank, or covered FSI;

(ii) The first day of the calendar quarter immediately following 18 months from the date the covered bank first becomes a covered bank if each party to the covered QFC (other than the covered bank) is a financial counterparty that is not a covered entity, covered bank, or covered FSI; or

(iii) The first day of the calendar quarter immediately following two years from the date the covered bank first becomes a covered bank if a party to the covered QFC (other than the covered bank) is not described in paragraphs (f)(2)(i) or (f)(2)(ii) of this section, or if, notwithstanding paragraph (f)(2)(ii) of this section, a party to the covered QFC (other than the covered bank) is a small financial institution.

**§ 47.4 U.S. special resolution regimes.**

(a) *Covered QFCs not required to be conformed.* (1) Notwithstanding § 47.3, a covered bank is not required to conform a covered QFC to the requirements of this section if:

(i) The covered QFC designates, in the manner described in paragraph (a)(2) of this section, the U.S. special resolution regimes as part of the law governing the QFC; and

(ii) Each party to the covered QFC, other than the covered bank, is:

(A) An individual that is domiciled in the United States, including any State;

(B) A company that is incorporated in or organized under the laws of the United States or any State;

(C) A company the principal place of business of which is located in the United States, including any State; or

(D) A U.S. branch or U.S. agency.

(2) A covered QFC designates the U.S. special resolution regimes as part of the law governing the QFC if the covered QFC:

(i) Explicitly provides that the covered QFC is governed by the laws of the United States or a state of the United States; and

(ii) Does not explicitly provide that one or both of the U.S. special resolution regimes, or a broader set of laws that includes a U.S. special resolution regime, is excluded from the laws governing the covered QFC.

(b) *Provisions required.* A covered QFC must explicitly provide that:

(1) In the event the covered bank becomes subject to a proceeding under a U.S. special resolution regime, the transfer of the covered QFC (and any interest and obligation in or under, and any property securing, the covered QFC) from the covered bank will be effective to the same extent as the transfer would be effective under the U.S. special resolution regime if the covered QFC (and any interest and obligation in or under, and any property securing, the covered QFC) were governed by the laws of the United States or a state of the United States; and

(2) In the event the covered bank or an affiliate of the covered bank becomes subject to a proceeding under a U.S. special resolution regime, default rights with respect to the covered QFC that may be exercised against the covered bank are permitted to be exercised to no greater extent than the default rights could be exercised under the U.S. special resolution regime if the covered QFC were governed by the laws of the United States or a state of the United States.

(c) *Relevance of creditor protection provisions.* The requirements of this

section apply notwithstanding paragraphs (d), (f), and (h) of § 47.5.

**§ 47.5 Insolvency proceedings.**

(a) *Covered QFCs not required to be conformed.* Notwithstanding § 47.3, a covered bank is not required to conform a covered QFC to the requirements of this section if the covered QFC:

(1) Does not explicitly provide any default right with respect to the covered QFC that is related, directly or indirectly, to an affiliate of the direct party becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding; and

(2) Does not explicitly prohibit the transfer of a covered affiliate credit enhancement, any interest or obligation in or under the covered affiliate credit enhancement, or any property securing the covered affiliate credit enhancement to a transferee upon or following an affiliate of the direct party becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding or would prohibit such a transfer only if the transfer would result in the supported party being the beneficiary of the credit enhancement in violation of any law applicable to the supported party.

(b) *General prohibitions.* (1) A covered QFC may not permit the exercise of any default right with respect to the covered QFC that is related, directly or indirectly, to an affiliate of the direct party becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding.

(2) A covered QFC may not prohibit the transfer of a covered affiliate credit enhancement, any interest or obligation in or under the covered affiliate credit enhancement, or any property securing the covered affiliate credit enhancement to a transferee upon or following an affiliate of the direct party becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding unless the transfer would result in the supported party being the beneficiary of the credit enhancement in violation of any law applicable to the supported party.

(c) *Definitions relevant to the general prohibitions—*(1) *Direct party.* *Direct party* means a covered entity, covered bank, or covered FSI that is a party to the direct QFC.

(2) *Direct QFC.* *Direct QFC* means a QFC that is not a credit enhancement, provided that, for a QFC that is a master agreement that includes an affiliate credit enhancement as a supplement to the master agreement, the direct QFC does not include the affiliate credit enhancement.

(3) *Affiliate credit enhancement.*

*Affiliate credit enhancement* means a credit enhancement that is provided by an affiliate of a party to the direct QFC that the credit enhancement supports.

(d) *General creditor protections.*

Notwithstanding paragraph (b) of this section, a covered direct QFC and covered affiliate credit enhancement that supports the covered direct QFC may permit the exercise of a default right with respect to the covered QFC that arises as a result of:

(1) The direct party becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding;

(2) The direct party not satisfying a payment or delivery obligation pursuant to the covered QFC or another contract between the same parties that gives rise to a default right in the covered QFC; or

(3) The covered affiliate support provider or transferee not satisfying a payment or delivery obligation pursuant to a covered affiliate credit enhancement that supports the covered direct QFC.

(e) *Definitions relevant to the general creditor protections—*(1) *Covered direct QFC.* *Covered direct QFC* means a direct QFC to which a covered entity, covered bank, or covered FSI is a party.

(2) *Covered affiliate credit enhancement.* *Covered affiliate credit enhancement* means an affiliate credit enhancement in which a covered entity, covered bank, or covered FSI is the obligor of the credit enhancement.

(3) *Covered affiliate support provider.* *Covered affiliate support provider* means, with respect to a covered affiliate credit enhancement, the affiliate of the direct party that is obligated under the covered affiliate credit enhancement and is not a transferee.

(4) *Supported party.* *Supported party* means, with respect to a covered affiliate credit enhancement and the direct QFC that the covered affiliate credit enhancement supports, a party that is a beneficiary of the covered affiliate support provider's obligation under the covered affiliate credit enhancement.

(f) *Additional creditor protections for supported QFCs.* Notwithstanding paragraph (b) of this section, with respect to a covered direct QFC that is supported by a covered affiliate credit enhancement, the covered direct QFC and the covered affiliate credit enhancement may permit the exercise of a default right after the stay period that is related, directly or indirectly, to the covered affiliate support provider becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding if:

(1) The covered affiliate support provider that remains obligated under the covered affiliate credit enhancement becomes subject to a receivership, insolvency, liquidation, resolution, or similar proceeding other than a Chapter 11 proceeding;

(2) Subject to paragraph (h) of this section, the transferee, if any, becomes subject to a receivership, insolvency, liquidation, resolution, or similar proceeding;

(3) The covered affiliate support provider does not remain, and a transferee does not become, obligated to the same, or substantially similar, extent as the covered affiliate support provider was obligated immediately prior to entering the receivership, insolvency, liquidation, resolution, or similar proceeding with respect to:

(i) The covered affiliate credit enhancement;

(ii) All other covered affiliate credit enhancements provided by the covered affiliate support provider in support of other covered direct QFCs between the direct party and the supported party under the covered affiliate credit enhancement referenced in paragraph (f)(3)(i) of this section; and

(iii) All covered affiliate credit enhancements provided by the covered affiliate support provider in support of covered direct QFCs between the direct party and affiliates of the supported party referenced in paragraph (f)(3)(ii) of this section; or

(4) In the case of a transfer of the covered affiliate credit enhancement to a transferee:

(i) All of the ownership interests of the direct party directly or indirectly held by the covered affiliate support provider are not transferred to the transferee; or

(ii) Reasonable assurance has not been provided that all or substantially all of the assets of the covered affiliate support provider (or net proceeds therefrom), excluding any assets reserved for the payment of costs and expenses of administration in the receivership, insolvency, liquidation, resolution, or similar proceeding, will be transferred or sold to the transferee in a timely manner.

(g) *Definitions relevant to the additional creditor protections for supported QFCs*—(1) *Stay period*. *Stay period* means, with respect to a receivership, insolvency, liquidation, resolution, or similar proceeding, the period of time beginning on the commencement of the proceeding and ending at the later of 5:00 p.m. (eastern time) on the business day following the date of the commencement of the

proceeding and 48 hours after the commencement of the proceeding.

(2) *Business day*. *Business day* means a day on which commercial banks in the jurisdiction the proceeding is commenced are open for general business (including dealings in foreign exchange and foreign currency deposits).

(3) *Transferee*. *Transferee* means a person to whom a covered affiliate credit enhancement is transferred upon the covered affiliate support provider entering a receivership, insolvency, liquidation, resolution, or similar proceeding or thereafter as part of the resolution, restructuring, or reorganization involving the covered affiliate support provider.

(h) *Creditor protections related to FDI Act proceedings*. Notwithstanding paragraphs (b), (d), and (f) of this section, with respect to a covered direct QFC that is supported by a covered affiliate credit enhancement, the covered direct QFC and the covered affiliate credit enhancement may permit the exercise of a default right that is related, directly or indirectly, to the covered affiliate support provider becoming subject to FDI Act proceedings:

(1) After the FDI Act stay period, if the covered affiliate credit enhancement is not transferred pursuant to section 11(e)(9)–(e)(10) of Federal Deposit Insurance Act (12 U.S.C. 1821(e)(9)–(e)(10)) and any regulations promulgated thereunder; or

(2) During the FDI Act stay period, if the default right may only be exercised so as to permit the supported party under the covered affiliate credit enhancement to suspend performance with respect to the supported party's obligations under the covered direct QFC to the same extent as the supported party would be entitled to do if the covered direct QFC were with the covered affiliate support provider and were treated in the same manner as the covered affiliate credit enhancement.

(i) *Prohibited terminations*. A covered QFC must require, after an affiliate of the direct party has become subject to a receivership, insolvency, liquidation, resolution, or similar proceeding:

(1) The party seeking to exercise a default right to bear the burden of proof that the exercise is permitted under the covered QFC; and

(2) Clear and convincing evidence or a similar or higher burden of proof to exercise a default right.

#### **§ 47.6 Approval of enhanced creditor protection conditions.**

(a) *Protocol compliance*. (1) Unless the OCC determines otherwise based on

the specific facts and circumstances, a covered QFC is deemed to comply with this part if it is amended by the universal protocol or the U.S. protocol.

(2) A covered QFC will be deemed to be amended by the universal protocol for purposes of paragraph (a)(1) of this section notwithstanding the covered QFC being amended by one or more Country Annexes, as the term is defined in the universal protocol.

(3) For purposes of paragraphs (a)(1) and (2) of this section:

(i) The *universal protocol* means the ISDA 2015 Universal Resolution Stay Protocol, including the Securities Financing Transaction Annex and Other Agreements Annex, published by the International Swaps and Derivatives Association, Inc., as of May 3, 2016, and minor or technical amendments thereto;

(ii) The *U.S. protocol* means a protocol that is the same as the universal protocol other than as provided in paragraphs (a)(3)(ii)(A)–(F) of this section.

(A) The provisions of Section 1 of the attachment to the universal protocol may be limited in their application to a covered entity, covered bank, or covered FSI and may be limited with respect to resolutions under the Identified Regimes, as those regimes are identified by the universal protocol;

(B) The provisions of Section 2 of the attachment to the universal protocol may be limited in their application to a covered entity, covered bank, or covered FSI;

(C) The provisions of Section 4(b)(i)(A) of the attachment to the universal protocol must not apply with respect to U.S. special resolution regimes;

(D) The provision of Section 4(b) of the attachment to the universal protocol may only be effective to the extent that the covered QFC affected by an adherent's election thereunder would continue to meet the requirements of this part;

(E) The provisions of Section 2(k) of the attachment to the universal protocol must not apply; and

(F) The U.S. protocol may include minor and technical differences from the universal protocol and differences necessary to conform the U.S. protocol to the differences described in paragraphs (a)(3)(ii)(A)–(E) of this section;

(iii) Amended by the universal protocol or the U.S. protocol, with respect to covered QFCs between adherents to the protocol, includes amendments through incorporation of the terms of the protocol (by reference or otherwise) into the covered QFC; and

(iv) The *attachment to the universal protocol* means the attachment that the universal protocol identifies as “ATTACHMENT to the ISDA 2015 UNIVERSAL RESOLUTION STAY PROTOCOL.”

(b) *Proposal of enhanced creditor protection conditions.* (1) A covered bank may request that the OCC approve as compliant with the requirements of §§ 47.4 and 47.5 proposed provisions of one or more forms of covered QFCs, or proposed amendments to one or more forms of covered QFCs, with enhanced creditor protection conditions.

(2) Enhanced creditor protection conditions means a set of limited exemptions to the requirements of § 47.5(b) that are different than that of paragraphs (d), (f), and (h) of § 47.5.

(3) A covered bank making a request under paragraph (b)(1) of this section must provide:

(i) An analysis of the proposal that addresses each consideration in paragraph (d) of this section;

(ii) A written legal opinion verifying that proposed provisions or amendments would be valid and enforceable under applicable law of the relevant jurisdictions, including, in the case of proposed amendments, the validity and enforceability of the proposal to amend the covered QFCs; and

(iii) Any other relevant information that the OCC requests.

(c) *OCC approval.* The OCC may approve, subject to any conditions or commitments the OCC may set, a proposal by a covered bank under paragraph (b) of this section if the proposal, as compared to a covered QFC that contains only the limited exemptions in paragraphs (d), (f), and (h) of § 47.5 or that is amended as provided under paragraph (a) of this section, would promote the safety and soundness of federally chartered or licensed institutions by mitigating the potential destabilizing effects of the resolution of a global significantly important banking entity that is an affiliate of the covered bank, at least to the same extent.

(d) *Considerations.* In reviewing a proposal under this section, the OCC may consider all facts and circumstances related to the proposal, including:

(1) Whether, and the extent to which, the proposal would reduce the resiliency of such covered banks during distress or increase the impact on U.S. financial stability were one or more of the covered banks to fail;

(2) Whether, and the extent to which, the proposal would materially decrease the ability of a covered bank, or an

affiliate of a covered bank, to be resolved in a rapid and orderly manner in the event of the financial distress or failure of the covered bank, or an affiliate of a covered bank, that is required to submit a resolution plan;

(3) Whether, and the extent to which, the set of conditions or the mechanism in which they are applied facilitates, on an industry-wide basis, contractual modifications to remove impediments to resolution and increase market certainty, transparency, and equitable treatment with respect to the default rights of non-defaulting parties to a covered QFC;

(4) Whether, and the extent to which, the proposal applies to existing and future transactions;

(5) Whether, and the extent to which, the proposal would apply to multiple forms of QFCs or multiple covered banks or an affiliates of covered banks;

(6) Whether the proposal would permit a party to a covered QFC that is within the scope of the proposal to adhere to the proposal with respect to only one or a subset of covered banks or an affiliates of covered banks;

(7) With respect to a supported party, the degree of assurance the proposal provides to the supported party that the material payment and delivery obligations of the covered affiliate credit enhancement and the covered direct QFC it supports will continue to be performed after the covered affiliate support provider enters a receivership, insolvency, liquidation, resolution, or similar proceeding;

(8) The presence, nature, and extent of any provisions that require a covered affiliate support provider or transferee to meet conditions other than material payment or delivery obligations to its creditors;

(9) The extent to which the supported party's overall credit risk to the direct party may increase if the enhanced creditor protection conditions are not met and the likelihood that the supported party's credit risk to the direct party would decrease or remain the same if the enhanced creditor protection conditions are met; and

(10) Whether the proposal provides the counterparty with additional default rights or other rights.

#### **§ 47.7 Foreign bank multi-branch master agreements.**

(a) *Treatment of foreign bank multi-branch master agreements.* With respect to a Federal branch or agency of a global systemically important foreign banking organization, a foreign bank multi-branch master agreement that is a covered QFC solely because the master agreement permits agreements or

transactions that are QFCs to be entered into at one or more Federal branches or agencies of the global systemically important foreign banking organization will be considered a covered QFC for purposes of this part only with respect to such agreements or transactions booked at such Federal branches or agencies.

(b) *Definition of foreign bank multi-branch master agreements.* A foreign bank multi-branch master agreement means a master agreement that permits a Federal branch or agency and another place of business of a foreign bank that is outside the United States to enter transactions under the agreement.

#### **§ 47.8 Exclusion of certain QFCs.**

(a) *Exclusion of QFCs with FMUs.* Notwithstanding § 47.3, a covered bank is not required to conform to the requirements of this part a covered QFC to which:

(1) A CCP is party; or  
(2) Each party (other than the covered bank) is an FMU.

(b) *Exclusion of certain covered entity and covered FSI QFCs.* If a covered QFC is also a covered QFC under part 382 or 252, subpart I, of this title that an affiliate of the covered bank is also required to conform pursuant to part 382 or 252, subpart I, of this title and the covered bank is:

(1) The affiliate credit enhancement provider with respect to the covered QFC, then the covered bank is required to conform the credit enhancement to the requirements of this part but is not required to conform the direct QFC to the requirements of this part; or

(2) The direct party to which the excluded bank is the affiliate credit enhancement provider, then the covered bank is required to conform the direct QFC to the requirements of this part but is not required to conform the credit enhancement to the requirements of this part.

(c) *Exclusion of certain contracts.* Notwithstanding § 47.3, a covered bank is not required to conform the following types of contracts or agreements to the requirements of this part:

(1) An investment advisory contract that:

(i) Is with a retail customer or counterparty;

(ii) Does not explicitly restrict the transfer of the contract (or any QFC entered into pursuant thereto or governed thereby, or any interest or obligation in or under, or any property securing, any such QFC or the contract) from the covered bank except as necessary to comply with section 205(a)(2) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-5(a)(2)); and

(iii) Does not explicitly provide a default right with respect to the contract or any QFC entered pursuant thereto or governed thereby.

(2) A warrant that:

(i) Evidences a right to subscribe to or otherwise acquire a security of the covered bank or an affiliate of the covered bank; and

(ii) Was issued prior to January 1, 2018.

(d) *Exemption by order.* The OCC may exempt by order one or more covered banks from conforming one or more contracts or types of contracts to one or more of the requirements of this part after considering:

(1) The potential impact of the exemption on the ability of the covered bank, or affiliates of the covered bank, to be resolved in a rapid and orderly manner in the event of the financial distress or failure of the entity that is required to submit a resolution plan;

(2) The burden the exemption would relieve; and

(3) Any other factor the OCC deems relevant.

#### **PART 50—LIQUIDITY RISK MEASUREMENT STANDARDS**

■ 4. The authority citation for part 50 continues to read as follows:

**Authority:** 12 U.S.C. 1 *et seq.*, 93a, 481, 1818, and 1462 *et seq.*

■ 5. Section 50.3 is amended by revising the definition of “qualifying master netting agreement” to read as follows:

#### **§ 50.3 Definitions.**

\* \* \* \* \*

*Qualifying master netting agreement* means a written, legally enforceable agreement provided that:

(1) The agreement creates a single legal obligation for all individual transactions covered by the agreement upon an event of default following any stay permitted by paragraph (2) of this definition, including upon an event of receivership, conservatorship, insolvency, liquidation, or similar proceeding, of the counterparty;

(2) The agreement provides the national bank or Federal savings association the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default, including upon an event of receivership, conservatorship, insolvency, liquidation, or similar proceeding, of the counterparty, provided that, in any such case:

(i) Any exercise of rights under the agreement will not be stayed or avoided

under applicable law in the relevant jurisdictions, other than:

(A) In receivership, conservatorship, or resolution under the Federal Deposit Insurance Act, Title II of the Dodd-Frank Act, or under any similar insolvency law applicable to GSEs, or laws of foreign jurisdictions that are substantially similar to the U.S. laws referenced in this paragraph (2)(i)(A) in order to facilitate the orderly resolution of the defaulting counterparty; or

(B) Where the agreement is subject by its terms to, or incorporates, any of the laws referenced in paragraph (2)(i)(A) of this definition; and

(ii) The agreement may limit the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default of the counterparty to the extent necessary for the counterparty to comply with the requirements of part 47, subpart I of part 225, or part 382 of this title, as applicable;

\* \* \* \* \*

Dated: November 20, 2017.

**Keith A. Noreika,**

*Acting Comptroller of the Currency.*

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## Part III

### Securities and Exchange Commission

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Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt Investigatory and Disciplinary Processes Substantially Similar to Nasdaq BX, Inc. and The Nasdaq Stock Market LLC; Notice

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82143; File No. SR–Phlx–2017–92]

### Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt Investigatory and Disciplinary Processes Substantially Similar to Nasdaq BX, Inc. and The Nasdaq Stock Market LLC

November 22, 2017.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b–4 thereunder,<sup>2</sup> notice is hereby given that on November 15, 2017, Nasdaq PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt an investigatory and disciplinary process identical in all material respects to the investigatory and disciplinary processes of Nasdaq BX, Inc. (“BX”) and The Nasdaq Stock Market LLC (“Nasdaq”).

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

Phlx is proposing to adopt processes and related rules concerning investigatory and disciplinary matters involving Phlx Members, Member Organizations, and persons associated with Member Organizations (also known as “Associated Persons”),<sup>3</sup> which are identical in all material respects to the disciplinary process of Phlx’s sister exchange BX, and substantially similar to that of Nasdaq.<sup>4</sup>

<sup>3</sup> Pursuant to Rule 1(n), a Member is a permit holder which has not been terminated in accordance with the By-Laws and these Rules of the Exchange. A Member is a natural person. Pursuant to Rule 1(o), the term “Member Organization” shall mean a corporation, partnership (general or limited), limited liability partnership, limited liability company, business trust or similar organization, transacting business as a broker or a dealer in securities and which has the status of a Member Organization by virtue of (i) admission to membership given to it by the Membership Department pursuant to the provisions of Rules 900.1 or 900.2 or the By-Laws or (ii) the transitional rules adopted by the Exchange pursuant to Section 6–4 of the By-Laws. Accordingly, a Member Organization is an entity and not a person (hence the name “organization”). Pursuant to Rule 908(c), a Member must be affiliated with a Member Organization. Every Member Organization must have at least one Member. A Member cannot be a broker or a dealer nor may a Member have associated persons. The Exchange notes that certain Exchange rules may lead a person to conclude that a Member may be a broker or a dealer and have persons associated with the Member. See, e.g., Rule 600(c). Notwithstanding any such ambiguities in the Phlx rules, a Member cannot be a broker or a dealer, and a Member cannot have persons associated with it on Phlx. In addition, Phlx does not currently have any Members that are a broker or a dealer, nor does it currently have any Members with associated persons. The Exchange will not allow a Member to be a broker or a dealer and have any associated persons in the future unless it amends its rules to allow for such Members and associated persons. Thus, the Exchange is replacing references to “members” in the BX rules with “member organizations” in the New Phlx rules, is replacing references to “persons associated with members” in BX rules with references to “persons associated with member organizations” in the New Phlx rules, and is clarifying any ambiguity in both the proposed New Phlx rules and certain existing Phlx rules that associated persons are associated with member organizations. As discussed above, the Exchange is amending the definition of “Member” to clarify that it is a natural person that is associated with a Member Organization. Accordingly, any references in the rules to an “associated person” or “persons associated with a member organization” also refer to a Member. Thus, any instance where the terms “associated person” or “persons associated with a member organization” occur in the rules and the term “member” is omitted, the rule nonetheless applies to Members. The Exchange is separately reviewing its entire rulebook to determine where other such ambiguities exist and will file a rule change proposal to clarify any additional ambiguities in the rules.

<sup>4</sup> The BX disciplinary rules were based on those of Nasdaq with minor differences to the process

The proposed change will provide uniform investigative and disciplinary processes applied to Members, Member Organizations, and persons associated with Member Organizations of Phlx and members and persons associated with members of BX, and Nasdaq, and harmonize the work FINRA conducts for these exchanges.

FINRA performs, among other things, investigatory and prosecutorial work for Phlx pursuant to a Regulatory Services Agreement between the two parties (the “RSA”).<sup>5</sup> Under the RSA, FINRA is responsible for the investigation of potential violations of Phlx rules and the Exchange Act, and for the prosecution of any such violations thereof, by Phlx Members, Member Organizations, and Associated Persons. Moreover, under the RSA, Phlx’s Regulation Department staff may elect to exercise jurisdiction over a matter involving a Phlx Member, Member Organization, or Associated Person, performing the investigation and any resulting prosecutorial work without FINRA’s involvement. Upon the conclusion of FINRA’s or staff’s investigation of a matter involving a Member, Member Organization, or Associated Person, a proposed resolution is recommended to the Phlx Business Conduct Committee (“BCC”), which is charged with, among other things, the approval of action against a Member, Member Organization, or Associated Person. When a matter is contested, it may be reviewed by a Phlx Hearing Panel, which is charged with issuing a decision in such matters after reviewing evidence and considering arguments.

As discussed in detail below, Phlx is proposing to eliminate the BCC and the related hearings process, and adopt a new Exchange Review Council and a related adjudicatory process that mirrors that of the Exchange’s sister exchanges, BX, and Nasdaq. Under the new process, FINRA’s responsibilities will now include the adjudicatory roles

discussed below. The Exchange is basing its new disciplinary rules on those of BX. Nevertheless, the majority of the new disciplinary rules proposed herein are materially identical to those of Nasdaq as well.

<sup>5</sup> See RSA (January 2013). The Exchange retains ultimate legal responsibility for the regulation of its Members, Member Organizations, and Associated Persons and its market. Both BX and Nasdaq have entered into RSAs with FINRA to perform the work under their respective Rule 8000 and 9000 Series. The Exchange will amend its RSA to include the new processes under New Rule 8000 and 9000 Series, and the related changes proposed herein, thus harmonizing the regulatory work FINRA conducts for all three self-regulatory organizations (“SROs”).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b–4.

currently performed by the BCC<sup>6</sup> and Hearings Panels<sup>7</sup> under the Rule 960 Series, and the Exchange Review Council will serve as the appellate body for cases appealed from new Hearing Panels. The Exchange Review Council will also serve as the appellate body for other determinations made by Phlx, such as reviewing appeals of determinations brought by market makers seeking review of a denial of reinstatement pursuant to Rule 3220, which are currently reviewed by the Exchange's Market Operations Review Committee, as discussed below.<sup>8</sup> The Exchange Review Council will also be responsible for the approval of minor rule violation plan letters and violation letters under New Rule<sup>9</sup> 9216(b), and appeals of Membership Department determinations (for denials of membership pursuant to Rule 923) under the new process.

Decisions<sup>10</sup> issued by the Exchange Review Council may be reviewed by the Exchange Board of Directors ("Board"), which may also issue a decision in the matter.<sup>11</sup> Decisions issued by the Board are considered final action of the Exchange in a matter for purposes of appeals to the Commission.<sup>12</sup> Should the Board decline to review an Exchange Review Council decision, the decision is the final action of the Exchange.<sup>13</sup> Phlx notes that, because the new proposed process is derived from the BX and Nasdaq member investigative and adjudicatory processes, it will provide consistency in the procedure used to investigate and

resolve matters concerning members of three of Nasdaq, Inc.'s U.S. exchanges.<sup>14</sup>

To implement the proposed change, Phlx is amending Phlx By-Law, Article V, Section 5–3, and its rules to adopt substantially similar text to that of BX and Nasdaq, reflect the changes to the process, and delete old text where necessary. Specifically and as discussed in greater detail below, the Exchange is deleting its current Disciplinary Rules found under the Rule 960 Series and replacing them with new investigatory and disciplinary rule sets under the New Rule 8000 and 9000 Series, which are in nearly all material respects identical<sup>15</sup> to the Rule 8000 and 9000 Series of BX, and substantially similar to the Rule 8000 and 9000 Series of Nasdaq.<sup>16</sup> Under the new process, the current BCC and Phlx Hearing Panels are generally being replaced with FINRA's Office of Disciplinary Affairs ("ODA")<sup>17</sup> and new Hearing Panels,<sup>18</sup> although in certain circumstances the BCC is being replaced by the Department of Enforcement,<sup>19</sup> the Department of Market Regulation,<sup>20</sup> Phlx Regulation Department<sup>21</sup> and/or

the Chief Regulatory Officer ("CRO").<sup>22</sup> As a consequence, the Exchange is also eliminating references to the BCC and Phlx Hearings Panels in existing rules, deleting rules specifically relating to the BCC or Phlx Hearings Panels, and in certain cases replacing references to the BCC or Phlx Hearing Panels with the appropriate group or groups responsible for the process. The Exchange notes that, under the proposed New Rules, in certain instances the rules may reference an obligation or right of an Associated Person and not also include such a reference to a Member, notwithstanding that a Member is an Associated Person. In such cases, the obligation or right also applies to the Member unless otherwise expressly noted.

#### Current Phlx Rules and Adjudicatory Process

Responsibility for the adjudication of Phlx rules is divided into two categories: (1) Rules for which the BCC and Hearing Panels are responsible for adjudicating as formal disciplinary proceedings; and (2) Rules under which fines may be assessed or privileges suspended in lieu of disciplinary action.<sup>23</sup> Specifically, in lieu of conducting a formal disciplinary proceeding, Rules 60 (Sanctions for

<sup>14</sup> Nasdaq, Inc.'s other three exchanges, Nasdaq ISE, LLC, Nasdaq GEMX, LLC, and Nasdaq MRX, LLC, are in various stages of harmonizing their investigative and disciplinary processes with those of BX, Nasdaq, and FINRA.

<sup>15</sup> The proposed New Rules are based on the BX rule set, which is substantially similar to the corresponding Nasdaq rule set. Significantly, the Nasdaq rules define Special Panelist, which is a category of Hearing Panelist BX does not have. A Special Panelist is an individual approved by the Nasdaq Board of Directors and selected by the Chief Hearing Officer to participate in proceedings in which certain issues arise, about which Nasdaq determined individuals with appropriate expertise and knowledge should be chosen. See Nasdaq Rule 9120(k). Like BX rules, the Exchange's rules do not provide for such a category of Hearing Panelist and the Exchange does not believe that Special Panelists are needed at this juncture. Nasdaq also has a legacy category of Panelist who the Chief Hearing Officer may select, who is a person that served on FINRA's National Adjudicatory Council ("NAC"), or on a disciplinary subcommittee thereof, prior to the date that Nasdaq commenced operation as a national securities exchange. See Nasdaq Rules 9231(b)(1)(D) and 9820(a)(4). Like BX, the Exchange is not adopting this category of person eligible to serve on a Panel.

<sup>16</sup> As discussed in greater detail below, unlike Nasdaq and BX, the Exchange operates a physical trading floor, which necessitates some changes to accommodate regulation of the floor.

<sup>17</sup> As defined under New Rule 9120(w).

<sup>18</sup> As defined under New Rule 9120(s).

<sup>19</sup> New Rule 9120(f).

<sup>20</sup> New Rule 9120(g).

<sup>21</sup> The Exchange is proposing to adopt a new defined term "Phlx Regulation Department" under New Rule 9120(v), which mirrors the definitions of "the Exchange's Regulation Department" and "Nasdaq Regulation" under BX and Nasdaq Rules 9120(w), respectively, however, the proposed definition also expressly includes the Exchange's Enforcement Department. Options Exchange Officials and Exchange staff acting in certain capacities are also considered staff of the Phlx

Regulation Department. See note 47, *infra* for a description of the Phlx Regulation Department. The Exchange's Enforcement Department is specifically charged with pursuing disciplinary action against Members, Member Organizations, Associated Persons and persons subject to the Exchange's jurisdiction, and it is not affiliated with FINRA's Department of Enforcement.

<sup>22</sup> The Exchange is replacing the BCC with the CRO instead of the ODA where the responsibilities under the rule do not fall within the ODA's purview under the Codes of Procedure for FINRA, BX, Nasdaq or any other exchange. For example, Rule 777(a) prohibits a branch office manager of any member organization, an employee of any member organization engaged in trading in securities for the organization, and a securities salesman of any member organization, from guaranteeing the payment of the debit balance, in a customer's account, to his employer or to any other creditor carrying such account, without the prior written consent of the BCC. The Exchange is proposing to replace the BCC with the CRO in this instance because this is not a normal function of the ODA and the CRO is in the best position to make such determinations. The Exchange is also replacing the BCC's role in determining penalties under the Advices with the Department of Enforcement, the Department of Market Regulation, and Phlx Regulation Department, which will each individually have the authority to assess, and determine the amount of, fines under the Advices after repeated violations thereof, with the exception of the Advices relating to Order and Decorum for which the Phlx Regulation Department will be solely responsible for assessing and determining the amount of fines thereunder.

<sup>23</sup> Fines may be assessed by an Options Exchange Official or by Exchange staff. In certain circumstances, an Options Exchange Official and an officer of the Exchange, as defined by Rule 60(c)(ii), may exclude a Member from the trading floor.

<sup>6</sup> As described below, case authorization and adjudicatory functions of the BCC and current Hearing Panels will be administered by FINRA's Office of Disciplinary Affairs and Office of Hearing Officers, while other functions of the BCC will be handled by the Phlx Regulation Department, Department of Enforcement, and the Department of Market Regulation. In certain existing rules where the responsibilities under the rule do not fall within the Office of Disciplinary Affairs' purview under the Codes of Procedure for FINRA, BX, Nasdaq or any other exchange, the Exchange is replacing the BCC with the Chief Regulatory Officer instead of the Office of Disciplinary Affairs.

<sup>7</sup> As described below, the current functions of the Phlx Hearings Panels will be handled by FINRA's Hearing Panels.

<sup>8</sup> See New Rule 1(k). The Exchange Review Council will also review appeals brought under the New Rule 9280 (Contemptuous Conduct), New Rule 9520 Series (Eligibility Proceedings), New Rule 9550 Series (Expedited Proceedings), and New Rule 9600 Series (Procedure for Exemptions).

<sup>9</sup> Citation to rules of the proposed 8000 and 9000 Series herein will be preceded by "New Rule."

<sup>10</sup> As defined by New Rule 9349. See also BX Rule 9349 and Nasdaq Rule 9349.

<sup>11</sup> See New Rule 9351(d) and (e).

<sup>12</sup> 15 U.S.C. 78s(d).

<sup>13</sup> See New Rule 9349(c).

Breach of Regulations) and 970 (Floor Procedure Advices: Violations, Penalties, and Procedures) provide alternative disposition of violations through assessment of a fine and/or suspension of trading floor privileges.<sup>24</sup> Rules 60 and 970 provide the process for administering fines for violations of the Options Floor Procedure Advices and Equity Floor Procedure Advices<sup>25</sup> (collectively, the “Advices”), which include regulations that comprise the Exchange’s minor rule violation plan (“MRVP”) as well as violations of Order and Decorum Regulations that are not included in the Exchange’s MRVP but may be considered minor in nature and thus possibly resolved outside of the formal disciplinary process.<sup>26</sup>

Generally, notice to the SEC of final disciplinary action by an SRO is required pursuant to Rule 19d–1 of the Exchange Act; however, uncontested fines of \$1,000 or less or exclusion of a clerical employee from the trading floor for five days or less for violations of regulations that relate to administration of order, decorum, health, safety, and welfare (“Order and Decorum”) are not required to be reported to the SEC. In addition, uncontested fines of \$2,500 or less assessed for violation of MRVP rules are subject to abbreviated periodic SEC reporting.

Rule 60 provides the process for regulating Order and Decorum on the Exchange’s trading floor. The Order and Decorum rules are found under Section H of the Options Floor Procedure Advices. Pursuant to Rule 60, both Exchange staff and Options Exchange Officials<sup>27</sup> have authority to fine a

Member, Member Organization, or Associated Person for violations of any of the Order and Decorum regulations under the Options Floor Procedure Advices in lieu of conducting a formal disciplinary proceeding.

In addition, an Options Exchange Official and an officer of the Exchange may exclude a Member or Associated Person from the trading floor. Both Exchange staff and Options Exchange Officials may alternatively refer the matter to the BCC for formal disciplinary proceeding, which would be charged with determining whether a fine or formal disciplinary proceeding is appropriate.

Under Rule 60, a Member, Member Organization, or Associated Person may contest a fine by requesting a hearing before a Hearing Director appointed by the Chair of the BCC, who may overturn, affirm, or modify the citation. The Hearing Director’s determination is final. A determination to exclude a Member, Member Organization, or Associated Person from the trading floor is not appealable.

Rule 970 provides the process for regulating other behavior pursuant to the Advices not related to Order and Decorum through assessment of a fine.<sup>28</sup> Fines assessed under the Advices increase with each subsequent violation

adjacent thereto; (ii) the activities of specialists, registered option traders, floor brokers, or other types of market makers and shall establish standards and procedures for the training and qualification of members active on the trading floor; (iii) all trading floor employees of members, and shall make and enforce such rules with respect to such employees as it may deem necessary; (iv) all connections or means of communications with the options trading floor and may require the discontinuance of any such connection or means of communication when, in the opinion of the President or his designee, it is contrary to the welfare or interest of the Exchange; (v) the location of equipment and the assignment and use of space on the options trading floor; and (vi) relations with other options exchanges. See Rule 1000(e).

<sup>28</sup> Under the Advices, the Exchange assesses fines ranging from \$50 to \$10,000. Pursuant to paragraph (c) of Rule 19d–1 of the Exchange Act, the Commission allows SROs to submit for Commission approval plans for the abbreviated reporting of minor disciplinary infractions (*i.e.*, an MRVP). Any disciplinary action taken by an SRO against any person for violation of a rule of the SRO which has been designated as a minor rule violation pursuant to such an MRVP filed with, and declared effective by, the Commission shall not be considered “final” for purposes of Rule 19d–1(c)(1) of the Exchange Act if the sanction imposed consists of a fine not exceeding \$2,500 and the sanctioned person has not sought an adjudication, including a hearing, or otherwise exhausted his administrative remedies under Section 19d–1(c)(2). Most fines assessed under both Advices that do not exceed \$2,500 are included in the MRVP pursuant to Exchange Act Rule 19d–1(c)(2). Order and Decorum Regulations under the Option Floor Procedure Advices, however, are not included in the MRVP, but may be subject to an exemption from the notice requirement of Exchange Act Rule 19d–1(c)(1) if the fine does not exceed \$1,000.

and after a set number of repeated violations, are thereafter are [sic] assessed at the discretion of the BCC, which may, as an alternative to assessing a fine, recommend the matter for formal disciplinary proceeding. Notwithstanding, determinations to issue a fine are made on a case by case basis, whereby the Exchange considers the individual facts and circumstances to determine whether a fine of more or less than the recommended amount is appropriate for the violation, or whether the violation requires formal disciplinary action. Fines of \$2,500 or less levied for violations of the Advices, other than Order and Decorum, are included in the Exchange’s MRVP, whereas any fine exceeding \$2,500 under the Advices is not. If a Member, Member Organization, or Associated Person contests a fine, it must provide a written response meeting the requirements of an “Answer,” as set forth in Rule 960.4, which is thereafter provided to the BCC for its consideration.

With respect to violations that are adjudicated by the BCC and Hearing Panels, Rule 960.2(f)(i) requires the BCC to direct Exchange staff to initiate a Statement of Charges when it appears that there is probable cause for finding that a violation within the jurisdiction of the Exchange has occurred and disciplinary action is warranted.

The BCC is a Board-appointed committee<sup>29</sup> with jurisdiction to monitor compliance with the Act and the rules and regulations thereunder, the By-Laws and rules of the Exchange or any interpretation thereof, and the rules, regulations, resolutions, and stated policies of the Board or any Exchange committee, by Members, Member Organizations, and Associated Persons.<sup>30</sup> The BCC reviews disciplinary matters involving Members, Member Organizations, and Associated Persons, which are first identified generally by Phlx’s Market Surveillance group and referred to FINRA to investigate and to propose a recommended resolution pursuant to the RSA.<sup>31</sup>

Under the RSA, FINRA is responsible for, among other things, the investigation of matters referred from the Phlx Market Surveillance and

<sup>29</sup> The BCC meets quarterly and on an as-needed basis.

<sup>30</sup> See Phlx By-Law, Article V, Sec. 5–3(b).

<sup>31</sup> The Phlx Market Surveillance group is responsible for detecting potentially violative conduct among Members, Member Organizations, and Associated Persons and referring such conduct to FINRA for investigation pursuant to the RSA. In a small number of cases, Phlx enforcement staff will investigate potentially violative conduct and recommend a resolution to the BCC.

<sup>24</sup> None of the fines assessed in lieu of formal disciplinary action exceed [sic] \$10,000. Under both Rules 60 and 970, matters may alternatively be referred for formal disciplinary proceedings.

<sup>25</sup> The Exchange notes that it no longer operates an equity trading floor. The regulations under the Equity Trading Floor Advices relate to requirements such as notices, record retention, and compliance with Exchange inquiries.

<sup>26</sup> For example, Options Floor Procedure Advice F–35 concerns violations of exercise and exercise advice rules for noncash-settled equity option contracts imposes a fine of \$1,000 for the first violation of the Advice, a fine of \$2,500 for the second violation of the Advice, and \$5,000 for the third and each subsequent violation of the Advice. The first two fines would fall under the Exchange’s MRVP as they are \$2,500 or less in amount, whereas the third and subsequent violations would not as they are in excess of \$2,500, but may be considered as “minor” and not subject to formal disciplinary action. As is currently the case, the Exchange may choose to pursue formal disciplinary action in lieu of resolving a violation of the Advices through fine and/or suspension.

<sup>27</sup> The President of the Exchange and his designated staff shall have general supervision over: (i) The options trading floor as well as general supervision of the dealings of members on the trading floor and on Exchange trading systems and of the premises of the Exchange immediately

Membership departments, and the performance of routine and cause examinations of Phlx Members, Member Organizations, and Associated Persons. FINRA is also responsible for providing services related to Phlx's formal disciplinary process, including issuance of Wells Notices, Cautionary Action Letters, Statements of Charges, settlements, disciplinary decisions, and prosecution.

Upon completion of an investigation, FINRA analyzes the evidence and applicable law, and makes a preliminary determination of whether or not a violation appears to have occurred. Known as a "Sufficiency of Evidence" review, it is the same process followed by FINRA staff in matters involving Members, Members Organizations and Associated Persons for the Exchange; however, in such matters the BCC provides authorization to proceed as proposed by FINRA instead of the ODA, as described below.<sup>32</sup> The Sufficiency of Evidence review determines whether FINRA will recommend that the Exchange negotiate a settlement, issue a Cautionary Action Letter, or pursue formal action against a Member, Member Organization, or Associated Person.<sup>33</sup> FINRA presents its recommendations to the BCC for approval at both periodic and *ad hoc* meetings. In order to become an official action of the Exchange, FINRA must gain BCC approval of its recommendation.<sup>34</sup> The BCC may approve, deny or modify each recommendation presented to it. In cases that FINRA recommends issuance of a Statement of Charges,<sup>35</sup> it prepares a memorandum and draft Statement of Charges for review and approval by the BCC. In certain cases, FINRA will also negotiate a settlement with a Respondent in addition to recommending the issuance of a Statement of Charges. In such cases, FINRA will provide the BCC with an offer of settlement together with a draft Statement of Charges for the BCC's review and approval.<sup>36</sup> If a

recommendation to issue a Statement of Charges is approved, FINRA will finalize the approved Statement of Charges based on the BCC's recommendation, which is signed by the BCC's chairperson and then served on the Member, Member Organization, and/or Associated Person.<sup>37</sup>

In certain cases, a Member, Member Organization, or Associated Person will not accept the allegations made against it in the Statement of Charges. If a Member, Member Organization, or Associated Person does not agree with the allegations, it may request that a Hearing Panel review the matter pursuant to Rule 960.5(a)1. Hearing Panels are charged with reviewing the facts and circumstances of a contested matter, and determining whether the Member, Member Organization, or Associated Person has committed a violation and if so, what the appropriate sanctions are, if any. A Hearing Panel also issues a written decision in conformity with its determination.<sup>38</sup> Moreover, a Hearing Panel may hold summary disposition hearings and issue a summary decision in cases where any Member, Member Organization, or Associated Person has admitted to a violation, or if there is no dispute concerning those material facts which give rise to such a violation.<sup>39</sup> Pursuant to Rule 960.9, a Hearing Panel decision may be appealed to the Board.

The BCC may also examine the business conduct and financial condition of a Member, Member Organization or Associated Person, and may authorize the initiation of any disciplinary actions or proceedings brought by the Exchange.<sup>40</sup> With respect to disciplinary actions, the BCC or its designee (including a Hearing Panel) shall impose appropriate sanctions of expulsion, suspension, fine, censure or any other fitting sanction where the BCC or its designee finds that a violation within the disciplinary jurisdiction of the Exchange has been committed.<sup>41</sup> The BCC may also direct a general

partner(s) or an executive officer(s) of a Member Organization to appear before the BCC or its designee for examination upon forty-eight hours' notice, either oral or in writing and, after such examination, the BCC has authority to suspend such Member Organization until the requirements of the financial responsibility and reporting rule<sup>42</sup> are fully met.

The BCC may also prescribe regulations for the carrying of securities on margin by Members and Member Organizations for customers, and it may also make such regulations in regard to the segregation or hypothecation of securities carried in customers' accounts as it deems advisable.<sup>43</sup> The BCC may prohibit trading by a Member or Member Organization that is excessive in view of such person's or organization's capital.<sup>44</sup> The BCC may require or request detailed financial reports or such other operational reports as it deems necessary,<sup>45</sup> and supervise the advertising of Members and Member Organizations.<sup>46</sup>

#### The New Process and FINRA's Role Resolution by Fine or Acceptance, Waiver, and Consent

Under the proposed new process, the Exchange will continue to have authority to resolve certain violations outside of the formal disciplinary process. Options Exchange Officials and Exchange staff will continue to have authority to investigate possible violations of the Advises, issue fines, and in certain cases suspend trading floor access for violations of the Advises. The authority to resolve violations outside of the formal disciplinary process exists under proposed New Rule 9216. New Rule 9216 provides alternatives to the issuance of a formal complaint and the initiation of a formal disciplinary proceeding, which include the assessment of fines or exclusion from the Exchange's options trading floor. The Exchange is proposing to adopt New Rule 9216(a) (Acceptance, Waiver, and Consent Procedures). It will provide a new process by which the Phlx Regulation Department, the Department of Enforcement or the Department of Market Regulation<sup>47</sup>—if they have

<sup>32</sup> See FINRA Regulatory Notice 09-17 (March 2009) at 3 (available at <http://www.finra.org/sites/default/files/NoticeDocument/p118171.pdf>).

<sup>33</sup> *Id.*

<sup>34</sup> Rule 960.2.

<sup>35</sup> Rule 960.3.

<sup>36</sup> The offer of settlement is negotiated with, and signed by, the Respondent prior to FINRA's presentation of the proposed Statement of Charges to the BCC. Providing a draft Statement of Charges together with the proposed offer of settlement to the BCC at the same meeting facilitates expeditious resolution in cases where both parties have come to an agreement on how to settle the matter. The process also allows the BCC to consider the facts and circumstances of the matter at the time it is presented to it for approval, including that the Respondent has committed to settle the matter

based on the Statement of Charges recommended by FINRA. If the BCC approves the issuance of the Statement of Charges in these matters it also accepts the offer of settlement, and considers it the Respondent's Answer. Like other matters involving an offer of settlement, where the BCC accepts an offer of settlement it must issue a decision and impose sanctions consistent with the terms of such offer. See Rule 960.7. Thus, after issuance of the Statement of Charges and acceptance of the offer of settlement, FINRA provides the BCC Chair, or its designee, with a draft Decision informing the Respondent that the BCC has accepted the offer of settlement.

<sup>37</sup> Rule 960.3.

<sup>38</sup> Rule 960.5(a)(3).

<sup>39</sup> Rule 960.6.

<sup>40</sup> Phlx By-Law, Article V, Sec. 5-3(b).

<sup>41</sup> *Id.*

<sup>42</sup> See Phlx By-Law, Article V, Sec. 5-3(b)(c); see also Rule 703.

<sup>43</sup> Phlx By-Law, Article V, Sec. 5-3(b)(d). Such proscriptive power is subject to the SEC rulemaking process.

<sup>44</sup> Phlx By-Law, Article V, Sec. 5-3(b)(e).

<sup>45</sup> Phlx By-Law, Article V, Sec. 5-3(b)(f).

<sup>46</sup> Phlx By-Law, Article V, Sec. 5-3(b)(g).

<sup>47</sup> Phlx is adopting new defined terms "Department of Enforcement" the "Department of

reason to believe a violation has occurred and the Member, Member Organization or Associated Person does not dispute the violation—may prepare and request that the Member, Member Organization or Associated Person execute a letter accepting a finding of violation, consenting to the imposition of sanctions, and agreeing to waive such Member's, Member Organization's or Associated Person's right to a hearing before a Hearing Panel or, if applicable, an Extended Hearing Panel, and any right of appeal to the Exchange Review Council, the Commission, and the courts, or to otherwise challenge the validity of the letter, if the letter is accepted. If the acceptance, waiver and consent is accepted, the matter is resolved without issuance of a complaint. The Exchange does not currently have an analogous process. However, the Exchange believes that providing its Members, Member Organizations and Associated Persons the optionality to dispose of a matter prior to the issuance of a complaint will make the process fairer for its participants. In certain respects, the process is similar to the Exchange's current offer of settlement process, discussed above, by which FINRA recommends acceptance of an offer of settlement and provides a draft Statement of Charges to the BCC for its review and approval, together with an executed offer of settlement. This process results from negotiation with the Member, Member Organization or Associated Person prior to the approval of the offer of settlement, like an acceptance, waiver, and consent. An important difference is that, unlike the current offer of settlement process, which requires the issuance of a

Market Regulation" under New Rules 9120(f) and (g), respectively, which are also defined in BX and Nasdaq under their respective Rules 9120. These two departments are authorized to act on behalf of BX and Nasdaq in investigating and administering disciplinary matters pursuant to [sic] regulatory service [sic] agreement, and will do the same for Phlx upon adoption of the new process. Phlx is also adopting a new defined term "Phlx Regulation Department," which is the department of Phlx that administers the Code, and includes the Phlx Enforcement Department. See New Rule 9120(v); see also note 21, *supra*. As described above, Options Exchange Officials, and Exchange staff acting in certain capacities are also considered staff of the Phlx Regulation Department. Phlx notes that the Phlx Regulation Department currently exists and is responsible for, among other things, preparing matters for review by the BCC. Under the new process, the Phlx Regulation Department will have the option of investigating and bringing matters to the ODA directly for review and possible authorization of a disciplinary action, or alternatively may provide a matter to the Department of Enforcement or Department of Market Regulation to investigate and present to the ODA for possible authorization of a disciplinary action.

Statement of Charges and decision, an acceptance, waiver and consent under New Rule 9216(a) is proposed in lieu of a complaint.<sup>48</sup> Thus, under the new rule, if the Phlx Regulation Department, the Department of Enforcement or the Department of Market Regulation has reason to believe a violation has occurred and the Member, Member Organization, or Associated Person does not dispute the violation, then the Phlx Regulation Department, the Department of Enforcement or the Department of Market Regulation may prepare and request that the Member, Member Organization, or Associated Person execute a letter accepting the violation, consenting to the imposition of sanctions, and agreeing to waive any right of appeal, if the letter is accepted.<sup>49</sup> The letter must be approved by the Review Subcommittee,<sup>50</sup> FINRA's ODA,<sup>51</sup> or the Exchange Review Council to become a final action of the Exchange.<sup>52</sup> The process under New Rule 9216(a) is the same process used by BX and Nasdaq under their respective Rules 9216(a).

The Exchange is also adopting New Rule 9216(b) to address the process for administering violations of regulations that are resolved by assessment of a fine, including regulations subject to the Exchange's minor rule violation regulations,<sup>53</sup> other than Order and Decorum, in lieu of the current process under Rule 970.<sup>54</sup> The Exchange is adopting procedures applicable to violations of the Advices subject to the MRVP under New Rule 9216(b)(1), and is adopting procedures applicable to other violations of the Advices not included in the MRVP under New Rule

9216(b)(2). The Exchange notes that neither BX nor Nasdaq have [sic] regulations analogous to the Advices with fines up to \$10,000. Therefore, BX and Nasdaq do not need to adopt separate rules addressing how violations resolved through a fine in lieu of formal disciplinary proceedings in excess of \$2,500 are managed. Thus, both BX and Nasdaq Rules 9216(b) solely address the procedures for violations of rules subject to their respective MRVPs pursuant to Rule 19d-1(c)(2) of the Exchange Act.

The Exchange is proposing to adopt New Rule 9216(b)(1) to address the process for administering fines included in the Advices that do not exceed \$2,500 and are included in the MRVP. Unlike Rule 970, which provides a process whereby the Exchange issues a citation that may be subsequently contested by the Member, Member Organization, or Associated Person, New Rule 9216(b) does not provide a similar process. Under New Rule 9216(b)(1) and like the comparable rules of BX and Nasdaq, the Department of Enforcement or Department of Market Regulation may prepare and provide an MRVP letter to a Member, Member Organization, or Associated Person for its signature. Unlike the BX and Nasdaq rules, the Exchange is also vesting the Phlx Regulation Department with the same authority given to the Department of Enforcement and Department of Market Regulation to administer the MRVP letter process.<sup>55</sup> The Exchange notes that a Member, Member Organization, or Associated Person is not obligated to agree to the terms of an MRVP fine or submit an MRVP letter for approval. The Exchange will issue an MRVP letter for execution by the Member, Member Organization, or Associated Person,<sup>56</sup> and the executed letter must thereafter be approved by the Exchange Review Council, Review Subcommittee or the ODA.<sup>57</sup> If the terms are not accepted, then the

<sup>48</sup> The Exchange is also adopting New Rule 9270, which provides the settlement process once a complaint has been issued in a matter. Thus, the process under New Rule 9216(a) occurs in lieu of the issuance of a complaint, whereas the process under New Rule 9270 is applicable to Respondents that have been provided notice that a proceeding has been instituted against him or her [sic]. New Rule 9270 will replace the settlement process provided under Rule 960.7, as discussed below.

<sup>49</sup> New Rule 9216(a)(1).

<sup>50</sup> As defined in New Rule 9120(bb).

<sup>51</sup> The Office of Disciplinary Affairs is a FINRA group independent of the enforcement function. See discussion *infra*, p. 25 [sic].

<sup>52</sup> New Rule 9216(a)(3) and (4).

<sup>53</sup> The Exchange's minor rule violation regulations include both fines included in its MRVP and other fines up to \$10,000.

<sup>54</sup> As discussed below, the Exchange is adopting New Rules 9216(b)(1)(E) and 9216(b)(2)(E) to account for the process provided under Rule 970 concerning imposing fines under the Option Floor Procedure Advices, when the number of violations under Exchange Rules is determined based upon an exception-based surveillance program. BX and Nasdaq Rules 9216(b) do not have a similar rule, allowing "batching" of violations under certain conditions. Thus, the Exchange is keeping the process provided by Rule 970, Commentary .01.

<sup>55</sup> The Phlx Regulation Department would prepare MRVP letters (and violation letters as discussed below) when it is the body that investigated the violation. This would occur commonly with violations of floor-based Advices. Options Exchange Officials are considered members of the Phlx Regulation Department, as are Exchange Staff when acting pursuant to the Advices; thus, Options Exchange Official and Exchange Staff rulings are considered action of the Phlx Regulation Department.

<sup>56</sup> New Rule 9216(b)(1)(A).

<sup>57</sup> New Rule 9216(b)(1)(C). The Exchange notes that, as is the case with BX and Nasdaq Rules 9216(b), a letter issued under New Rule 9216(b) is considered an action of the Review Council; however, the Review Subcommittee of the Review Council or ODA may accept such a letter on behalf of the Review Council by delegated authority. See New Rules 9216(b)(1)(A) and (C), and New Rules 9216(b)(2)(A) and (C).

Exchange or FINRA on behalf of the Exchange may pursue formal disciplinary proceedings.<sup>58</sup> As a consequence, under the New Rules there is no ability for a fine to be reversed, modified or affirmed, prior to formal disciplinary proceedings. The Exchange notes that this is consistent with the processes used by BX, Nasdaq, and FINRA.

The Exchange will follow the same process for violations of the Advices not included in the MRVP.<sup>59</sup> Specifically, the Exchange is proposing to adopt New Rule 9216(b)(2) to address the Exchange's authority to issue fines for violation of the Advices, other than violation of the Order and Decorum regulations, that exceed \$2,500 (and are thus not included in the MRVP), but are not greater than \$10,000. As discussed above, under Rule 970 the Exchange has authority to assess a fine up to \$10,000 under the Advices in lieu of pursuing formal disciplinary proceedings. The Exchange is proposing to provide the same procedures as applied to fines assessed for violations of regulations subject to the MRVP. However, violations of the Advices that result in a fine greater than \$2,500 up to the maximum fine assessed under the Advices of \$10,000 are not eligible for an exception to the reporting requirements of Rule 19d-1(c)(1) of the Act.<sup>60</sup>

Last, the Exchange is proposing to adopt New Rule 9216(c) to address the process followed for violations of the Order and Decorum regulations under the Advices, none of which are [sic] included in the MRVP. The fines assessed for violations of the Order and Decorum Advices range from \$50 to \$10,000. Thus, fines assessed for violation of Order and Decorum regulations of \$1,000 or less may be exempt from the reporting requirements of Rule 19d-1(c)(1) of the Exchange Act.<sup>61</sup> The Exchange notes that, because BX and Nasdaq do not have trading floors, their respective Rules 9216 do not address violations of Order and Decorum. Accordingly, the Exchange is incorporating the provisions of current Rule 60 into proposed New Rule

9216(c), largely unchanged. The Exchange is retaining sole jurisdiction to review violations of Order and Decorum under New Rule 9216(c) because the regulations arise from the operation of the trading floor. Nevertheless, non-compliance with the Order and Decorum regulations may result in referral for formal disciplinary action, which would then proceed pursuant to the New Rule 9000 Series.<sup>62</sup>

#### Disciplinary Process

With respect to the formal disciplinary process, Phlx is retiring the BCC and its related processes and adopting new policy and disciplinary processes that are derived from those of BX and Nasdaq. Phlx and FINRA amended the RSA to include the processes formerly conducted by the BCC and Hearing Panels. As such, FINRA will now not only investigate possible violation of Phlx rules and federal securities laws and recommend action against Members, Member Organizations, and Associated Persons, but FINRA will also adjudicate matters pursuant to the Exchange's new rules.<sup>63</sup> In this regard, the case authorization and adjudicatory functions of the BCC and current Hearing Panels will be administered by FINRA's ODA and Office of Hearing Officers ("OHO"), respectively.

The ODA is an office within FINRA, independent of the FINRA enforcement function and not involved in investigating or litigating cases.<sup>64</sup> Similar to the BCC, the ODA reviews each proposed complaint to determine the legal and evidentiary sufficiency of proposed charges and settlements.<sup>65</sup>

<sup>62</sup> In cases where the Phlx Regulation Department determines that formal disciplinary action is appropriate for a violation of Order and Decorum, it would provide the recommendation to the ODA directly, or may provide it to the Department of Enforcement or Department of Market Regulation to manage the ODA review process. See, e.g., New Rule 9216(c). The Exchange notes that Phlx Regulation Department may provide the recommendation to the ODA directly, or may provide it to the Department of Enforcement or Department of Market Regulation to manage the ODA review process for each of the processes under New Rule 9216(a), (b) and (c). As discussed above, both Options Exchange Officials and Exchange Staff are considered members of the Phlx Regulation Department. *Supra* note 55.

<sup>63</sup> In certain instances, as set forth in proposed New Rule 9211(a)(1), Phlx Regulation will retain discretion to investigate potentially violative conduct itself and recommend a resolution to FINRA. In this respect, New Rule 9211(a)(1) will differ from the corresponding provisions of the BX and Nasdaq Rules.

<sup>64</sup> *Supra* note 32 at 4.

<sup>65</sup> *Id.* The ODA also reviews and accepts uncontested offers of settlement for FINRA matters (FINRA Rule 9270(e)(2)), and for BX and Nasdaq matters pursuant to their respective Rules 9270(e)(2). The ODA also has sole authority to

Like matters presented to the BCC for its determination of whether to initiate charges,<sup>66</sup> a recommendation proposed by FINRA staff or the Phlx Regulation Department as proposed herein in a matter involving formal disciplinary action cannot proceed without approval by the ODA.<sup>67</sup> If a complaint is authorized by the ODA, then FINRA's Department of Enforcement or the Department of Market Regulation or the Phlx Regulation Department as proposed herein<sup>68</sup> must issue the complaint, which is filed with the OHO.<sup>69</sup>

The OHO, like the ODA, is an independent office within FINRA not

accept or reject uncontested offers of settlement involving affiliates of BX and Nasdaq pursuant to their respective Rules 9270(e). As a practical matter, FINRA has informed the Exchange that the ODA reviews nearly all uncontested offers of settlement for possible acceptance, however, the ODAs authority to *reject* uncontested offers of settlement is limited to those involving affiliates of the Exchange. Accordingly, the Exchange is proposing to make it clear in New Rule 9270(e) and subparagraph (2) thereunder that the ODA may accept an offer of settlement and order of acceptance or refer them to the Exchange Review Council, and it may also reject uncontested offers of settlement in matters involving an affiliate of the Exchange pursuant to New Rule 9270(e).

<sup>66</sup> See Rule 960.2(f).

<sup>67</sup> *Supra* note 32 at 4; see also New Rule 9211(a).

<sup>68</sup> In addition to retaining discretion to investigate potentially violative conduct and recommending a resolution to FINRA, the Phlx Regulation Department is also retaining discretion to prosecute matters as a party before Hearing Panels. As a consequence, the Exchange has included reference to the Phlx Regulation Department in the New Rule 9200, 9300 and 9800 Series whereas the analogous rules of BX and Nasdaq do not include references to their respective Regulation Departments. Likewise, the Exchange is proposing to include the Phlx Regulation Department in the definition of "Party" under proposed New Rule 9120(z) for purposes of the New Rule 9200, 9300 and 9800 Series. The Exchange is also including the New Rule 9400 Series as covered by the term "Party." Although, omitted from the related definitions of "Party" under the BX, Nasdaq and FINRA rules, the Exchange believes that it is appropriate to include the New Rule 9400 Series because it concerns expedited client suspensions whereby the Phlx Regulation Department, Department of Enforcement, or the Department of Market Regulation at the direction of the CRO or another senior officer, may initiate expedited suspension proceedings with respect to alleged violations of Rule 774. The New Rule 9400 Series includes a hearings process in which the Phlx Regulation Department, Department of Enforcement, or the Department of Market Regulation and the Member, Member Organization or Associated Person subject to expedited suspension are considered Parties to the matter. The Exchange notes that, although the BX and Nasdaq rules do not include the Department of Enforcement or the Department of Market Regulation, nor do they mention FINRA, it believes that including FINRA and its departments in proposed New Rule 9400 Series is appropriate because they may be involved in the initiation of such a matter for BX and Nasdaq currently. Thus, the proposed addition is a clarifying change. As such, the Exchange believes that including the New Rule 9400 Series under the definition "Party" is appropriate.

<sup>69</sup> See New Rule 9212(a)(1).

<sup>58</sup> New Rule 9216(b)(1)(D).

<sup>59</sup> Instead of issuing an MRVP letter, letters issued by the Exchange under New Rule 9216(b)(2) are termed "violation letters." As a consequence of the two types of minor rule violation letters, the Exchange is adopting New Rule 9143(e)(3) and New Rule 9144(c)(3), which discuss certain waivers in relation to ex parte communications and separation of functions, to include violation letters in addition to MRVP letters. As a consequence, these two new rules differ from the analogous rules of BX and Nasdaq, neither of which have [sic] violation letters.

<sup>60</sup> See 17 CFR 240.19d-1(c)(1); *supra* note 28.

<sup>61</sup> *Id.*

involved in investigating or litigating cases. The OHO is responsible for the administration of the hearing process. Under the new process, hearings will be held before a Hearing Officer and two Panelists, with limited exception.<sup>70</sup> Panelists are selected by the Chief Hearing Officer and must be a person who: (i) Previously served on the Exchange Review Council; (ii) previously served on a disciplinary subcommittee of the Exchange Review Council, including a Subcommittee, an Extended Proceeding Committee, or their predecessor subcommittees; (iii) previously served as a Director, or as a Governor of the Exchange prior to its acquisition by Nasdaq, Inc., but does not serve currently in that position; or (iv) is a FINRA Panelist approved by the Board at least annually, including a member of FINRA's Market Regulation Committee or who previously served on the Market Regulation Committee not earlier than four years before the date the complaint was served upon the Respondent who was the first served Respondent in the disciplinary proceeding for which the Hearing Panel or the Extended Hearing Panel is being appointed, or from other sources the Board deems appropriate given the responsibilities of Panelists.<sup>71</sup>

Upon the filing of a complaint, the respondent is afforded time to reply and request a hearing.<sup>72</sup> The hearing process begins at this juncture, unless the respondent waives a hearing,<sup>73</sup> and the Hearing Officer, Hearing Panel or, if applicable, the Extended Hearing Panel,<sup>74</sup> does not order a hearing on his

or her own motion.<sup>75</sup> Should a hearing be waived and the Hearing Officer or Hearing Panel declines [sic] to hold a hearing, the matter may be considered by the Hearing Panel on the record, as defined in New Rule 9267.<sup>76</sup> Should the hearing process proceed, it is governed by the New Rule 9200 Series. The hearing process concludes with either all of the causes of action in the matter summarily disposed of on motion,<sup>77</sup> acceptance of an offer of settlement,<sup>78</sup> or the issuance of a decision by the Hearing Panel.<sup>79</sup>

#### The Exchange Review Council

The Exchange is eliminating two committees under the By-Laws and adopting the Exchange Review Council in their stead. The Exchange Review Council will have, in all material respects, the same broad authority as the BX and Nasdaq Review Councils.<sup>80</sup> As such, the new Exchange Review Council will be charged with ensuring the consistent and fair application of the rules pertaining to discipline of Members, Member Organizations, and Associated Persons, and considering

and Hearing Panelists include references to Extended Hearing Panels and Extended Hearing Panelists, and references to Subcommittees and Subcommittee members include references to Extended Proceeding Committees and Extended Proceeding Committee members, unless otherwise noted.

<sup>75</sup> See New Rule 9120 for definitions of these terms.

<sup>76</sup> New Rule 9221(c).

<sup>77</sup> After a hearing on the merits has commenced, either the Respondent or the Phlx Regulation Department, the Department of Enforcement or the Department of Market Regulation may make a motion for summary disposition of any or all of the causes of action in the complaint with respect to that Respondent or defenses raised in that Respondent's answer only with leave of the Hearing Officer. See New Rule 9264.

<sup>78</sup> New Rule 9270.

<sup>79</sup> New Rule 9268.

<sup>80</sup> The Review Councils of BX and Nasdaq preside over matters involving appeals of their respective Rules 4612 (Registration as an Equities/Nasdaq Market Maker), 4619 (Withdrawal of Quotations), 4620 (Voluntary Termination of Registration), and 11890 (Clearly Erroneous Transactions). See Rules 0120(m) of BX and Nasdaq. Moreover, the Nasdaq Review Council presides over matters involving appeals of Nasdaq Options Rule Chapter V Section 6 (Obvious and Catastrophic Errors). See Nasdaq Rule 0120(m). The Exchange Review Council presides over matters involving, in part, appeals of Rules 124 (Disputes-Options), 1092 (Obvious Errors and Catastrophic Errors), 3219 (Withdrawal of Quotations), 3220 (Voluntary Termination of Registration), and 3312 (Clearly Erroneous Transactions). See New Rule 1(k). BX and Nasdaq Rules 4619, 4620 and 11890 are materially identical to Exchange Rules 3219, 3220 and 3312, respectively. Nasdaq Options Rule Chapter V, Section 6, and Exchange Rule 1092 both address obvious and catastrophic errors on their respective options markets. Last, Exchange Rule 124 is unique to Phlx as it addresses disputes occurring on and relating to the Exchange's trading floor. Neither BX nor Nasdaq have [sic] a physical trading floor.

and making recommendations to the Board on policy and rule changes relating to business and sales practices of Members, Member Organizations, and Associated Persons and enforcement policies, including policies with respect to fines and other sanctions.<sup>81</sup> The policy function of the Exchange Review Council is similar to that of the BCC, yet broader in scope.<sup>82</sup> The Exchange is also eliminating the Market Operations Review Committee, whose duties will be the responsibility of the Exchange Review Council, which is discussed in greater detail below.

In its adjudicatory role, the Exchange Review Council will serve as an appellate body, with jurisdiction to: (i) Review decisions issued in disciplinary proceedings,<sup>83</sup> statutory disqualification proceedings, or membership proceedings;<sup>84</sup> (ii) review an offer of settlement, a letter of acceptance, waiver, and consent, and a minor rule violation plan letter;<sup>85</sup> (iii) review the exercise of exemptive authority;<sup>86</sup> and (iv) review such other proceedings or

<sup>81</sup> See New Phlx By-Law, Article V, Sec. 5-3(b)(i). The Exchange Review Council also may consider and make recommendations to the Board on policy and rule changes relating to business and sales practices of members, member organizations and associated persons and enforcement policies, including policies with respect to fines and other sanctions, may advise the Board on regulatory proposals and industry initiatives relating to quotations, execution, trade reporting, and trading practices and may advise the Board in its administration of programs and systems for the surveillance and enforcement of rules governing member, member organization and associated person conduct and trading activities in the national securities exchange operated by the Company. *Id.* The same provisions of the BX and Nasdaq by-laws only apply this role as it relates to their respective members. The Exchange notes that programs and systems for the surveillance and enforcement of rules governing member conduct and trading activities, as described in the BX and Nasdaq by-laws, implicitly apply to such conduct and activity of associated persons. Thus, the proposed addition of Members and Associated Persons to this provision of New Phlx By-Law, Article V, Sec. 5-3(b)(i), is done for clarification purposes.

<sup>82</sup> Specifically, the proposed amended By-Laws provide that the Exchange Review Council may be authorized to: Act for the Board with respect to appeals or reviews of disciplinary proceedings; act for the Board with respect to statutory disqualification proceedings; act for the Board with respect to membership proceedings; review offers of settlement, letters of acceptance, waiver and consent, and minor rule violation plan letters; exercise exemptive authority; consider and make recommendations to the Board on policy and rule changes relating to business and sales practices of Members, Member Organizations and Associated Persons and enforcement policies, including policies with respect to fines and other sanctions; exercise other such powers and duties as the Board deems appropriate. See New Phlx By-Law, Article V, Sec. 5-3(b)(i).

<sup>83</sup> See New Rule 9300 Series.

<sup>84</sup> See New Rule 9520 Series.

<sup>85</sup> See New Rule 9216.

<sup>86</sup> New Rule 9600 Series.

<sup>70</sup> New Rule 9231(b). As noted in the New Rule, there are certain limited circumstances whereby a hearing may proceed without the participation of a Hearing Officer or two Panelists, such as when Hearing Officer becomes incapacitated, or otherwise is unable to continue service after being appointed, and the replacement Hearing Officer determines to allow the Panelist to resolve the matter without his or her participation. See New Rule 9231(e)(1). See also New Rule 9234(a), (c), (d), and (e).

<sup>71</sup> New Rule 9231(b).

<sup>72</sup> See New Rules 9215 and 9221.

<sup>73</sup> Under New Rule 9221(a), a respondent may waive its right to a hearing if it fails to request a hearing in its answer.

<sup>74</sup> Under New Rules 9231(c) and 9331(a)(2), the Chief Hearing Officer and Exchange Review Council or Review Subcommittee, respectively, may determine that a matter be designated as an Extended Hearing or Extended Proceeding, and that such matter be considered by an Extended Hearing Panel or Extended Proceeding Committee. Under New Rule 9231(c), in making its determination, the Chief Hearing Officer will consider complexity of the issues involved, the probable length of the hearing, or other factors that the Chief Hearing Officer deems material. Under New Rule 9331(a)(2), in making its determination, the Exchange Review Council or the Review Subcommittee will consider the volume and complexity of the certified record, or other factors that the Exchange Review Council or the Review Subcommittee deems material. For purposes of this filing, references to Hearing Panels

actions as may be authorized by the Exchange rules.<sup>87</sup> As such, the Exchange Review Council will perform a role identical to that of the Review Councils of BX and Nasdaq, and FINRA's NAC. The NAC reviews decisions rendered by Hearing Panels in FINRA disciplinary proceedings and Member Regulation Department decisions rendered in membership proceedings involving FINRA members, among other things.<sup>88</sup>

Likewise, the Exchange Review Council will review decisions issued by Hearing Panels concerning disciplinary matters and Membership Department decisions in membership proceedings concerning Members, Member Organizations, [sic] Associated Persons.<sup>89</sup> Hearing Panel decisions may be appealed to the Exchange Review Council by either the respondent or the Phlx Regulation Department, the Department of Enforcement or the Department of Market Regulation.<sup>90</sup> Appeals must be made in writing within 25 days after service of the decision.<sup>91</sup>

The Exchange Review Council may also call a Hearing Panel decision for review on its own motion, except that default decisions issued pursuant to New Rule 9269 shall be subject to a call for review by the CRO and a decision with respect to a Member, Member Organization, or Associated Person that is an affiliate of the Exchange within the meaning of Rule 985 may not be called for review.<sup>92</sup> Decisions of the Exchange Review Council are final unless called for review by the Board.<sup>93</sup> This process is consistent with the current process by which the BX and Nasdaq Boards may call for review a decision made by their Review Councils arising from their respective disciplinary and membership rules, as well as the process followed by the FINRA Board of Directors in its review of such decisions issued by the NAC.<sup>94</sup>

The Exchange notes that both Nasdaq and BX eliminated their respective Market Operations Review Committees and transferred those committees' responsibilities to their Review Councils.<sup>95</sup> Accordingly, the Exchange

is proposing to eliminate its Market Operations Review Committee ("MORC") and include its responsibilities within those of the new Exchange Review Council. The MORC is responsible for considering appeals of determinations made pursuant to Exchange Rules 124, 1092, 3219, 3220, and 3312. Decisions of the MORC in these matters are not appealable,<sup>96</sup> however, determinations of the MORC with respect to Rule 3312 may be arbitrated.<sup>97</sup> The By-Laws require that the MORC be comprised of a number of Member Representative members that is equal to at least 20 percent of the total number of members of the MORC.<sup>98</sup> Moreover, the By-Laws require that no more than 50 percent of the members of the MORC be engaged in market making activity or employed by a Member whose revenues from market making exceed 10 percent of its total revenues.<sup>99</sup> The By-Laws do not provide a description of what is a quorum for purposes of holding a meeting of the MORC, however, the committee has adopted a three member quorum requirement.<sup>100</sup>

#### Structure of the New Rules

The Exchange is adopting a New Rule 8000 and 9000 Series, which are modeled on the BX and Nasdaq Rules, and which replace the current Rule 960 Series.

The New Rule 8000 Series is titled "Investigations and Sanctions," and it governs the regulation of Member Organizations, Members and Associated Persons, investigations and sanctions. With respect to regulation of Member Organizations, Members and Associated Persons, the New Rule 8000 Series generally describes the regulatory contract between the Exchange and FINRA,<sup>101</sup> and requires Member Organizations to keep and maintain

current paper or electronic copies of both the FINRA and Exchange manuals.<sup>102</sup>

The New Rule 8200 Series concerns the investigative process. It grants the Phlx Regulation Department, including FINRA staff, the right to require Members, Member Organizations, Associated Persons and persons subject to the Exchange's jurisdiction to provide information and to testify under oath,<sup>103</sup> and to permit inspections of their books and records, and accounts with respect to any matter involved in the investigation, complaint, examination, or proceeding.<sup>104</sup> The New Rule 8200 Series also extends this authority to investigations conducted by a domestic or foreign SRO, association, securities or contract market, or regulator of such markets with which the Exchange has entered into an agreement providing for the exchange of information and other forms of material assistance solely for market surveillance, investigative, enforcement, or other regulatory purposes.<sup>105</sup> The New Rule 8211 Series imposes a new obligation on member organizations to submit certain trade data<sup>106</sup> to the Phlx Regulation Department, including FINRA staff, in such an automated format as the New Rule prescribes. Pursuant to the New Rule 9600 Series, the Exchange may exempt a Member Organization from this requirement for good cause shown.

The New Rule 8300 Series describes the nature and effect of sanctions the Exchange may impose on a Member, Member Organization or Associated Person after compliance with the New Rule 9000 Series, including the circumstances under which the Exchange will release information concerning a disciplinary matter.<sup>107</sup> The New Rule 8300 Series also provides the requirements concerning payment of fines, other monetary sanctions, and the consequences of non-payment.<sup>108</sup>

The New Rule 9000 Series is titled "Code of Procedure." It governs proceedings for: disciplining Members, Member Organizations, and Associated

<sup>96</sup> Unlike disciplinary proceedings under the New Rule 9000 Series, speedy resolution of matters under the MORC's jurisdiction is important to ensuring fair and equitable treatment of Members.

<sup>97</sup> See Rule 3312(c)(3).

<sup>98</sup> Phlx By-Law, Article V, Sec. 5-3(d).

<sup>99</sup> *Id.*

<sup>100</sup> Rule 3312(c)(2) expressly requires a panel to consist of three or more members of the MORC, provided that no more than 50 percent of the members of any panel are directly engaged in market making activity or employed by a Member firm whose revenues from market making activity exceed ten percent of its total revenues. The rule also states that in no case shall a MORC Panel include a person affiliated with a party to the trade in question. The amended Exchange By-Laws define an Exchange Review Council quorum for the transaction of business with regard to an appeal of proceedings involving Exchange Rules 124, 1092, 3219, 3320, and 3312 (currently under the MORC's jurisdiction) [sic] shall consist of three members of the Exchange Review Council.

<sup>101</sup> New Rule 8001.

<sup>102</sup> New Rule 8110.

<sup>103</sup> New Rule 8210(a)(1).

<sup>104</sup> New Rule 8210(a)(2).

<sup>105</sup> New Rule 8210(b).

<sup>106</sup> The data required is based on whether the transaction was proprietary or effected for a customer, however, the Phlx Regulatory Department also may require a member organization to submit other information in an automated format. See New Rule 8211(b)-(d).

<sup>107</sup> New IM-8310-3.

<sup>108</sup> See New Rule 8320. New Rule 8330 provides that a Member, Member Organization or Associated Person that is disciplined pursuant to New Rule 8310 shall bear such costs of the proceeding, as the Adjudicator deems fair and appropriate under the circumstances.

<sup>87</sup> New Phlx By-Law, Article V, Sec. 5-3(b)(i).

<sup>88</sup> FINRA Regulation, Inc. By-Law, Article V, Sec. 5.1.

<sup>89</sup> New Phlx By-Law, Article V, Sec. 5-3(b)(i).

<sup>90</sup> New Rule 9311(a).

<sup>91</sup> *Id.*

<sup>92</sup> New Rule 9312.

<sup>93</sup> New Rules 923(a)(x)(C), 9349(c), and 9351.

<sup>94</sup> See Nasdaq Rules 1016, 9349(c) and 9351, BX Rules 1016, 9349(c) and 9351, and FINRA Rules 1016, 9349(c) and 9351.

<sup>95</sup> See Securities Exchange Act Release No. 72151 (May 12, 2014), 79 FR 28571 (May 16, 2014) (SR-NASDAQ-2014-048) and Securities Exchange Act Release No. 72149 (May 12, 2014), 79 FR 28564 (May 16, 2014) (SR-BX-2014-024).

Persons; regulating Member Organizations experiencing financial or operational difficulties; summary or non-summary suspensions, cancellations, bars, prohibitions, or limitations; and obtaining relief from the eligibility requirements of the Exchange By-Laws and the Exchange Rules. The New Rule 9000 Series generally describes the RSA between the Exchange and FINRA.<sup>109</sup>

The New Rule 9100 Series describes the application and purpose of the New Rule 9000 Series, including the types of proceedings covered by the New Rules,<sup>110</sup> the rights, duties, and obligations of Members, Member Organizations and Associated Persons,<sup>111</sup> jurisdiction,<sup>112</sup> defined terms,<sup>113</sup> and rules concerning the filing and service of papers.<sup>114</sup> The New Rule 9100 Series also provides rules concerning proceedings, including appearance and practice,<sup>115</sup> withdrawal by attorney or representative,<sup>116</sup> *ex parte* communications,<sup>117</sup> separation of functions among Adjudicators and Interested Staff,<sup>118</sup> rules of evidence and official notice,<sup>119</sup> motions,<sup>120</sup> rulings on procedural matters,<sup>121</sup> and interlocutory review.<sup>122</sup>

The New Rule 9200 Series sets forth the disciplinary process, including rules concerning the authorization and issuance of a complaint,<sup>123</sup> the briefing and hearings process,<sup>124</sup> issuance of a decision,<sup>125</sup> the settlement process,<sup>126</sup> and sanctions for contemptuous conduct.<sup>127</sup> The New Rule 9200 Series also includes rules concerning adjudication that imposes [sic] a

temporary or permanent cease-and-desist order.<sup>128</sup>

The New Rule 9300 Series sets forth the process for review of disciplinary proceedings by the Exchange Review Council and the Board.<sup>129</sup> The New Rule 9300 Series also describes the role of Counsel to the Exchange Review Council, review of Counsel decisions,<sup>130</sup> and the time when sanctions become effective,<sup>131</sup> including when a Respondent appeals a decision to the Securities and Exchange Commission.<sup>132</sup>

The New Rule 9400 Series provides the process for expedited client suspension proceedings, involving alleged violations of New Rule 774 (Disruptive Quoting and Trading Activity Prohibited).

The New Rule 9500 Series provides the process for proceedings other than formal disciplinary proceedings. The New Rule 9520 Series sets forth procedures for a person to become or remain associated with a Member Organization, notwithstanding the existence of a statutory disqualification, and provides the process for a Member, Member Organization, or Associated Person to obtain relief from the eligibility or qualification requirements. The New Rule 9550 Series<sup>133</sup> provides

the process followed for violations of Phlx rules subject to expedited proceedings, including: Failures to provide information or keep information current (New Rule 9552); failures to pay Exchange dues, fees and other charges (New Rule 9553); failures to comply with an arbitration award or related settlement or an order of restitution or settlement providing for restitution (New Rule 9554); failures to meet the eligibility or qualification standards or prerequisites for access to services (New Rule 9555); failures to comply with temporary and permanent cease-and-desist orders (New Rule 9556); procedures for regulating activities under Rule 703 regarding a Member Organization experiencing financial or operational difficulties (New Rule 9557);<sup>134</sup> summary proceedings for actions authorized by Section 6(d)(3) of the Act (New Rule 9558); and the hearing procedures for expedited proceedings under the New Rule 9550 Series.

The New Rule 9600 Series provides procedures followed when a Member Organization seeks exemptive relief pursuant to any Exchange Rule that references the New Rule 9600 Series.

or office may grant relief for good cause shown.” By contrast, BX and Nasdaq Rules 9552(f), 9553(g), 9554(g), and 9558(g) speak of filing a request for termination a limitation, prohibition or suspension, as applicable, with “the head of the FINRA department or office that issued the notice or, if another FINRA department or office is named as the party handling the matter on behalf of the issuing department or office, with the head of the FINRA department or office that is so designated. The appropriate head of the department or office may grant relief for good cause shown.” The Exchange is proposing to adopt a consistent notification requirement under the respective New Rule 9550 Series by requiring notice to the “Exchange department or FINRA department.” The Exchange notes that, in practice, a FINRA department may be included as the proper department for notice based on the respective RSAs of BX, Nasdaq and the Exchange. See BX Rule 9001, Nasdaq Rule 9001, and proposed New Rule 9001.

<sup>134</sup> Currently, the Exchange has emergency authority to suspend a member organization pursuant to Phlx By-Law, Article VII, Sec. 7–5(b), which provides “The Board of Directors, or such person or persons or committee as may be designated by the Board of Directors, in the event of an emergency or extraordinary market conditions, shall have the authority to take any action regarding . . . the operation of any or all offices or systems of Members and Member Organizations, if, in the opinion of the Board of Directors or the person or persons hereby designated, such action is necessary or appropriate for the protection of investors or the public interest or for the orderly operation of the marketplace or the system.” The Exchange does not have an analogous rule that relates to this authority. As such, New Rule 9557 provides a more specific description of the exercise of this authority in instances where a Member Organization is experiencing financial or operational difficulties, including notice requirements, a hearing process, and a process for the removal or reduction of a requirement or restriction.

<sup>109</sup> See New Rule 9001.

<sup>110</sup> See New Rule 9110.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> See New Rule 9120. The Exchange notes that it is adopting a more comprehensive definition of “Interested Staff” under New Rule 9120(t) than the comparable definitions under BX and Nasdaq. Specifically, the Exchange is adopting new text that accounts for the role of the Phlx Regulation Department, including the involvement of employees thereof. Thus, the proposed new definition will include all individuals that should be considered as “Interested Staff” for purposes of the New Rule 9000 Series.

<sup>114</sup> See New Rules 9131–9138.

<sup>115</sup> See New Rule 9141.

<sup>116</sup> See New Rule 9142.

<sup>117</sup> See New Rule 9143.

<sup>118</sup> See New Rule 9144.

<sup>119</sup> See New Rule 9145.

<sup>120</sup> See New Rule 9146.

<sup>121</sup> See New Rule 9147.

<sup>122</sup> See New Rule 9148.

<sup>123</sup> See New Rules 9211 and 9212.

<sup>124</sup> See New Rules 9215–9267.

<sup>125</sup> See New Rules 9268 and 9269.

<sup>126</sup> See New Rule 9270.

<sup>127</sup> See New Rule 9280.

<sup>128</sup> See New Rules 9290 and 9291.

<sup>129</sup> The New Rules include provisions for the appeal of a matter to the Exchange Review Council (New Rule 9311), review proceedings initiated by the Exchange Review Council (New Rule 9312), and discretionary review by the Board (New Rule 9350 Series).

<sup>130</sup> See New Rule 9313.

<sup>131</sup> See New Rule 9360.

<sup>132</sup> See New Rule 9370.

<sup>133</sup> The Exchange is proposing to include both the Phlx Regulation Department and FINRA as authorized to provide notice under the various expedited proceedings Rules. The Exchange notes that the analogous BX and Nasdaq expedited proceedings Rules state that notice is to be provided by those exchanges’ respective Regulation Department staff only. See, e.g., BX and Nasdaq Rules 9553(b). FINRA, acting on behalf of the Exchange, is authorized to provide such notice under BX and Nasdaq rules, notwithstanding the omission in the rule text. Thus, including both Phlx Regulation Department staff as well as FINRA under the service of notice provisions of the expedited hearings rules will avoid any confusion caused by the omissions in the BX and Nasdaq rule text, and will make it clear that such notices may be issued by either the Exchange or FINRA. Similarly, the Exchange is proposing to adopt consistent notification requirements under New Rule 9550 Series. BX and Nasdaq Rules 9555(g) and 9556(g) provide a process by which a member or person subject to a limitation or suspension, respectively, may seek termination of the limitation or suspension. Under those rules, a written request for such a termination must be filed with “the head of the Exchange department or office that issued the notice or, if another Exchange department or office is named as the party handling the matter on behalf of the issuing department or office, with the head of the Exchange department or office that is so designated. The appropriate head of the department

The New Rule 9800 Series provides the process followed by the Exchange in administering temporary cease-and-desist orders, including the initiation of proceeding to issue such an order,<sup>135</sup> service thereof,<sup>136</sup> subsequent review of the order by the Hearing Panel,<sup>137</sup> the consequences of non-compliance,<sup>138</sup> and the process for seeking Commission review of the order.<sup>139</sup>

#### Specific Rule Changes

As discussed above, the Exchange is amending its By-Laws, deleting the Rule 960 Series, and adopting the New Rule 8000 and 9000 Series. As a consequence of these changes, the Exchange has amended or deleted other Rules, which are either not needed, duplicated elsewhere, or referenced the deleted rules or the BCC. Below is a description of the individual changes the Exchange is making to its Rules. The descriptions describe the current Rule, where the rule resides in the New Rules, and any differences between the current and New Rule.

- Phlx is proposing to amend its By-Laws by deleting Article V, Section 5–3(b), “The Board shall appoint a Business Conduct Committee” and replace it with a new Section 5–3(b) titled “The Board shall appoint an Exchange Review Council.” Current Section 5–3(b) describes the jurisdiction and composition requirements of the BCC. New Section 5–3(b), which is copied from Article VII of the BX By-Laws and Article VI of the Nasdaq By-Laws, describes the jurisdiction and composition requirements of the Exchange Review Council. The new rule text of Section 5–3(b) materially differs from Article VII of the BX By-Laws and Article VI of the Nasdaq By-Laws in that new Phlx By-Law expressly provides that the Exchange Review Council may advise the Board in its administration of programs and systems for the surveillance and enforcement of rules governing Member, Member Organization and Associated Person conduct and trading activities in the national securities exchange operated by Phlx. In contrast, the related provisions of the BX and Nasdaq By-Laws only describe such an advisory role with respect to their members. The Exchange believes that BX and Nasdaq consider this Exchange Review Council advisory role to their respective boards to implicitly extend to associated persons. The Exchange also believes that this

Exchange Review Council advisory role should include both Member Organizations and their Associated Persons, including Members. Consequently, the Exchange is expressly including Members and Associated Persons in this provision. Otherwise, the new rule text of Section 5–3(b) is identical in all material respects to that of Article VII of the BX By-Laws and Article VI of the Nasdaq By-Laws, differing in the By-Laws and rule numbers cited due to the Exchange’s different numbering conventions. The Exchange notes that the majority of these Rules align with the comparable rules of BX and Nasdaq (*compare, e.g.* Phlx Rule 3312 “Clearly Erroneous Transactions” with BX and Nasdaq Rules 11890 “Clearly Erroneous Transactions”); however, the Exchange includes Rule 124 “Disputes-Options” under the Exchange Review Council’s jurisdiction, which is currently under the jurisdiction of the MORC as discussed above and which neither BX nor Nasdaq have [sic]. In addition, BX and Nasdaq have a Rule 4612, which concerns registration as a market maker and which the Exchange does not have an analogue. The Exchange notes that appeals of determinations made pursuant to BX and Nasdaq Rules 4612 were reviewed by their respective MORCs prior to consolidation into their Review Councils. Similarly, appeals of determinations made pursuant to Exchange Rule 124 are currently reviewed by the Exchange’s MORC. The Exchange notes that Section 5–3(b)(iv) of the amended By-Laws provides that each Exchange Review Council member shall hold office for a term of three years or until a successor is duly appointed and qualified, except in the event of earlier termination from office by reason of death, resignation, removal, disqualification, or other reason. Further, Section 5–3(b)(iv) provides that the Exchange Review Council shall be divided into three classes. To simplify the process of appointing Exchange Review Council members, the Exchange is proposing to use the members of the BX and Nasdaq Review Councils as the members of the Exchange Review Council, with the same terms and classes as those members have on the BX Review Council. The Exchange notes that this will ease the administration and recruitment of members by harmonizing their terms, and thus when new members must be approved by the exchange boards.

- Phlx is proposing to amend its By-Laws by deleting Article V, Section 5–3(d), and holding it in reserve. Section 5–3(d) establishes the MORC and its

functions, which have been incorporated into new Section 5–3(b).

- Existing Rule 1 provides definitions for purposes of the rules of the Board, and rules and regulations of standing committees of the Exchange.

- The Exchange is amending the definition of the terms “Associated Person” and “Person Associated with a Member Organization” to include, for purposes of the New Rule 8000 and 9000 Series, an amended definition of what currently resides at Rule 960.1, Interpretation and Policies .01. The Exchange is proposing to replace use of the term “associated person of a member,” which as described below is incorrectly used at Rule 960.1, Interpretation and Policies .01 since there are no persons associated with a Member, with the defined term “associated person.” The Exchange is also proposing to make it clear that, for purposes of the 8000 and 9000 Rule Series, the term “person associated with a member organization” or “associated person” shall have the same meaning as the term “persons associated with a member” or “associated person of a member,” respectively, as provided in Section 3(a)(21) of the Exchange Act. The Exchange notes that the proposed changes to the defined terms does [sic] not change how they are presently applied.

- The Exchange is defining the new term “Code of Procedure” as the procedural rules contained in the New Rule 9000 Series.

- The Exchange is amending the definition of the term “Commission” to include the term “SEC.”

- The Exchange is defining the new term “Exchange Review Council,” which is copied from BX and Nasdaq Rules 0120(m). The Exchange notes that item (6) of the new definition differs from the BX and Nasdaq items (6) in that it cites the analogous Rules of the Exchange, which have different rule numbers. In addition, and as noted above in the By-Laws discussion, the rules for which the Exchange Review Council is the appellate body, which are listed under item (6) of each of the three exchanges, derive from the responsibilities of the former BX and Nasdaq MORCs that were incorporated into their Review Councils, and such responsibilities of the Exchange’s current MORC. Accordingly, to the extent those rules differ, so do the citations under the Exchange Review Council definitions of the three exchanges.

- The Exchange is amending the definition of “Member” to add rule text that clarifies that a Member is a natural person and must be a person associated

<sup>135</sup> New Rule 9810.

<sup>136</sup> *Id.*

<sup>137</sup> New Rule 9850.

<sup>138</sup> New Rule 9860.

<sup>139</sup> New Rule 9870.

with a Member Organization, and, as such, any references to Exchange to the rights or obligations of an Associated Person or person associated with a Member Organization also includes a Member.

- The Exchange is eliminating references to the phase-in period of Rule 611 of Regulation NMS under the definition of “Protected Bid,” since the phase-in period has since past. As a consequence, the Exchange is also deleting definitions of “Nasdaq Global Market Security” and “Nasdaq Capital Market Security,” which were solely referenced under the deleted portions of the definition of “Protected Bid.”

- Rule 50 concerns the consequences of a Member’s, Member Organization’s, or Associated Person’s failure to pay dues, fees, and other charges. Phlx is replacing the Rule with New Rule 9553, which is materially identical to the old Rule, except for the notice provisions under Rule 50(b), which require that service of a notice of suspension, cancellation or bar be done in accordance with Rule 960.6 (Summary Disposition Proceedings). Rule 960.6(b) requires that notice and a copy of a summary decision is provided to Respondents in accordance with Rule 960.11. Rule 960.11, in turn, allows service on a Respondent or Respondent’s Counsel either personally or by deposit with the United States Postal Service (postage pre-paid via registered or certified mail), by courier service addressed to Respondent’s Counsel or the Respondent at his address (as it appears on the books and records of the Exchange), or, upon mutual written consent of the parties, by electronic delivery. By contrast, New Rule 9553(b) requires notice in accordance with Rule 9134 (Methods of, Procedures for Service) or by facsimile or email. Rule 9134 is generally consistent with current requirements under Rule 50; however, Rule 9134 provides more specificity on the source of the addresses that may be used for service, types of allowable service by U.S. Postal Service, and when service is complete.

- Rule 60 provides the process for assessing fines pursuant to the Order and Decorum regulations under Section H of the Option Floor Procedure Advices and Order & Decorum Regulations. The Order and Decorum regulations provide fines assessed in lieu of formal disciplinary proceedings for conduct relating to the administration of order, decorum, health, safety and welfare on the Exchange. The Exchange is proposing to adopt Rules 9216(c)(1) and (2) to address the process for administering

violations of the Order and Decorum regulations under Section H of the Option Floor Procedure Advices.

- Rule 60(a)(i) provides an Options Exchange Official authority to assess fines on Members, Member Organizations, and Associated Persons for breaches of the Order and Decorum regulations. In addition, the rule permits the Options Exchange Official to refer the matter to the BCC, where it will proceed in accordance with the Rule 960 Series. The Exchange is moving Rule 60(a)(i) to New Rule 9216(c)(1) with minor changes. Specifically, the Exchange is replacing reference to the BCC with reference to the Department of Enforcement or the Department of Market Regulation, which are the bodies responsible for bringing formal disciplinary action under the BX and Nasdaq rules. The Exchange is also providing that an Options Exchange Official, as a representative of the Phlx Regulation Department, may instead request authorization for the issuance of a complaint from the ODA directly.<sup>140</sup> In addition, the Exchange is replacing a reference to its current disciplinary Rules 960.1—960.12 with reference to the New Rule 8000 and 9000 Series.

- Rule 60(a)(ii) provides Exchange staff authority to assess fines on Members, Member Organizations, or persons associated with Member Organizations for breaches of the Order and Decorum regulations and is otherwise identical in all respects to Rule 60(a)(i), including permitting Exchange staff to refer the matter to the BCC, where it will proceed in accordance with the Rule 960 Series. The Exchange is moving Rule 60(a)(ii) to New Rule 9216(c)(1), which combines Rules 60(a)(i) and (ii), as modified by the minor changes described above. The Exchange is also providing that Exchange staff, acting as a representative of the Phlx Regulation Department, may instead request authorization of a complaint from the ODA directly.<sup>141</sup>

- Rule 60(b)(i) provides Options Exchange Officials and officers of the Exchange authority exclude a Member or Associated Person from the trading floor for breaches of Order and Decorum regulations that occurred on the trading floor, or on the premises immediately adjacent to the trading floor. In particular, Members and Associated Persons are excluded if they pose an immediate threat to the safety of persons or property, are seriously disrupting Exchange operations, or are in possession of a firearm. Under the rule,

Members or Associated Persons so excluded may be excluded for a period of up to five business days. The Exchange is moving the Rule to New Rule 9216(c)(2), with only a minor change to delete text that defines a “Member” as either a Member or a person associated with a Member Organization. As described above, a Member must be a person associated with a Member Organization; however, use of the term to refer to both types of Associated Persons may be confusing. Thus, the Exchange is instead including both terms individually.

- Rule 60(b)(ii)<sup>142</sup> defines an “officer of the Exchange” for purposes of Rule 60 to mean an officer who is a vice president or higher. The Exchange is moving the rule unchanged to New Rule 9216(c)(2)(A).

- Rule 60(b)(iii) defines the “premises immediately adjacent to the trading floor” to include: (1) All premises other than the trading floor that are under Exchange control, and (2) premises in the building where the Exchange maintains its principal office and place of business, namely FMC Tower, 2929 Walnut Street, Philadelphia, Pennsylvania. The Exchange is moving the rule unchanged to New Rule 9216(c)(2)(B).

- Rule 60(b)(iv) provides that exclusion from the floor may not be the exclusive sanction for breaches of the Order and Decorum regulations, which include, in addition to exclusion, a fine or referral to the BCC, where it shall proceed in accordance with the Rule 960 Series. The Exchange is moving the Rule to New Rule 9216(c)(2)(C) with minor changes. Specifically, the Exchange is replacing reference to referring matters to the BCC with reference to the Department of Enforcement or the Department of Market Regulation, which are the appropriate bodies responsible for bringing formal disciplinary action under the BX and Nasdaq rules. The Exchange is also providing that the Phlx Regulation Department may instead request authorization of a complaint from the ODA directly.<sup>143</sup> In addition, the Exchange is replacing references to its current disciplinary rules with the New Rule 8000 and 9000 Series.

- Rule 60(c) provides the process for Expedited Hearings for Members and Associated Persons that are excluded for a period exceeding forty-eight hours. Pursuant to the Rule, an expedited

<sup>142</sup> The Exchange notes that Rule 60(c) was mistakenly placed between Rules 60(b)(i) and (ii). See Securities Exchange Act Release No. 61207 (December 18, 2009), 74 FR 69185 (December 30, 2009) (SR-Phlx-2009-84).

<sup>143</sup> See notes 47 and 55, *supra*.

<sup>140</sup> See notes 47 and 55, *supra*.

<sup>141</sup> *Id.*

hearing will be held before the Chair of the BCC or a member of the Committee designated by the Chair within forty-eight business hours after the Member's or Associated Person's exclusion from the trading floor. The Rule further provides the required contents of the notice to the Member or Associated Person and sets forth the Member's or Associated Person's right to be represented by counsel. The Rule also provides the hearing process, issues to be considered by the adjudicator, and the timing and form of the determination. The Exchange is moving the Rule to New Rule 9216(c)(2)(D) with minor changes. Specifically, the Exchange is changing who is authorized to be an Expedited Hearing Officer to either the Chair of the Exchange Review Council or a member thereof. The Exchange believes that members of the Exchange Review Council are best suited to be Expedited Hearings panelist because of their expertise. Moreover, violations of Order and Decorum rules are not appealable to the Exchange Review Council, thus members thereof will not be conflicted in any subsequent appeal. The Exchange is also adding clarifying text to New Rule 9216(c)(2)(E)(ii) that describes in greater detail the exception to reporting provided by Rule 19b-1(c).

- Rule 60, Commentary (a) provides the procedures to be followed in cases where a pre-set fine of up to \$10,000 is summarily assessed. The Exchange is moving the Commentary under New Rule 9216(c)(1).

- Rule 60, Commentary (a).01 requires the notice of the fine for breach of such regulations to be given by the issuance of a written citation, served by Exchange staff. The commentary provides that the cited party may accept or contest the written citation. The Exchange is moving the Commentary unchanged to New Rule 9216(c)(1)(A).

- Rule 60, Commentary (a).02 provides the notice requirements for hearings arising from contested citations. The Exchange is moving the Commentary unchanged to New Rule 9216(c)(1)(B).

- Rule 60, Commentary (a).03 provides the hearing recordation requirements. The Exchange is moving the Commentary unchanged to New Rule 9216(c)(1)(C).

- Rule 60, Commentary (a).04 provides the procedure for hearings of contested fines. The Exchange is moving the Commentary with minor changes to New Rule 9216(c)(1)(D). Specifically, the Exchange is replacing the Chair of the BCC as the individual responsible for appointing a Hearing Director under

the Rule with the Chair of the Exchange Review Council.

- Rule 60, Commentary (a).05 provides the nature and timing of the Hearing Director's determination upon conclusion of the hearing. The Exchange is moving the Commentary unchanged to New Rule 9216(c)(1)(E).

- Rule 60, Commentary (a).06 provides the conditions for assessing a forum fee. The Exchange is moving the Commentary to New Rule 9216(c)(1)(F), with only a minor change to update a citation to Rule 60 with New Rule 9216(c).

- Rule 60, Commentary (a).07 states that there is no right of appeal of a hearing determination under the Rule. The Exchange is moving the Commentary unchanged to New Rule 9216(c)(1)(G).

- Rule 60, Commentary (a).08 states that the Exchange will file a report in appropriate form with the SEC for any fine assessed under the Rule that is not contested and does not exceed \$1,000. The Exchange is moving the Commentary, with only minor changes, to New Rule 9216(c)(1)(H) to clarify that the exemption to SEC reporting arises from SEC Rule 19d-1(c)(1).

- Rule 60, Commentary (b) provides the procedures to be followed when a Member or an Associated Person is to be excluded from the trading floor. The Exchange is moving the rule to New Rule 9216(c)(2)(E).

- Rule 60, Commentary (b).01 provides that the determination that a Member or an Associated Person shall be excluded is final and that there shall be no appeal from such determination. The Exchange is moving the Rule unchanged to New Rule 9216(c)(2)(E)(i).

- Rule 60, Commentary (b).02 notes that the Exchange will file a report in appropriate form with the SEC, except in cases where a clerical employee is excluded for a breach of the Order and Decorum regulations. The Exchange is moving the Rule unchanged to New Rule 9216(c)(2)(E)(ii).

- RULE 60—REGULATION AND FINE SCHEDULE provides that most violations of the Order and Decorum Code are handled by a pre-set fine and/or sanction, and an Options Exchange Official or Exchange staff may refer the matter to the BCC for formal disciplinary proceedings. The Rule also provides that in the case of repeat violations of a regulation by the same individual, the amount of the fine is determined by the number of such violations which have occurred within the year immediately preceding the current violation. The Exchange is moving the Rule to New Rule 9216(c), with minor changes to cite the new

disciplinary rules and to note that referrals for formal disciplinary proceedings are made to either the Department of Enforcement or the Department of Market Regulation. The Exchange is also providing that an Options Exchange Official or Exchange Staff, as a representative of the Phlx Regulation Department, may instead request authorization of a complaint from the ODA directly.<sup>144</sup>

- The Rule 70 Series concerns insolvency of Members and Member Organizations, providing the Exchange with authority to suspend the permit of a Member that fails to perform its contracts or is deemed insolvent, and to suspend the permit of a Member or Member Organization that has failed to meet his or its engagements or is insolvent. See Rules 70 and 71. The Rule 70 Series consists of Rules 70 through 76, which provide the processes for suspending and resolving suspensions due to insolvency. These rules also provide the rights and obligations of those subject to suspension. This series of rules were significantly more important in the days when the Exchange required seats to transact on the Exchange. Prior to demutualization, when the Exchange issued seats, those seats could be leased. As a consequence, Members could be indebted to other Members for the right to lease a seat. Since the Exchange demutualized, there are no longer any seats, owners or lessors thereof. Today permits provide trading rights to Members and Member Organizations in lieu of the issuance of seats as property. Moreover, the Exchange collects fees owed by Members and Member Organizations via direct debit each month. Thus, these rules were designed to protect Members and the Exchange during a time when the relationships among Members, and between Members and the Exchange, resulted in much greater risk exposure if a Member became insolvent than is the case today. Under the New Rules, the Exchange will continue to have the authority to suspend a Member, Member Organization, or an Associated Person, which would include the ability to suspend the permit(s) associated with a Member Organization. Specifically, New Rule 9558(a)(2), which provides the Exchange's CRO with authority to provide written authorization to FINRA staff to issue on a case-by-case basis a written notice that summarily suspends a Member Organization, and its associated permit(s), who is in such financial or operating difficulty that FINRA staff determines and so notifies

<sup>144</sup> See notes 47 and 55, *supra*.

the Commission that the Member Organization cannot be permitted to continue to do business as a Member Organization with safety to investors, creditors, other Member Organizations, or the Exchange.<sup>145</sup> New Rule 9558 provides protections similar to the Rule 70 Series by preventing a Member Organization, and by extension its Associated Persons (including the Member(s) holding the permit(s)), from transacting on the Exchange while it is having financial or operating difficulty. Such financial or operating difficulty includes insolvency, which is what the Rule 70 Series concerns. Accordingly, the Exchange is proposing to delete the Rule 70 Series.

- Rule 70 permits the Exchange to suspend the permit of a Member upon notice of insolvency to the Exchange. Rule 71 permits the Exchange to suspend the permit of a Member if it appears to the BCC that the Member or its Member Organization has failed to meet its engagements or is insolvent. New Rule 9558(a) provides the CRO authority to direct FINRA to suspend a Member Organization, together with its permit(s), that is in such financial or operating difficulty that FINRA staff determines and so notifies the Commission that the Member Organization cannot be permitted to continue to do business as a Member Organization with safety to investors, creditors, other Member Organizations, or the Exchange. The Exchange notes that, although New Rule 9558 does not provide an affirmative obligation of Member Organizations to notify the Exchange that it is having financial difficulties, the Exchange does not believe that such an obligation is needed in light of the direct debit of Member Organization obligations and the prompt notice of a deficit in a Member Organization's account.

- Rule 72 concerns investigation of insolvency, and describes the Member's and Member Organization's obligation to cooperate with the BCC's investigation of insolvency. New Rule 8210 provides the Exchange similar authority to conduct an investigation and obligates a Member, Member Organization and Associated Person to provide information and allow Phlx Regulation Department and FINRA staff

to inspect and copy books and records and accounts of such Member, Member Organization or person.

- Rule 73 concerns the time for settlement of an insolvent Member, and allows the Membership Department to terminate a Member's permit if the Member fails to settle with its creditors and apply for reinstatement within six months from the time of such suspension, and permits the Board of Directors or their [sic] designee to extend the time of settlement for periods not exceeding one year each. In lieu of this process, the Exchange is instead applying the process under New Rule 9558, which provides an expedited process for resolving suspensions issued to Member Organizations having financial or operating difficulties that places [sic] the safety of investors, creditors other Member Organizations, or the Exchange at risk. In terms of settlement with its creditors, the Exchange, FINRA acting on behalf of the Exchange, or to the extent a hearing is held, a Hearing Panel, may determine the steps necessary to lift the suspension. If a Member Organization fails to satisfy those prerequisites, the Exchange may terminate the Member Organization and its permit(s).<sup>146</sup>

- Rule 74 concerns reinstatement of an insolvent Member, and requires Members applying for reinstatement of their permits to provide proof of settlement with their creditors, and provides the right to appeal a denial of reinstatement to the Board of Directors. New Rule 9558(d) provides that that [sic] a Member Organization may submit a written request for a hearing and written request for a stay, the Chief Hearing Officer or Hearing Officer assigned to the matter [sic] finds good cause exists to stay the limitation, prohibition or suspension.<sup>147</sup> Under New Rule 9558(g), a Member Organization may file a written request for termination of the limitation, prohibition or suspension on the ground of full compliance with the notice or decision. The appropriate head of the Exchange or FINRA department or office may grant relief for good cause shown.

- Rule 75 allows the Exchange to proceed with [sic] against a Member whose permit is suspended, or its affiliated Member Organization, for any

offense committed by the Member either before or after the announcement of the suspension as if the suspension had not occurred. New Rule 9110(d) sets forth the disciplinary jurisdiction of the Exchange, which provides similarly broad jurisdiction. Specifically, Rule 9110(d) provides that any Member, Member Organization, or any partner, officer, director or person employed by or associated with any Member Organization (the Respondent) who is alleged to have violated or aided and abetted a violation of the Securities Exchange Act of 1934 (Exchange Act), the rules and regulations thereunder, the By-Laws and Rules of the Exchange or any interpretation thereof, and the Rules, Regulations, resolutions and stated policies of the Board of Directors or any Committee of the Exchange, shall be subject to the disciplinary jurisdiction of the Exchange. Moreover, the rule further provides that disciplinary jurisdiction applies to any Member, or any partner, officer, director, or person employed by or associated with a Member Organization, and any Member Organization following the termination of such person's permit or the termination of the employment by or the association with a Member Organization of such Member or partner, officer, director or person, or following the deregistration of a Member Organization from the Exchange.

- Rule 76 concerns the rights of a Member suspended for insolvency, and provides that such a Member and its affiliated Member Organization shall be deprived during the suspension of all rights and privileges of a Member or Member Organization, except the right to have its business transacted at Members' commission rates. As described above, New Rule 9558(a) provides that a Member Organization, together with its associated permit(s), may be suspended. This effectively ensures that it is unable to conduct business on the Exchange. New Rule 9558(d) provides that such a suspension shall remain in effect unless, after a timely written request for a hearing and written request for a stay, the Chief Hearing Officer or Hearing Officer assigned to the matter finds good cause exists to stay the limitation, prohibition or suspension. New Rule 9558(g) provides the process by which a Member Organization subject to a suspension may request termination of the suspension. Last, the Exchange notes that the concept of allowing a Member or Member Organization the right to transact at Members' commission rates applied to the time

<sup>145</sup> Unlike the Rules 9558(a)(2) of BX and Nasdaq, the Exchange is including authority to suspend a Member Organization's associated permit. The Exchange notes that neither BX nor Nasdaq have [sic] trading permits. Permits allow Members and Member Organizations the ability to trade on the Exchange's [sic]. Consequently, suspension of a permit is vital to suspending a Member Organization, and its Associated Persons' ability to trade on the Exchange when subject to a suspension under Rule 9558(a)(2).

<sup>146</sup> As discussed, a Member Organization may appeal a suspension issued pursuant to New Rule 9558(a)(2) to a Hearing Panel. Any decision thereof may be called for review by the Review Council pursuant to New Rule 9559(q). If a Member Organization fails to request a hearing timely, the suspension is final action of the Exchange.

<sup>147</sup> A Hearing held pursuant to New Rule 9558 follows the expedited hearing procedures provided by New Rule 9559.

when the Exchange had seats, and thus is no longer applicable.

■ Rule 124 concerns disputes that occur on or relate to the Phlx options trading floor. Under subparagraph (b) of the Rule, a Member's, Member Organization's, or Associated Person's failure to comply with an initial Options Exchange Official ruling may result in a referral to the BCC. Phlx is replacing reference to the BCC with reference to the Phlx Regulation Department, Department of Market Regulation, or Department of Enforcement, which will be charged with the review of any such referred non-compliance. Phlx is proposing that the Phlx Regulation Department, Department of Market Regulation, and Department of Enforcement have this discretion under the proposed Rules because these departments may exercise prosecutorial discretion to determine if formal disciplinary action is warranted. To the extent the Phlx Regulation Department, Department of Market Regulation, or Department of Enforcement determines that formal disciplinary action is warranted, the department must gain approval from the ODA to issue a complaint. As described above, the ODA is an office within FINRA, independent of the enforcement function and not involved in investigating or litigating cases. Thus, ultimately the referred non-compliance will be reviewed by a committee independent of the enforcement function. Phlx is also replacing references to Rules 60 and 970 in subparagraphs (b) and (c) of the rule with references to New Rules 9216(c) and (b), respectively, which have replaced those Rules as discussed both above and below. Phlx is also making it clear under Rule 124(c) that Options Exchange Official rulings issued pursuant to Floor Procedure Advices not related to Order and Decorum are subject to the 9000 Series. As described below in relation to Rule 970, Phlx is adopting the process used by BX and Nasdaq in administering their MRVPs.<sup>148</sup> Specifically, once the Phlx Regulation Department,<sup>149</sup> the Department of Enforcement or the Department of Market Regulation determine [sic] that a fine should be levied against a Member, Member Organization, or an Associated Person, a draft letter is provided to the Member, Member Organization, or Associated Person. If a Member, Member Organization, or Associated Person does not agree to the terms of a minor rule violation letter or violation letter proposed by the Exchange pursuant to

the Advices, then it is not compelled to accept the letter. As a consequence, however, the Exchange or FINRA acting on its behalf may pursue formal disciplinary action. Phlx notes that assessing a fine pursuant to the Advices in lieu of pursuing formal disciplinary action is always discretionary. Thus, if a Member, Member Organization, or Associated Person does not agree to the terms of a minor rule violation plan letter or violation letter provided, then the matter may be resolved through the formal disciplinary process, through which the Member, Member Organization, or Associated Person may submit arguments in its defense through an Answer. Phlx is also replacing references to the Market Operations Review Committee in subparagraph (d) with references to the Exchange Review Council, which is the committee responsible for reviewing disputed rulings under the New Rules. Under subparagraph (d)(v) of the Rule, all decisions of the Market Operations Review Committee that are not complied with promptly by a Member, Member Organization, or Associated Person may result in referral to the BCC. Phlx is replacing reference to the BCC with reference to the Phlx Regulation Department, Department of Market Regulation, and Department of Enforcement, each of which will have authority to review of any such referred non-compliance since each of these departments may exercise their prosecutorial discretion to determine if formal disciplinary action is warranted. To the extent the Phlx Regulation Department, Department of Market Regulation, or Department of Enforcement determines that formal disciplinary action is warranted, the department must gain approval from the ODA to issue a complaint pursuant to New Rule 9211(a)(1). As described above, the ODA is an office within FINRA, independent of the enforcement function and not involved in investigating or litigating cases. Thus, ultimately the referred non-compliance will be reviewed by a committee independent of the enforcement function.

■ Rule 600 concerns a Member's and Member Organization's obligation to provide notice to the Exchange of its address and any changes thereto. The Rule also requires Members and Member Organizations to use FINRA's Web Central Registration Depository for reporting obligations. Rule 600(c) requires each Member and Member Organization applicant that is a registered broker or dealer pursuant to Section 15 of the Securities Exchange

Act of 1934 must [sic] use Web CRD to submit a Uniform Application for Broker-Dealer Registration, Form BD. The Exchange is deleting the term "member" from Rule 600(c) because it erroneously applies the requirement to Members, which, as discussed above, cannot be registered brokers or dealers. The Exchange is also adopting a new paragraph (d) to the Rule, which requires Member Organizations to report all contact information required by the Exchange to the FINRA Contact System. FINRA uses the FINRA Contact System as the repository of member firm contact information for its members, as do BX and Nasdaq under their respective Rule 1160. The Exchange is adopting this requirement to facilitate FINRA's execution of its responsibilities under the RSA.

■ Rule 615 concerns the Exchange's authority to waive the applicable Qualification Examination and accept other standards as evidence of an applicant's qualifications for registration. The Exchange is amending this Rule to make clear that the New Rule 9600 Series process for receiving a waiver is followed for such requests. The New Rule 9600 Series concerns the procedures for Member Organizations to request exemptions, and the appeal of adverse decisions regarding an exemptive request. Thus, Member Organizations may request an exemption to a Qualification Examination on behalf of their Associated Persons. The Exchange notes that text of Rule 615 currently closely mirrors BX and Nasdaq Rule 1070(d) and that the new language added to Rule 615 is taken from these BX and Nasdaq Rules.

■ Rule 712 concerns the Exchange's requirement that each Member Organization doing business with the public have an independent audit of its affairs at least once a year. Under the Supplementary Material to the Rule, the BCC provided guidance to Member Organizations on the textual requirements of the agreement between the Member Organization and its accountant, which is provided in supplementary material to the Rule and is cited as a directive of the BCC. In such references to the BCC, the Exchange is replacing it with references to the Exchange. With the retirement of the BCC, the Exchange is adopting the directive as a directive of the Exchange. The guidance requires accountants to provide notice of the commencement of an audit, and provide certain documents to the BCC. The Exchange is replacing references in the guidance to the BCC with references to the Membership

<sup>148</sup> New Rule 9216(b).

<sup>149</sup> See notes 47 and 55, *supra*.

Department, which the Exchange has determined is the best entity within the Exchange to receive such notice and documents in the absence of the BCC. The purpose of the guidance is to ensure that the Exchange is notified of the initiation of the required annual audit, thus aiding the Exchange in its oversight responsibilities. Likewise, the documents required to be provided by the auditing accountant ensures [sic] that the Exchange is aware of any identified deficiencies. The Exchange is now requiring that accountants performing annual audits provide the notice discussed above to the Membership Department.

■ Rule 722 concerns requirements for margin accounts in miscellaneous securities. Subparagraph (d) of the rule provides that the BCC may appoint a World Currency Options Margin Subcommittee, charged with the monitoring of the use of letters of credit by world currency option writers, monitoring the volatility of each world currency underlying a class of world currency options traded on the Exchange and for recommending to the Exchange that higher margin requirements be imposed with respect to any world currency option position(s) whenever such Subcommittee deems such higher margin requirements advisable. The Exchange is replacing references to the BCC and Subcommittee with reference to the CRO and Committee, respectively. The Exchange believes that the CRO is best suited to select members of such a committee to make these determinations in light of the retirement of the BCC because the CRO has general supervision of the Exchange's regulatory operations, including the responsibility for overseeing its surveillance, examination, and enforcement functions and for administering any regulatory services agreements with another self-regulatory organization to which the Exchange is a party. The CRO meets with the regulatory oversight committee of the Board of Directors. As such, the Board will remain apprised of the formation of, and any decisions made by, the new Committee. The Exchange notes that the new Committee will have the same responsibilities under the amended rule as the Subcommittee does currently.

■ Rule 774 is currently held in reserve. The Exchange is amending Rule 774 to now include an express requirement that Member Organizations and Members not engage in disruptive quoting and trading activity. BX and Nasdaq adopted this authority under their respective Equities Rule 2170 and Options Rule Chapter III, Section 16 to

clearly prohibit disruptive quoting and trading activity on both the equities and options markets.<sup>150</sup> BX and Nasdaq also adopted new Rules 9400 to permit them to take prompt action to suspend their members or their clients that violate such rule. The Exchange is amending Rule 774 to house the obligation of its Member Organizations and Members, which will apply to both participation in the Exchange's equity and options markets. The Exchange is amending Rule 3202 to include Rule 774 as a rule that applies to the Nasdaq PSX ("PSX") equities market. The Exchange notes that Rules 600 through 799 concern the regulation of Members and Member Organizations (including associated persons thereof), and their participation on both the Exchange's equity and options markets. The Exchange is likewise adopting New Rule 9400 as adopted by BX and Nasdaq except that the Exchange rule includes the Department of Enforcement and the Department of Market Regulation as potential parties to the matter. As discussed above, the Exchange believes that including these departments in proposed New Rule 9400 Series is appropriate because they may be involved in the initiation of such a matter for BX and Nasdaq currently. The Exchange is also adding FINRA to other parts of New Rule 9400 where it is appropriate to show that FINRA may be the entity that initiated an action under the rule.

■ Rule 777 prohibits certain guarantees made by Member Organizations or persons employed by them. Subparagraph (a) of the rule prohibits a guarantee of payment of the debit balance, in a customer's account, to his employer or to any other creditor

carrying such account, without the prior written consent of the BCC. The Exchange is replacing reference to the BCC with reference to the CRO, who Phlx believes is best suited to make such determinations in light of the elimination of the BCC.

■ Rule 923 sets forth an applicant's right to appeal an adverse action with respect to a membership application, permit application, or other matter for which the Membership Department has responsibility. The Exchange is retaining this right under the Rule, but is replacing the current Board subcommittee appeals process with an Exchange Review Council appeals process with discretionary review by the Board based on the processes of BX and Nasdaq under their respective Rules 1016 and 1015. In adopting the new rule text under Rule 923, the Exchange is not copying the term "Applicant," which is a defined term under BX and Nasdaq membership proceedings rules. The Exchange is rather using the term "applicant" as it is represented in current Rule 923, which applies to membership applications, permit applications, or other matters for which the Membership Department has responsibility.

■ The Rule 960 series sets forth the Exchange's current Disciplinary Rules. The Exchange is deleting the entire rule series<sup>151</sup> and replacing it with the New Rule 8000 and 9000 Series. Specifically:

• Rule 960.1 concerns the jurisdiction of the Exchange in disciplinary matters.

■ Rule 960.1(a) defines who is subject to the disciplinary jurisdiction of the Exchange as any Member, Member Organization, or any partner, officer, director or person employed by or associated with any Member or Member Organization (the Respondent) who is alleged to have violated or aided and abetted a violation of the Act, rules and regulations thereunder, the By-Laws and rules of the Exchange or any interpretation thereof, and the rules, regulations, resolutions and stated policies of the Board or any committee of the Exchange. After notice and opportunity for a hearing, such a Respondent may be appropriately disciplined by expulsion, suspension, fine, censure, limitation or termination as to activities, functions, operations, or association with a Member or Member Organization, or any other fitting sanction in accordance with the

<sup>150</sup> See Securities Exchange Act Release No. 77913 (May 25, 2016), 81 FR 35081 (June 1, 2016) (SR-NASDAQ-2016-074) (adopting the prohibition applied to the equity market and the disciplinary process) and Securities Exchange Act Release No. 77914 (May 25, 2016), 81 FR 35106 (June 1, 2016) (SR-BX-2016-028) (adopting the prohibition applied to the equity market and the disciplinary process); see also Securities Exchange Act Release No. 78208 (June 30, 2016), 81 FR 44366 (July 7, 2016) (SR-NASDAQ-2016-092) (extending the prohibition to the options market) and Securities Exchange Act Release No. 78107 (June 21, 2016), 81 FR 41619 (June 27, 2016) (SR-BX-2016-036) (extending the prohibition to the options market). Nasdaq and BX filed immediately effective rule changes to make a technical correction to their respective Rules 9400 to include reference to their respective Options Rules Chapter III, Section 16, which were inadvertently not updated when Nasdaq and BX extended the prohibition on engaging in disruptive quoting and trading activity their options markets. See Securities Exchange Act Release No. 79240 (November 4, 2016), 81 FR 79068 (November 10, 2016) (SR-NASDAQ-2016-146) and Securities Exchange Act Release No. 79241 (November 4, 2016), 81 FR 79534 (November 14, 2016) (SR-BX-2016-056).

<sup>151</sup> As discussed below, the Exchange will retain a transitional rule book that will contain the Exchange's rules as they are at the time of this filing, including the Rule 960 series. This transitional rule book will apply only to matters initiated prior to the operational date of the changes proposed herein.

provisions of the disciplinary rules. The Exchange is moving this rule to New Rule 9110(d), which is not included in Rule 9110 of either BX or Nasdaq, but will preserve the Exchange's current jurisdiction under its rules.

- Rule 960.1(b) permits the Exchange to charge a supervisor with a violation of a rule within the disciplinary jurisdiction of the Exchange committed by an employee under his supervision or by the Member Organization with which he is associated, as though such violations were his own. Similarly, the rule permits the Exchange to charge a Member Organization with any violation within the disciplinary jurisdiction of the Exchange committed by its officers, directors, or employees or by a Member or Associated Person, as though such violation were its own. The Exchange is moving this rule to New Rule 9110(d), which is not included in Rule 9110 of either BX or Nasdaq, but will preserve the Exchange's current jurisdiction under its rules.

- Rule 960.1(c) extends the disciplinary jurisdiction of the Exchange to continue after the termination of a Member's permit or employment or association with the firm, or following deregistration of the Member from the Exchange. Staff must serve written notice to the former Member within one year of receipt by the Exchange of notice of such termination or deregistration that the Exchange is making inquiry into a matter or matters, which occurred prior to the termination or deregistration. The Exchange is moving this Rule to New Rule 9110(d), which is not included in Rule 9110 of either BX or Nasdaq but will preserve the Exchange's current jurisdiction under its rules.

- Rule 960.1, Interpretations and Policies .01 defines the term "person associated with a member" or "associated person of a member" as the same meaning as Section 3(a)(21) of the Act. The Exchange is retaining this definition by amending Rule 1(b), which currently defines "associated person" or "person associated with a member organization," but is making a corrective change to the rule text by making it clear that the Rule applies to persons associated with a "member organization" instead of a "member." As discussed above, there are no persons associated with a Member. Therefore, under amended Rule 1(b), the Exchange is noting that, for purposes of the Rule 8000 and 9000 Series, the terms "person associated with a member organization" or "associated person" have the same meaning as the terms "persons associated with a member" or "associated person of a member,"

respectively, as provided in Section 3(a)(21) of the Act.

- Rule 960.1, Interpretations and Policies .02 notes that summary suspension or other action taken pursuant to Exchange By-Laws or rules, or Section 6(d)(3) of the Act is not deemed to be disciplinary action under the disciplinary rules. The Exchange is replacing this Rule with New Rule 9558, which concerns summary proceedings authorized by Section 6(d)(3) of the Act. Although not explicitly noted in the New Rule, action taken under the rule is not defined as disciplinary action, but rather summary action to impose limitation, prohibition or suspension on a Member, Member Organization, or Associated Person, pending the opportunity for a hearing.

- Rule 960.2 concerns the investigative process and authorization of complaints. The Exchange is replacing this Rule with New Rules under the Rule 8000 and 9000 Series.

- Rule 960.2(a) requires that the Exchange investigate possible violations within its disciplinary jurisdiction upon instruction of the Board, BCC, or other Exchange official or upon receipt by the Exchange of a written accusation from a Member, Member Organization, or Associated Person, which specifies in reasonable detail the facts that are subject to the accusation. The Exchange is replacing this Rule with New Rule 8210, which sets forth staff's (including FINRA staff's) authority to examine and investigate potential violations of the Exchange rules.

- Rule 960.2(b) requires a Member, Member Organization, or Associated Person to cooperate with Exchange staff in the investigative process, and to not otherwise impede or delay an Exchange investigation into matters within its disciplinary jurisdiction. The Exchange is replacing this Rule with New Rule 8210, which specifically sets forth the Member's, Member Organization's, Associated Person's, or person subject to the Exchange's jurisdiction's obligation to cooperate with the Exchange and FINRA in the investigative process.

- Rule 960.2(c) sets forth a Member's, Member Organization's or Associated Person's right to counsel in connection with requests for information, documents or testimony and throughout the course of any disciplinary proceeding and the review thereof, or any hearing concerning a summary action. The Exchange is replacing this Rule with New Rule 9141(b), which provides that a Member, Member Organization, or Associated Person may be represented in any proceeding by an attorney, so long as the attorney has not been barred pursuant to New Rules 9150

or 9280. Although not explicitly stated in the rules, as is the case for BX and Nasdaq, FINRA allows a member or person associated with a member to be represented by counsel in an investigation.<sup>152</sup>

- Rule 960.2(d) requires staff to, upon forming a reasonable basis that a violation with [sic] the disciplinary jurisdiction of the Exchange has occurred, submit a written report to the BCC that specifies the violations and the facts that gave rise to the violations. The Exchange is replacing this Rule with New Rule 9211(a)(1), which provides a process whereby staff may seek approval from the ODA to issue a complaint in a matter when staff believes that any Member, Member Organization, or Associated Person is violating or has violated any rule, regulation, or statutory provision, including the federal securities laws and the regulations thereunder, which the Exchange has jurisdiction to enforce.

- Rule 960.2(e) requires staff, prior to submitting its report pursuant to subparagraph (d), to provide notice to the person who is the subject of the report of the nature of the allegations and specific rule(s) and/or law(s) that appear to have been violated. Such notice must also state that report will be reviewed by the BCC. The subject of the report may submit a written statement to the BCC stating why no disciplinary action should be taken. Staff must provide the subject with access to any documents and other materials in the Exchange's investigative file that were furnished by the subject or his agents. This Rule describes the "Wells Notice" process and, although there is no explicit rule under the New Rule 8000 and 9000 Series that describes the Wells Notice process, FINRA uses this process in its disciplinary process.<sup>153</sup>

- Rule 960.2(f)(i) requires the BCC to direct staff to prepare a Statement of Charges when it appears that there is probable cause for finding a violation within the disciplinary jurisdiction of the Exchange. Should the BCC determine there is not such probable cause, or disciplinary action is not warranted, it shall inform staff and instruct them not to initiate action. In such a case, the BCC must document its basis for its determination in its meeting minutes. This process is generally subsumed in the ODA approval process noted under New Rule 9211(a)(1). Under the new process, however, a

<sup>152</sup> See FINRA Regulatory Notice 09-17 (March 2009) (stating, "All FINRA investigations are non-public and confidential, and firms and individuals are entitled to be represented by counsel.").

<sup>153</sup> *Id.*

complaint is required only if a settlement is unable to be reached. Although not noted in New Rule 9211(a)(1), FINRA represented to the Exchange that the ODA memorializes in writing all decisions not to authorize a complaint or accept a settlement.

- Rule 960.2(f)(ii) permits the Exchange, in the case of violations determined based on an exception-based surveillance program, to aggregate individual violations of the Exchange order handling rules and consider such violations as a single offense only in accordance with the guidelines set forth in the Exchange's Numerical Criteria for Bringing Cases for Violations of Exchange Order Handling Rules. The Rule also provides that the Exchange may batch individual violations of Rule 1014(c)(i)(A) pertaining to quote spread parameters (and corresponding Options Floor Procedure Advice F-6). In the alternative, the Exchange may refer the matter to the Business Conduct Committee for possible disciplinary action when: (i) The Exchange determines that there exists a pattern or practice of violative conduct without exceptional circumstances, or (ii) any single instance of violative conduct without exceptional circumstances is deemed to be so egregious that referral to the Business Conduct Committee for possible disciplinary action is appropriate. The Exchange is proposing to move the language under Rule 960.2(f)(ii) to New Rule 9211(a)(1), which discusses the authorization of complaints, with minor changes. Specifically, the Exchange is replacing text concerning referring matters to the BCC with requesting authorization from the ODA, which is the appropriate body responsible for authorizing the issuance of a complaint for conduct arising from violations under the Advices. The Exchange is also replacing references to the "Exchange" with references to the Phlx Regulation Department, Department of Enforcement, or the Department of Market Regulation. The Exchange is also being more specific under the New Rules by noting that Phlx Regulation Department, Department of Enforcement, or the Department of Market Regulation may seek authorization to take formal disciplinary action from the ODA.

- Rule 960.3 concerns the contents and required service of Statements of Charges. The Rule requires Statements of Charges to include the specific provisions within the Exchange's disciplinary jurisdiction alleged to have been violated, the persons or organizations alleged to have committed each of the violations (the "Respondents"), and the specific acts

that give rise to the alleged violations. New Rule 9212(a)(1) sets forth the required contents of a complaint. In this regard, the new requirements are substantially similar to the old rule. Specifically, both rules require the Exchange to name the specific provision(s) of the rules purported to have been violated by the respondent(s), and the specific conduct that gave rise to the alleged violations. In addition, Rule 960.3 provides a definition of the term "Respondents" as noted above, whereas New Rule 9212 does not; however, New Rule 9120(aa) provides a definition of the term "Respondents," which is materially identical to the definition in Rule 960.3 and is designed to encompass the same entity in the process. Specifically, New Rule 9120(aa) defines "Respondent" as an Exchange Member, Member Organization or Associated Person against whom a complaint is issued in a disciplinary proceeding governed by the New Rule 9200 Series and in an appeal or review governed by the New Rule 9300 Series. Moreover, the definition notes that in a proceeding governed by the Rule 9800 Series, the term "Respondent" means an Exchange Member, Member Organization or Associated Person that has been served a notice initiating a cease and desist proceeding. Rule 960.3 also requires that a copy of the Statement of Charges be served on each of the Respondents. The Exchange is replacing this Rule with New Rule 9130 Series, which concerns the service and filing of papers in a matter. New Rule 9131 specifically sets forth the process for service of complaints and documents initiating proceedings.

- Rule 960.4 concerns the content and timing of submission of an Answer to a Statement of Charges. The Rule requires a Respondent to file an Answer within 15 business days after service of the Statement of Charges. The Rule allows a Member, Member Organization, or Associated Person to request a hearing or alternatively request that a decision be rendered based upon the written submissions. The Rule also provides that the charges shall be considered admitted by a Member, Member Organization, or Associated Person that fails to submit an Answer within the specified time, or failed to receive an extension from Exchange staff prior to the expiration of the 15 business day deadline. The Exchange is generally replacing this Rule with rules found in the New Rule 9220 Series, which concern requests for hearings. New Rule 9215 concerns Answers to Complaints and requires Respondents to file an Answer within 25 days after

service of a complaint. New Rule 9138(a) defines a "day," for purposes of the New Rule 9000 Series, as a calendar day. Like the old Rule, New Rule 9269 provides for the issuance of a default decision against a Respondent that fails to answer the complaint within the time afforded under New Rule 9215. Under New Rule 9221, a Respondent may request [sic] hearing, and if it does not request a hearing, subparagraph (c) of the rule permits a Hearing Panel or Extended Hearing Panel to consider the matter on the record.

- Rule 960.5 concerns the hearings process, and sets forth, among other things, the process for requesting a hearing, how Hearings Panels are selected, and the roles and responsibilities of Hearing Panel members and counsel thereto, the pre-hearing and hearing procedures, and the conduct of hearings. The Exchange is replacing this Rule with the New Rule 9200 Series, which provides a more comprehensive process than the existing rule.

- Rule 960.5(a)1. allows a hearing to be held on a Statement of Charges if requested by the Respondent in its Answer or upon motion of the BCC or staff. The Rule requires hearings to be presided over by three Hearing Panelists. New Rule 9221 provides a Respondent with the right to request a hearing in its answer. If a Respondent does not request a hearing in its answer and, in the absence of a waiver by an adjudicator for a hearing request submitted after submission of the answer, the decision may be made on the record, as defined in New Rule 9267. Pursuant to New Rule 9221(b), in the absence of a request for a hearing from any Respondent, the Hearing Officer may order any complaint set down for hearing. Pursuant to New Rule 9221(c), if all respondents waive a hearing, and the Hearing Officer does not order a hearing on his or her own motion, a Hearing Panel or, if applicable, the Extended Hearing Panel may order a hearing or may consider the matter on the record. Further, if fewer than all Respondents waive a hearing, a Hearing Officer, a Hearing Panel or, if applicable, an Extended Hearing Panel, may exercise its discretion to order that a hearing be held as to all Respondents or, alternatively, conduct a hearing as to only those Respondents who requested a hearing and consider the matter on the record as to those Respondents who waived a hearing. Consequently, the new rule will preserve the ability for a Respondent to request a hearing, and for an adjudicator to order a hearing, however, staff will no longer have the authority to request a hearing. The

Exchange notes that both the Hearing Officer and Hearing Panel may exercise discretion to order a hearing, thereby providing unbiased judgement on whether a hearing is warranted.

■ Rule 960.5(a)2. requires that the Chair of the BCC or its designee name a Hearing Panel within ten business days of receipt of notice that the Respondent has requested a hearing, upon motion of the BCC for naming of a Hearing Panel, or upon Respondent's request that the matter be decided on written submissions. Under the Rule, the BCC Chair or its designee must promptly notify staff and the Respondent of the selection. New Rule 9213(a) provides that a Hearing Officer must be assigned to preside over the matter as soon as practicable after staff files a complaint, and requires that Parties are provided with notice of the Hearing Officer's assignment pursuant to New Rule 9132. New Rule 9213(b) provides that the Chief Hearing Officer must appoint Hearing Panelists pursuant to New Rules 9231 and 9232 as soon as practicable after assigning the Hearing Officer in the matter.

■ Rule 960.5(a)3. sets forth the responsibilities of the Hearing Panel, which include but are not limited to presiding over hearings in contested disciplinary cases, conducting pre-hearing conferences, ruling on procedural or discovery matters, making all necessary evidentiary or other rulings, regulating the conduct of a hearing, imposing appropriate sanctions for improper conduct by a party or a party's representative, issuing decisions, and rendering decisions in connection with Summary Disposition Proceedings. The Rule also prohibits Hearing Panelists from involvement with the investigative process, participation in the decision to institute disciplinary proceedings, issue decisions without a majority concurrence of the Hearing Panel, rule on requests to disqualify a member of the Hearing Panel, or issue citations for violations of Exchange Rules and Floor Procedure Advises. Hearing Panelists under the current Rule may be Members, general partners or officers of Member Organizations, or other individuals that the BCC Chair or its designee deems qualified. New Rule 9231(b) describes the compositional requirements of Hearing Panels. Under the New Rule, the Hearing Panel generally must consist of a Hearing Officer and two Hearing Panelists. The Chief Hearing Officer is responsible for selecting the Panelists, who must be associated with a Member Organization or retired therefrom. New Rule 9233(a) requires a Hearing Officer to recuse himself if he determines that he has a

conflict of interest or bias or circumstances otherwise exist where his fairness might reasonably be questioned. Subparagraph (b) of the New Rule provides that a Party may move for the disqualification of a Hearing Officer. New Rule 9234(a) applies the same recusal standard as New Rule 9233(a) to Hearing Panelists. Likewise, New Rule 9234(b) provides parties with a process identical to New Rule 9233(b), yet also provides that the Chief Hearing Officer may order the disqualification of a Hearing Panelist if he determines that the Panelist has a conflict of interest or bias or circumstances otherwise exist where his fairness might reasonably be questioned. New Rule 9231(b)(1) permits the Chief Hearing Officer to select as a Panelist a person who: (A) Previously served on the Exchange Review Council; (B) previously served on a disciplinary subcommittee of the Exchange Review Council, including a Subcommittee, an Extended Proceeding Committee, or their predecessor subcommittees; (C) previously served as a Director, or as a Governor of the Exchange prior to its acquisition by Nasdaq, Inc., but does not serve currently in that position; or (D) is a FINRA Panelist approved by the Exchange Board at least annually, including a member of FINRA's Market Regulation Committee or who previously served on the Market Regulation Committee not earlier than four years before the date the complaint was served upon the Respondent who was the first served Respondent in the disciplinary proceeding for which the Hearing Panel or the Extended Hearing Panel is being appointed, or from other sources the Board deems appropriate given the responsibilities of Panelists. For purposes of initially applying New Rule 9231(b)(1)(B), the Exchange will allow former BCC members and former MORC members to serve as Panelist under the Rule. The Exchange believes that this is appropriate because it will be drawing from both of the groups for Exchange Review Council members.

■ Rule 960.5(a)4. describes the role of the Hearing Attorney. The Hearing Attorney assists a Hearing Panel in the discharge of its duties. The Hearing Attorney advises the Hearing Panel on application of rules, sanctions and relevant precedent, yet may not vote in the disposition of a matter. Under the existing Rule, the Hearing Attorney is subject to the same conflict of interest prohibitions as Hearing Panelists. Under the New Rules, hearings will be conducted by FINRA's OHO, which is responsible for the adjudication of matters. Hearings conducted by the

OHO are managed by a Hearing Officer, who is an attorney appointed by the Chief Hearing Officer to act in an adjudicative role and fulfill various adjudicative responsibilities and duties set forth in the New Rule 9200, 9550, and 9800 Series (*see* New Rule 9120(r)). Hearing Officers are subject to the same conflicts of interest standard as a Hearing Panelist. This standard requires a Hearing Officer to withdraw from a matter any time he or she determines that he or she has a conflict of interest or bias or circumstances otherwise exist where his or her fairness might reasonably be questioned (*see* New Rule 9233(a)). Similarly, in appellate matters, the Exchange Review Council is assigned counsel. New Rule 9120(e) defines the term "Counsel to the Exchange Review Committee" as an attorney that reports to the Chief Regulatory Officer of the Exchange who is responsible for advising the Exchange Review Council, the Review Subcommittee, a Subcommittee, or an Extended Proceeding Committee regarding a disciplinary proceeding on appeal or review before the Exchange Review Council. Counsel also may decide a motion on a procedural matter in the Rule 9300 Series (*see* New Rule 9146(j)). New Rule 9313 describes the authority of the Counsel and the process for seeking the review of a Counsel decision. Under New Rule 9313(a), Counsel has authority to take ministerial and administrative actions to further the efficient administration of a proceeding. A Party may seek review of a Counsel decision on motion to the Exchange Review Council, the Review Subcommittee, a Subcommittee or, if applicable, an Extended Proceeding Committee. Similar to the Hearing Attorney, Counsel is subject to the same conflict of interest prohibitions as the Exchange Review Council (*see* New Rule 9332), which requires that if a member of the Exchange Review Council, including a member of the Review Subcommittee, a Panelist of a Subcommittee or an Extended Proceeding Committee, or a Counsel to the Exchange Review Council determines that the member, the Panelist, or the Counsel to the Exchange Review Council has a conflict of interest or bias or circumstances otherwise exist where the fairness of the member, the Panelist, or the Counsel to the Exchange Review Council might reasonably be questioned, the member, the Panelist, or the Counsel to the Exchange Review Council shall notify the Chair of the Exchange Review Council, and the Chair of the Exchange Review Council shall issue and serve on the Parties a

notice stating that the member, the Panelist, or the Counsel to the Exchange Review Council has withdrawn from the matter.

- Rule 960.5(a)5. requires written notice of the Hearing Panelist selection to be given to the Respondent. The Rule provides opportunity for any person involved in the disciplinary proceeding to disclose any relationship with a Hearing Panelist, which might result in such Panelist being unable to render a fair and impartial decision. New Rule 9233(b) permits a Party to move for the disqualification of a Hearing Officer not later than 15 days after the later of: (1) When the Party learned of the facts believed to constitute the disqualification; or (2) when the Party was notified of the assignment of the Hearing Officer. Similarly, New Rule 9234(b) permits a Party to move for the disqualification of a Hearing Panelist within 15 days after the later of: (1) When the Party learned of the facts believed to constitute the disqualification; or (2) when the Party was notified of the assignment of the Hearing Panelist.

- Rule 960.5(a)6. outlines Hearing Panelist compensation, including additional compensation in extraordinary cases. Under New Rule 9231(c), the Chief Hearing Officer may determine based on the complexity of the issues involved, the probable length of the hearing, or other factors that the Chief Hearing Officer deems material, that a matter be designated as an Extended Hearing, and that such matter be considered by an Extended Hearing Panel. Similarly, under New Rule 9331(a)(2) the Exchange Review Council or Review Subcommittee may designate a matter as an Extended Proceeding and that such matter be considered by an Extended Proceeding Committee based upon consideration of the volume and complexity of the certified record, or other factors deemed material by the Exchange Review Council or Review Subcommittee. The primary significance of such a designation is to allow the compensation of Extended Hearing Panelists at the rate then in effect for arbitrators appointed under the FINRA Rule 12000 and 13000 Series.

- Rule 960.5(a)7. vests the BCC Chair with authority to appoint a qualified replacement Hearing Panelist should a Hearing Panelist become unavailable. New Rule 9231(e) provides that the Chief Hearing Officer may replace a Hearing Officer if the Hearing Officer withdraws, is incapacitated, or otherwise is unable to continue service after being appointed. Similarly, New Rule 9234 provides the Chief Hearing

Officer the authority to appoint new Hearing Panelists.

- Rule 960.5(b)1. requires a hearing on the Statement of Charges to be held no later than 120 days after the earlier of the filing date of the Answer or the date the BCC requests a hearing. The hearing date may be extended by Hearing Panel for good cause. New Rule 9221(d) provides that the Hearing Officer must issue a notice stating the date, time, and place of the hearing, and whether the hearing shall be held before a Hearing Panel or an Extended Hearing Panel, and shall serve such notice on the Parties at least 28 days before the hearing, unless: (1) In the discretion of the Hearing Officer, he or she determines that extraordinary circumstances require a shorter notice period; or (2) the Parties waive the notice period. Unlike Rule 960.5(b)1., New Rule 9221(d) does not impose a deadline by which a hearing must be held but the Exchange anticipates hearings will generally be held within 120 days.

- Rule 960.5(b)2. requires that the Respondent be given notice at least 15 business days before the hearing of the time and place of the hearing. As noted above, New Rule 9221(d) provides that notice of the hearing date and location must be provided to the Parties at least 28 days before the hearing.

- Rule 960.5(b)3. permits the Respondent or staff to request in writing an adjournment of the hearing date for just cause. The Hearing Panel must promptly consider the request and inform the parties of its determination. If granted, the Hearing Attorney must also inform the parties of the new hearing date. New Rule 9222 concerns extensions of time, postponements, and adjournments. Under the New Rule, a Hearing Officer may, for good cause shown, change the place of the hearing, postpone the commencement of the hearing, or adjourn a convened hearing for a reasonable period of time. Such an extension may not exceed 28 days unless the Hearing Officer states on the record or provides by written order the reasons a longer period is necessary.

- Rule 960.5(b)4. requires parties to furnish to the Hearing Panelists and each other copies of all documentary evidence to be presented at the hearing, and a list of witnesses to be called at the hearing. New Rule 9261 provides that, no later than ten days before the hearing, or at such earlier date as may be specified by the Hearing Officer, each Party shall submit to all other Parties and to the Hearing Officer copies of documentary evidence and the names of the witnesses each Party intends to present at the hearing.

- Rule 960.5(b)5. permits the Hearing Panel to schedule pre-hearing conferences not less than eight business days prior to the hearing date. Pre-hearing conferences are held for the purpose of clarifying and simplifying issues and otherwise expediting the proceeding, and must be attended by all parties and the Hearing Panel. New Rule 9241 provides that, on his or her own motion or at the request of a Party, the Hearing Officer may, in his or her discretion, order counsel or any Party to meet for a pre-hearing conference. The conference may be held for the following non-exclusive list of reasons: Expediting the disposition of the proceeding; establishing procedures to manage the proceeding efficiently; and improving the quality of the hearing through more thorough preparation. Under the New Rule, an initial pre-hearing conference, unless determined by the Hearing Officer to be unnecessary or premature, shall be held within 21 days after filing of an Answer. Under New Rule 9241(f), a Hearing Officer may issue a default decision against a Party that fails to appear at a pre-hearing conference, if the Party was provided due notice.

- Rule 960.5(c) vests the Hearing Panelists with authority to determine all questions concerning the admissibility of evidence, and to otherwise regulate the conduct of the hearing. The Rule also states that the formal rules of evidence do not apply. The Rule requires staff to present the charges in the matter, and permits both parties to present evidence and produce witnesses that testify under oath and are subject to cross-examination. The Rule also allows the Hearing Panel to request production of documentary evidence and witnesses, and to question witnesses. Last, the Rule requires that a written transcript be made of the hearing, which becomes part of the record. New Rule 9263 provides the Hearing Officer with authority to receive relevant evidence, and to exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial. New Rule 9145(a) provides that the formal rules of evidence shall not apply in a proceeding brought under the Rule 9000 Series.

- Rule 960.5, Interpretation and Policy .01 permits a non-party to the matter to intervene upon showing that it has an interest in the subject of the hearing and that the disposition of the matter may impair or impede its ability to protect its interest. The Hearing Panel may also permit a non-party to intervene as a party when the person's claim or defense and main action have questions of law or fact in common. A

non-party wishing to intervene must file with the Hearing Panel a notice requesting the right to intervene, stating the grounds therefor, and setting forth the claim or defense for which intervention is sought. The Exchange is eliminating the ability for a non-party to intervene, but will allow the consolidation of proceedings under New Rule 9214, which concerns consolidation and severance of disciplinary proceedings. Under subparagraph (b) of the New Rule, a Party may file a motion to consolidate two or more disciplinary proceedings if such consolidation would further the efficiency of the disciplinary process, or if the subject complaints involve common questions of law or fact or one or more of the same Respondents. When determining whether to order the consolidation of such disciplinary proceedings, the New Rule requires the Chief Hearing Officers to consider whether the same or similar evidence reasonably would be expected to be offered at each of the hearings, whether the proposed consolidation would conserve the time and resources of the parties, and whether any unfair prejudice would be suffered by one or more parties as a result of the consolidation. Unlike Rule 960.5, Interpretation and Policy .01, New Rule 9214 does not permit a non-party to a disciplinary proceeding to file a motion or intervene in the proceeding in any manner whatsoever. The Exchange believes that eliminating the ability of a non-party to intervene in a matter is a better practice and will ensure that disciplinary proceedings are limited to issues of concern to parties of a matter while still allowing the consolidation of matters under the conditions noted above.

■ Rule 960.5, Interpretation and Policy .02 requires a Hearing Panel to consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. As noted above, the New Rules do not permit a non-party to a disciplinary proceeding to file a motion or intervene in the proceeding in any manner whatsoever. Also as noted above, New Rule 9214(a) permits the Chief Hearing Officer to consolidate disciplinary proceedings after considering, among other things, whether any unfair prejudice would be suffered by one or more parties as a result of the consolidation.

■ Rule 960.5, Interpretation and Policy .03 prohibits any person not otherwise a party or licensed counsel representing a party from attending a hearing unless specifically allowed by the Hearing Panel. The new rules do not

have a provision specifically concerning attendance at a hearing; however, hearings will be similarly limited to parties and licensed counsel. New Rule 9141(b) concerns who may represent a Party in a matter. The New Rule provides that a licensed attorney may represent a Party in a proceeding, a member of a partnership may represent the partnership, and a bona fide officer of a corporation, trust or association may represent the corporation, trust or association. New Rule 9261(a) requires Parties to submit to all other Parties and to the Hearing Officer copies of documentary evidence and the names of the witnesses each Party intends to present at the hearing.

• Rule 960.6 concerns the summary disposition process. Under Rule 960.6(a), a Hearing Panel may issue a summary decision in a disciplinary proceeding that violations within the disciplinary jurisdiction of the Exchange have occurred and impose sanctions upon those culpable for such conduct if the Respondent has admitted to the violation(s), or there is no dispute concerning those material facts which give rise to such violation(s). Under Rule 960.6(b), the Exchange is required to serve the summary decision on the Respondent(s), to which the Respondent(s) may reply with a request to set aside any of the findings made or sanctions imposed by the summary decision. Rule 960.6(b) also provides that the Respondent(s) may request a hearing in their [sic] reply, which is governed by Rule 960.5 and, in cases where the Respondent has admitted to committing a violation, any further proceedings are limited to the issue of the propriety of the sanction imposed. Rule 960.6(c) requires the Hearing Panel to set aside a decision in a summary proceeding if the Respondent establishes that an issue of material fact or law exists as to any of the finding [sic] contained or sanctions imposed in the summary decision. New Rule 9264 provides for summary disposition. Unlike Rule 960.6, a motion for summary disposition must be initiated by a Party. Moreover, New Rule 9264 has different requirements based on when in the process the motion is made. Under the New Rule, the Respondent and/or staff may, prior to the Hearing but after the Respondent has filed an answer and had opportunity to inspect documents in the record, make a motion for summary disposition of any or all the causes of action in the complaint with respect to that Respondent, as well as any defense raised in a Respondent's answer. If a hearing on the merits has begun, then parties may submit such a

motion only with leave of the Hearing Officer. New Rule 9264(c) provides the process for proceeding when a summary motion does not dispose of the matter entirely. Under the New Rule, the Hearing Panel must, if practicable, ascertain what material facts exist without substantial controversy and what facts are controverted, and, based on this determination, issue an order specifying such. New Rule 9264(d) requires motions for summary disposition to be supported by a statement of undisputed facts, a supporting memorandum of points and authorities, and affidavits or declarations that set forth such facts. Because summary disposition proceedings are initiated by the Hearing Panel under Rule 960.6, there is no such analogue under the New Rules. New Rule 9264(e) concerns rulings on motions for summary disposition. The New Rule provides that a Hearing Officer may deny or defer a decision on any motion for summary disposition, yet only a Hearing Panel or, if applicable, the Extended Hearing Panel, may grant such a motion, except that the Hearing Officer may grant motions for summary disposition with respect to questions of jurisdiction. The New Rule also provides that a motion for summary disposition may be granted if there is no genuine issue with regard to any material fact and the Party that files the motion is entitled to summary disposition as a matter of law.

• Rule 960.7 concerns offers of settlement. Under the Rule, a Respondent in a matter may submit an offer of settlement within 120 days of submitting its Answer. The offer of settlement must contain a proposed stipulation of facts and shall consent to specified sanctions. The BCC may accept the offer of settlement or reject it. Should the BCC reject the offer of settlement, the matter will proceed normally. As noted above, in certain cases FINRA will negotiate a settlement prior to the issuance of a complaint. In such cases, the proposed Statement of Charges and offer of settlement are provided to the BCC for review and approval, with the BCC treating the offer of settlement as the Respondent's Answer. The Exchange is replacing this Rule with New Rule 9270,<sup>154</sup> which

<sup>154</sup> As discussed above, the Exchange is also adopting an acceptance, waiver and consent process under New Rule 9216(a), which allows for the settlement of matters prior to the issuance of a complaint. The Exchange is proposing to include the Phlx Regulation Department as an entity that may administer the acceptance, waiver and consent process under New Rule 9216(a) in addition to the Department of Enforcement and Department of Market Regulation, which is unlike the analogous

provides expressly that a Respondent to [sic] propose in writing an offer of settlement at any time. The offer must conform to the requirements of the New Rule and in submitting the offer the Respondent waives certain rights. If the Phlx Regulation Department,<sup>155</sup> Department of Enforcement or Department of Market Regulation do [sic] not oppose the offer of settlement, it is considered uncontested. Similar to Rule 960.7, an uncontested offer of settlement is provided to the Exchange Review Council (or to the ODA, in the case of a Respondent that is an affiliate of the Exchange within the meaning of Rule 985) by the Phlx Regulation Department, Department of Enforcement or Department of Market Regulation together with its recommendation. Under New Rule 9270(e), the ODA or Review Subcommittee may also accept any uncontested offer of settlement, and the Review Subcommittee may reject uncontested offers of settlement while the ODA may only reject uncontested offers of settlement involving Respondents that are affiliates of the Exchange. If a hearing on the merits has begun, the offer of settlement and a proposed order of acceptance is provided to the Hearing Panel or, if applicable, the Extended Hearing Panel for acceptance or rejection. If accepted by the Hearing Panel or, if applicable, the Extended Hearing Panel, the offer of settlement and the order of acceptance shall be forwarded to the Exchange Review Council (or to the ODA, in the case of a Respondent that is an affiliate of the Exchange within the meaning of Rule 985) to accept or reject. As described above, the Review Subcommittee may accept or reject an uncontested offer of settlement, and the ODA may only accept an uncontested offer of settlement not involving an Exchange affiliate.

- Rule 960.7 Interpretation and Policies .01 allows the BCC to consider an offer of settlement submitted after 120 days as long as its consideration does not delay the hearing in the matter. The policy also provides that, if the Respondent submits an offer of settlement after the hearing has commenced, staff must promptly submit its position with respect to the offer and the Hearing Panel will then determine

whether to consider the offer, and if so, determine whether to accept or reject the offer. The Exchange is replacing this policy with New Rule 9270(a), which provides that if a Respondent proposes an offer of settlement after the hearing on the merits has begun, the making of an offer of settlement shall not stay the proceeding, unless otherwise decided by the Hearing Panel or, if applicable, the Extended Hearing Panel. Under New Rule 9270(e), if an offer of settlement is offered after a hearing has commenced and it is uncontested, then the Phlx Regulation Department, the Department of Enforcement or Department of Market Regulation must transmit the offer with a proposed order of acceptance to the Hearing Panel or, if applicable, the Extended Hearing Panel, for approval or rejection. Under New Rule 9270(f), which concerns contested offers of settlement provided prior to or after a hearing has commenced, if an offer of settlement is offered after a hearing has commenced and it is contested then the Phlx Regulation Department, the Department of Enforcement or the Department of Market Regulation must provide a written opposition to the Hearing Panel or, if applicable, the Extended Hearing Panel, which may issue an approval or rejection of the offer, or may order the Parties [sic] attend a settlement conference. If a contested offer of settlement is approved by the Hearing Panel, or, if applicable, the Extended Hearing Panel, the Hearing Officer shall draft an order of acceptance of the offer of settlement, which is sent to the Exchange Review Council (or ODA in the case of a Respondent that is an Exchange affiliate) for acceptance or rejection. The Review Subcommittee may accept or reject a contested offer of settlement and offer [sic] of acceptance, other than those concerning a Respondent that is an Exchange affiliate, or refer them to the Exchange Review Council.

- Rule 960.8 concerns the content, approval and issuance of Hearing Panel decisions. The Rule requires the Hearing Panel to review the entire record and make a determination by a majority vote on the disposition of the matter, including whether a Respondent committed violations and the appropriate sanctions, if any. The Rule requires the Hearing Panel to thereafter issue a written decision consistent with its determination. The written decision must contain a statement of findings and conclusions, with the reasons therefor, upon all material issues presented in the record, and whether each violation within the disciplinary jurisdiction of the Exchange alleged in

the Statement of Charges occurred. The Rule requires the Hearing Panel, absent extraordinary circumstances, to issue its decision within 60 days after its receipt of the Transcript from staff, a copy of which must be promptly served on the Respondent. Last, the Rule requires disciplinary sanctions arising from the decision be made public in a manner prescribed by the Board of Directors. The Exchange is replacing this Rule with New Rule 9268, which concerns decisions of Hearing Panels or, if applicable, the Extended Hearing Panel. Similar to the old Rule, the New Rule requires the Hearing Panel to make a determination in a matter based on a majority vote, which is reflected in a decision drafted by the Hearing Officer. Also similar to the old Rule, New Rule 9268 requires a decision to include, in part, the specific statutory or rule provisions allegedly violated, a statement that sets forth the findings of the Hearing Panel with respect to the act or practice the Respondent was alleged to have committed or omitted, and to provide the conclusions of the Hearing Panel whether the Respondent violated any provision alleged in the complaint. The New Rule requires that the decision be issued within 60 days of the final date allowed for filing proposed findings of fact, conclusions of law, and post hearing briefs, or by a date established by the Chief Hearing Officer. Although the date on which the 60 day period begins is different between the old and New Rules, the principle is the same, namely that once the matter is closed to further motion or argument a decision must be issued within the required timeframe. Last, under subparagraph (d) of the New Rule, the OHO must publish notice of the decision and any dissenting opinion in the Central Registration Depository and provide a copy of the decision and any dissent thereto to the each Member Organization of the Exchange with which the Respondent is associated.

- Rule 960.8, Supplementary Material, provides the Board of Directors' directive with regard to publicity of sanctions. The Exchange is replacing this Rule with New Rule IM-8310-3, which concerns the release of disciplinary complaints, decisions, and other information. The New Rule generally requires the Phlx Regulation Department to release information concerning a decision that imposes a suspension, bar, cancellation or expulsion of a Member Organization or Member; suspension or revocation of a Member's permit; or suspension, bar or revocation of the registration of a Member or Associated Person. Unlike

rules of BX and Nasdaq that reference only the Department of Enforcement and Department of Market Regulation.

<sup>155</sup> The Exchange is proposing to include the Phlx Regulation Department as an entity that may administer the settlement process under New Rule 9270(e) in addition to the Department of Enforcement and Department of Market Regulation, which is unlike the analogous rules of BX and Nasdaq that reference only the Department of Enforcement and Department of Market Regulation.

BX and Nasdaq Rules 8310(a), New Rule 8310(a) will include suspension of a Member's permit and revocation or cancellation of a Member's permit as available sanctions under the rule, which is consistent with the authority currently provided under Rule 960.10(a)(1). As described above, BX and Nasdaq do not have Associated Persons that are permit holders, and therefore Members. Consequently, the Exchange is including Members in IM-8310-1, which discusses the effect of a suspension, revocation, cancellation or bar. The Exchange is also including disclosure of suspension of a Member's permit and revocation or cancellation of a Member's permit under New Rule IM-8310-3. The Regulation Department may also release such information concerning a decision where there is a significant policy or enforcement determination and the CRO has deemed the release to be in the public interest.

- Rule 960.9 concerns the review process of Hearing Panel decisions, which includes both appeals thereof and the initiation of reviews by the Board of Directors.

- Rule 960.9(a) provides a Respondent ten days after service of the notice and decision to appeal the decision to the Board of Directors by service of the petition on the Secretary of the Exchange. The Rule requires the petition to be in writing and to specify the findings and conclusions of the decision, which is the subject of the petition, together with the reasons that the Respondent petitions for review of these findings. Any objections to a decision not specified in the petition are thereafter waived. The rule permits staff to provide a written response to the request filed with the Secretary within fifteen days of service of the petition. Under the rule, staff may request review of a decision by petitioning the Board of Directors within ten days after the decision. The New Rule 9300 series concerns the review of Disciplinary Proceedings by the Exchange Review Council, Board of Directors, and CRO. Under the new process, a Hearing Panel decision issued pursuant to New Rules 9268 (Decision of Hearing Panel) or 9269 (Default Decisions) may be appealed to the Exchange Review Council by a party within 25 days after service of a decision. See New Rule 9311(a). A Hearing Panel decision issued pursuant to New Rule 9268 may be called for review by the Exchange Review Council within 45 days after the date of service of the decision. See New Rule 9312(a)(1). A Hearing Panel decision issued pursuant to New Rule 9269 may be called for review by the CRO within 25 days after the date of

service of the decision. Should the matter move forward (*i.e.*, the appeal is not withdrawn, abandoned, or the call for review is withdrawn), the Exchange Review Council will issue its own decision. Under the New Rule 9350 series, a Director of the Board of Directors may call for review of the decision of the Exchange Review Council not later than the next meeting of the Board of Directors that is at least fifteen days after the date on which the Board of Directors receives the Exchange Review Council decision. Unlike the old rule, New Rule 9351(a) does not provide a right to Parties to petition the Board of Directors for a review of an Exchange Review Council decision. The Exchange believes this is appropriate because parties are given the right to appeal a Hearing Panel decision to the Exchange Review Council, which serves in a similar appellate capacity as the Board of Directors under the old process.

- Rule 960.9(b)(i) concerns the Hearing Panel decision review process. Under the rule, the review is conducted by the Board of Directors or an Advisory Committee thereof. If an Advisory Committee is appointed, it must be composed of three Board Directors, one of which must be a Public Director appointed by the Chair of the Board. Any Board member that participated in the matter before the BCC or Hearing Panel may not participate in the Board review. Last, the rule provides that a matter is considered on the record and written exceptions filed by the parties, unless the adjudicators determine to hear oral arguments. As noted above, the Exchange Review Council performs a similar appellate function as the Board of Directors under the old process. Under New Rule 9332, Exchange Review Council members are subject to the same disqualification and recusal standards as the Hearing Panelists and Hearing Officers, including a direct conflict of interest such as prior participation in the matter. Under the new Exchange Review Council process and pursuant to New Rule 9331(b), a Subcommittee or Extended Proceeding Committee is formed for the purpose of participating in a hearing, to the extent oral arguments are heard, and to recommend the disposition of a matter before the Exchange Review Council. New Rule 9343 provides that, if no oral argument is held, a matter shall be decided on the record, supplemented by any written materials submitted to or issued by the Subcommittee or, if applicable, the Extended Proceeding Committee, or the Exchange Review Council in connection with the appeal,

cross-appeal, or call for review. Pursuant to New Rule 9346, the Exchange Review Council is charged with issuing a decision based on the record, as described above, and any oral argument permitted under the Code of Procedure, subject to limited exception.

- Rule 960.9(b)(ii) concerns reviews conducted by the Board of Directors. Under the rule, the Board must determine, by a majority vote, whether to affirm, reverse or modify, in whole or in part the decision of the Hearing Panel. The Board may not reverse or modify, in whole or in part the decision of the Hearing Panel if the factual conclusions in the decision are supported by substantial evidence and the decision is not arbitrary, capricious or an abuse of discretion. The rule requires the Board decision to be in writing and promptly served on the Respondent. Last, the rule provides that the Board decision represents the final disciplinary sanction of the Exchange in terms of the Act. As noted above, the Exchange Review Council performs a similar appellate function as the Board of Directors under the old process. Under New Rule 9348, the Exchange Review Council may affirm, dismiss, modify, or reverse with respect to each finding, or remand the proceeding with instructions. The Exchange Review Council may also affirm, modify, reverse, increase, or reduce any sanction, or impose any other fitting sanction. The Exchange Review Council must issue a decision consistent with New Rule 9349(b), which provides elements required to be included in an Exchange Review Council decision.

- Rule 960.9(b)(iii) concerns reviews conducted by an Advisory Committee of the Board. The Advisory Committee must submit a report to the Board with a recommendation to affirm, reverse or modify, in whole or in part, the decision of the Hearing Panel. A modification may include an increase or decrease of the sanction. Like the Board process, the Advisory Committee may not reverse or modify, in whole or in part the decision of the Hearing Panel if the factual conclusions in the decision are supported by substantial evidence and the decision is not arbitrary, capricious or an abuse of discretion. The Board must determine to affirm, reject or modify, in whole or in part the recommendation of the Advisory Committee under the same standard as if were reviewing the matter itself. The rule requires the Board decision to be in writing and promptly served on the Respondent. Last, the rule provides that the Board decision represents the final disciplinary sanction of the Exchange in terms of the Act. The Advisory

Committee process is similar to the compulsory Subcommittee or Extended Proceeding Committee process under the New Rule 9330 series, as discussed above.

- Rule 960.9(c) permits the Board to initiate a review of a Hearing Panel decision within twenty days of Respondent's notice of the decision. A review initiated under this rule follows the process outlined above. As noted above, the Exchange Review Council performs a similar appellate function as the Board of Directors under the old process. Under New Rule 9312(a), the Exchange Review Council may call for review of the decision of a Hearing Panel within forty-five days after the date of service of the decision. If, however, the Hearing Panel decision relates to a default decision issued pursuant to New Rule 9269, the Chief Regulatory Officer may call such decision for review within twenty-five days after the date of service of the decision. If called for review, such decision will be reviewed by the Exchange Review Council. As discussed, under the new process, an Exchange Review Council decision may be reviewed by the Board of Directors pursuant to New Rule 9351, and any final Exchange action may be appealed to the Commission pursuant to New Rule 9370.

- Rule 960.9(d) permits a Respondent to request review of a decision in a disciplinary proceeding to the Board in writing within ten days after the decision has been rendered. An appeal taken by staff or by a Respondent will be determined on the written record; however, parties may request an oral argument before the Board or Advisory Committee. As noted above, the Exchange Review Council performs a similar appellate function as the Board of Directors under the old process. Under New Rule 9311(a), a Respondent or the Phlx Regulation Department, the Department of Enforcement or the Department of Market Regulation may file written notice of appeal within twenty-five days after service of a decision.

- Rule 960.9(e) provides the process for staff to request Board review of a Hearing Panel decision, the timing of which mirrors that of a Respondent's appeal to the Board. As noted above, the Exchange Review Council performs a similar appellate function as the Board of Directors under the old process. Under New Rule 9311(a), a Respondent or the Phlx Regulation Department, the Department of Enforcement or the Department of Market Regulation may file written notice of appeal within

twenty-five days after service of a decision.

- Rule 960.10 concerns the process for determining appropriate sanctions against Members, Member Organizations, or persons associated with Member Organizations and the effectiveness of judgments.

- Rule 960.10(a)(1) requires Members, Member Organizations, or persons associated with Member Organizations to be appropriately disciplined for violations under the disciplinary rules by expulsion, suspension, fine, censure, limitations or termination as to activities, functions, operations, or association with a Member Organization, or any other fitting sanction. The Exchange is replacing this rule with New Rule 8310(a), which stands for the same proposition that Members, Member Organizations, and persons associated with Member Organizations should be subject to appropriate sanction for each violation of the federal securities laws, rules or regulations thereunder, subject to the process under the New Rule 9000 Series. Unlike BX and Nasdaq Rules 8310(a), New Rule 8310(a) will include suspension of a Member's permit and revocation or cancellation of a Member's permit as available sanctions under the rule, which is consistent with the authority currently provided under Rule 960.10(a)(1). As described above, BX and Nasdaq do not have Associated Persons that are permit holders, and therefore Members.

- Rule 960.10(a)(2) requires the BCC and Hearing Panel to refer to the Exchange's "Enforcement Sanctions User's Guide" when imposing sanctions for violation of the Order Handling Rules. Under New Rule 9270(c)(5), the Enforcement Sanctions User's Guide must be considered in settlement proceedings involving all proceedings under the New Rule 9000 Series. The Exchange notes that this is consistent with analogous rules of BX and Nasdaq.

- Rule 960.10(b) provides that sanctions imposed under the disciplinary rules are not effective until the Exchange review process is completed or the decision otherwise becomes final. Pending effectiveness of a decision imposing sanctions on a Respondent, a Hearing Panel may impose conditions and restrictions on the activities of a Respondent which it finds to be necessary or appropriate for the protection of the investing public, Members, Member Organizations, and persons associated with Member Organizations, and the Exchange and its subsidiaries. Under the new rules, the concept of final exchange action for purposes of Rule 19d-1(c)(1) of the Act

is reflected in multiple sections of the rule. Generally, action in a matter is not final until all periods available for appeal of a decision or call for review have lapsed. Under New Rule 9268(e), a Hearing Panel decision becomes final action if it is not appealed timely pursuant to New Rule 9311 or timely called for review by the Exchange Review Council pursuant to New Rule 9312. New Rule 9268(e) provides that a majority decision of a Hearing Panel with respect to a Member or Member Organization that is an affiliate of the Exchange within the meaning of Rule 985(b) is final action of the Exchange and cannot be appealed or called for review. New Rule 9269 concerns default decisions in a matter before a Hearing Panel. Subparagraph (d)(1) provides that the default decision becomes final action if it is not appealed timely pursuant to New Rule 9311 or timely called for review by the Exchange Review Council pursuant to New Rule 9312. New Rule 9269(d)(2), a default decision with respect to an Exchange member or member organization that is an affiliate of the Exchange within the meaning of Rule 985(b) constitutes final disciplinary action of the Exchange and cannot be appealed or called for review. New Rule 9349(c) concerns final exchange action with respect to an Exchange Review Council decision. Under the rule, the decision of the Exchange Review Council becomes final action of the Exchange after the decision has been provided to the Board of Directors and the decision was not called for review pursuant to New Rule 9351. If the Exchange Review Council decision remands the matter to the Hearing Panel, however, the decision is not final exchange action and will continue through the Code of Procedure process. If the Board of Directors calls an Exchange Review Council decision for review, any decision issued by the Board of Directors becomes final exchange action, unless the decision remands the matter, in which case the matter continues through the Code of Procedure process. The New Rule 9800 Series concerns temporary cease-and-desist orders, and provides the process by which the Phlx Regulation Department, the Department of Enforcement or the Department of Market Regulation may impose such restrictions and how such restrictions are adjudicated.

- Rule 960.11 concerns the requirements for service of notice under the disciplinary rules and the authority of the BCC, Hearing Panel or other appropriate committee to provide

extensions to certain time limits under the Disciplinary Rules.

- Rule 960.11(a) permits any charges, notices or other documents to be served on the Respondent or its counsel, either personally or by deposit in the U.S. mail, either registered or certified, or by courier. Such service must be made to the Respondent or its counsel at the address as it appears on the books and records of the Exchange, or by email by the written mutual consent of the parties. The rule also requires that all documents required by the disciplinary rules filed by any party to also be filed with the Hearing Panel and all parties, and received on the day prescribed by the disciplinary rules. The Exchange is replacing this rule with the New Rule 9130 Series, which concerns service and filing of papers. The new rule series provides the timing and form of required service based on the type of the notice. New Rule 9134 concerns the methods of and procedures for service. Like the old rule, New Rule 9134 permits personal service, service by U.S. Postal Service, or service by courier.

- Rule 960.11(b) permits the BCC or its designee, Hearing Panel, or the appropriate committee before whom a matter is pending, to extend any time limit imposed under the disciplinary rules, unless otherwise noted. The Exchange is replacing this rule with New Rules 9222 and 9322. New Rule 9322(a) allows, any time prior to the issuance of a decision, the Exchange Review Council, the Review Subcommittee, a Subcommittee or, if applicable, an Extended Proceeding Committee, or Counsel to the Exchange Review Council, for good cause shown, to extend or shorten a period prescribed by the Code for the filing of any papers, except that Counsel to the Exchange Review Council may shorten a period so prescribed only with the consent of the Parties. Similarly, New Rule 9322(b) allows the Exchange Review Council, the Review Subcommittee, a Subcommittee or, if applicable, an Extended Proceeding Committee, or Counsel to the Exchange Review Council, for good cause shown, to postpone, adjourn, or change the location of the oral argument, except that Counsel to the Exchange Review Council may adjourn or adjourn the oral argument only with the consent of the Parties. New Rule 9222(a) allows, at any time prior to the issuance of the decision of the Hearing Panel or, if applicable, the Extended Hearing Panel, the Hearing Officer to, for good cause shown, extend or shorten any time limits prescribed by the Code for the filing of any papers and, consistent with paragraph (b), postpone or adjourn any

hearing. Paragraph (b) requires the Hearing Officer to take into consideration several factors in determining to grant an extension and limits the length of the extension to 28 days unless the Hearing Officer states on the record or provides by written order the reasons a longer period is necessary.

- Rule 960.12 concerns fairness and impartiality of Board or Committee members in the disciplinary process. The rule sets forth the impartiality standard for adjudicators and provides the process for the removal of an adjudicator that does not meet the standard, either by motion of the chair or the adjudicator.

- Rule 960.12(a) prohibits a Board or Committee member, Hearing Officer, or Hearing Panelist from participating in any disciplinary proceeding if the individual cannot render a fair and impartial decision in the matter. In such a case, the rule requires the individual to remove himself from any consideration of the matter. As discussed above, New Rule 9233(a) requires a Hearing Officer to recuse himself if he determines that he has a conflict of interest or bias or circumstances otherwise exist where his fairness might reasonably be questioned. New Rule 9234(a) applies the same recusal standard as New Rule 9233(a) to Hearing Panelists. Similarly, New Rule 9332(a) requires an Exchange Review Council member and Counsel to recuse themselves should they determine that he has [sic] a conflict of interest or bias or circumstances otherwise exist where the fairness of the Exchange Review Council member or Counsel might be reasonably questioned.

- Rule 960.12(b) provides the Chair of an adjudicatory body authority to remove an individual from consideration of a matter, upon receiving written notice that such individual cannot render a fair and impartial decision in the disciplinary proceeding. The written notice must specify the grounds for contesting the qualification of the individual. The determination of the Chair is final and conclusive with respect to the participation of the individual. The Exchange is replacing this rule with New Rules 9233(b), 9234(b) and 9332(b). New Rule 9233(b) provides that a party may move for the disqualification of a Hearing Officer. Likewise, New Rule 9234(b) provides parties with a process identical to New Rule 9233(b), yet also provides that the Chief Hearing Officer may order the disqualification of a Hearing Panelist if he determines that he has a conflict of interest or bias or circumstances otherwise exist where his fairness might reasonably be questioned.

New Rule 9332(b) provides that a party may move for the disqualification of an Exchange Review Council member, Review Subcommittee [sic], a Panelist of a Subcommittee or an Extended Proceeding Committee, or Counsel to the Exchange Review Council.

- Rule 970 provides the process for assessing fines not relating to Order and Decorum up to \$10,000 in lieu of formal disciplinary proceedings. The Exchange is replacing Rule 970 with New Rule 9216(b).

- Rule 970(a) sets forth the Exchange's authority to assess a fine no greater than \$10,000 on a Member, Member Organization, or Associated Person in lieu of any disciplinary proceeding, other than regulations relating to order, decorum, health, safety and welfare on the Exchange pursuant to Section H of the Option Floor Procedure Advices. The rule also provides that any fines assessed pursuant to this Rule not exceeding \$2,500, and non-contested are not publicly reported to the Members except as may be required by Rule 19d-1 under the Exchange Act, or any other regulatory authority. The rule notes that any fine imposed pursuant to this Rule which exceeds \$2,500 shall be publicly reported to the Members as required by Rule 19d-1 under the Securities Exchange Act of 1934, and as may be required by any other regulatory authority. The Exchange is replacing Rule 970(a) with New Rules 9216(b)(1) and (2), which provides the Exchange's authority to assess such fines, and with New Rule 9216(b)(1)(D) and New Rule 9216(b)(2)(D).

- Rule 970(b) sets forth the notice requirements for service upon the Member, Member Organization, or Associated Person against which the fine is levied. The Exchange is replacing this rule with New Rule 9216(b)(1)(A), which describes the required contents of a minor rule violation plan letter, and New Rule 9216(b)(2)(A), which describes the required contents of a violation letter.

- Rule 970(c) states that payment of a fine assessed under the rule is deemed a waiver of a right to a disciplinary proceeding. The Exchange is replacing this rule with New Rules 9216(b)(1)(A), 9216(b)(2)(A), 9216(b)(1)(B), and 9216(b)(2)(B). New Rules 9216(b)(1)(A) and 9216(b)(2)(A) note that the Member, Member Organization, or Associated Person waives any right to hearing or appeal. New Rules 9216(b)(1)(B)(i)(a) and 9216(b)(2)(B)(i)(a) provide additional waivers not noted in Rule 970(c), concerning claims of bias or prejudgment of the CRO or Exchange Review Council in such body's

participation in discussions of the terms and conditions of the minor rule violation plan letter or violation letter. New Rules 9216(b)(1)(B)(i)(b) and 9216(b)(2)(B)(i)(b) provide additional waivers not noted under Rule 970(c) concerning ex parte communications. All of these new waivers arising from a Member's, Member Organization's or Associated Person's execution of a minor rule violation plan letter or a violation letter are a result of the different process for issuing fines for Advises. Under the current rule, a Member, Member Organization, or Associated Person may contest a citation by filing an Answer, which is provided to the BCC for disposition. Under the New Rules, a minor rule violation plan letter or a violation letter, as applicable, is agreed upon between the Exchange, or FINRA on its behalf, and the Member, Member Organization, or Associated Person. The waivers under New Rules 9216(b)(1)(A), 9216(b)(2)(A), 9216(b)(1)(B), and 9216(b)(2)(B) serve to protect the parties involved in the negotiated disposition of a matter through a minor rule violation plan letter or violation letter. Should a Member, Member Organization, or Associated Person not consent to the issuance of a minor rule violation plan letter or violation letter, the matter may be subject to formal disciplinary action, as is the current practice for contested matters under Rule 970(d).

- Rule 970(d) sets forth the process a Member, Member Organization, or Associated Person must follow to contest the assessment of a fine assessed under the rule. As noted immediately above, the new process requires that a minor rule violation plan letter, or violation letter, is agreed upon prior to its issuance. As a consequence, there is no provision under the new rules for contesting a fine. If a Member, Member Organization, or Associated Person does not agree to the terms of a minor rule violation plan or violation letter proposed by the Exchange, then it is not compelled to accept the letter.

- Rule 970(e) sets forth the review process of a contested fine. Under the rule, the BCC may then: (a) Decide that the matter be dismissed and the notice of alleged violation be rescinded; (b) decide that the notice, as issued, is valid, whereupon the alleged violator could either pay the fine or contest the matter before a Hearing Panel; (c) decide that the notice, as issued, should be modified to specify either a higher or lower fine than the one on the notice as issued, whereupon the alleged violator could either pay the new fine or contest the matter before a Hearing Panel; or (d) decide that the matter merits formal

disciplinary action and authorize issuance of a complaint, pursuant to Rule 960.2. As noted above, should a Member, Member Organization, or Associated Person not consent to the terms of a proposed minor rule violation plan letter or a violation letter, the matter may be subject to formal disciplinary proceedings. Unlike a hearing under Rule 970(d), the Exchange, or FINRA acting on its behalf, may pursue formal disciplinary action in any matter wherein a Member, Member Organization, or Associated Person refuses to consent to a minor rule violation plan letter or violation letter. As a consequence, there is no discretion to rescind, affirm or modify a determination prior to initiation of a formal disciplinary proceeding.

- Rule 970(f) sets forth the possible outcomes arising from a disciplinary proceeding arising from a contested fine. The rule provides that a hearing panel may impose any disciplinary sanction provided for in Disciplinary Rules, and may determine whether the violation is minor in nature. The rule further provides that if the violation is determined to be minor in nature, the violation(s) giving rise to the penalty shall not be publicly reported, except as may be required pursuant to Rule 19d-1 of the Exchange Act, or as may be required by any other regulatory authority. The rule notes that if the violation is determined to not be minor in nature, the decision of the Hearing Panel and any penalty imposed shall be publicly reported to the Members, Member Organizations, and persons associated with Member Organizations, in addition to any filing required by Rule 19d-1 of the Exchange Act, or any other regulatory authority, once such decision becomes "final" under the Disciplinary Rules. As noted above, the new process requires that the terms of a minor rule violation plan letter or a violation letter are agreed upon prior to their issuance. As a consequence, there is no provision under the new rules for contesting a fine. If a Member, Member Organization, or Associated Person does not agree to the terms of a minor rule violation letter or a violation letter proposed by the Exchange, then it is not compelled to accept the letter. Should a Member, Member Organization, or Associated Person not consent to the terms of a proposed minor rule violation plan letter or violation letter, the matter is subject to formal disciplinary action, as is the current practice for contested matters under Rule 970(d). As discussed above, under the new rules, if a Member, Member Organization, or Associated Person does not agree to the

terms of a proposed minor rule violation plan letter or violation letter, the Exchange or FINRA acting on its behalf will pursue a formal disciplinary proceeding against the Member, Member Organization, or Associated Person.

- Rule 970, Commentary .01 permits the Exchange to "batch" individual violations of order handling Options Floor Procedure Advises that are based on an exception-based surveillance program. The rule provides that such batch violations may be treated as a single occurrence, only in accordance with the guidelines set forth in the Exchange's Numerical Criteria for Bringing Cases for Violations of Phlx Order Handling Rules. The rule further provides that the Exchange may batch individual violations of Rule 1014(c)(i)(A) pertaining to quote spread parameters (and corresponding Options Floor Procedure Advice F-6). The Exchange may, in the alternative, refer the matter to the Business Conduct Committee for possible disciplinary action when (i) the Exchange determines that there exists a pattern or practice of violative conduct without exceptional circumstances, or (ii) any single instance of violative conduct without exceptional circumstances is deemed to be so egregious that referral to the Business Conduct Committee for possible disciplinary action is appropriate. The Exchange is proposing to move Commentary .01 to New Rules 9216(b)(1)(E) and 9216(b)(2)(E) with minor changes. Specifically, the Exchange is replacing text concerning referring matters to the BCC with requesting authorization from the ODA, which is the appropriate body responsible for authorizing the issuance of a complaint for conduct arising from violations under the Advises. The Exchange is also replacing references to the "Exchange" with references to the Phlx Regulation Department, Department of Enforcement, or the Department of Market Regulation. The Exchange is also being more specific under the New Rules by noting that Phlx Regulation Department, Department of Enforcement, or the Department of Market Regulation may seek authorization to take formal disciplinary action from the ODA.

- Rule 985 sets forth the limitations on ownership of the Exchange's parent company Nasdaq and restrictions on the Exchange's affiliation with Members, Member Organizations, and persons associated with Member Organizations. Rule 985(b) is cited in several sections of the New Rule 9000 Series, which uses its definition of "affiliate" to draw distinctions in the appeals process. Rule

985 is based on BX Rule 2140. The term “member” under BX’s rules is synonymous with the Exchange’s definition of “member organization,” whereas the definition of a “member” of the Exchange relates to the permit holder.<sup>156</sup> BX does not have such a concept, nor does Nasdaq under its analogous rules. Given that the purpose of the rule is to guard against any possibility that the Exchange may exercise, or forebear to exercise, regulatory authority with respect to an affiliated member in a manner that is influenced by commercial considerations, to provide an opportunity for Commission review of certain proposed affiliations, and to ensure that certain affiliated members do not receive advantaged access to information in comparison with unaffiliated members, the Exchange is adding to the rule references to Member Organizations.<sup>157</sup> When the rule was adopted, the Exchange neglected to include Member Organizations in the rule.<sup>158</sup> The Exchange is also clarifying in Rule 985(a)(i) that the rule applies to persons “associated with a member organization,” not “associated with a member.” As discussed above, there is no category of “person associated with a member” permitted by the Exchange, and thus the term “organization” was erroneously omitted when adopted.<sup>159</sup>

■ Rule 1092 concerns obvious errors and catastrophic errors. The rule currently references the MORC as the body responsible for review of determinations made by Options Exchange Officials pursuant to the rule. In light of the fact that the MORC’s responsibilities are now incorporated into those of the Exchange Review Council, the Exchange is changing references to the MORC under the rule to references to the Exchange Review Council, which BX and Nasdaq have done in their analogous Options Rules Chapter V, Section 6(l).

■ Rule 3202 concerns the application of other rules of the Exchange to the PSX equities market. The Exchange is amending references in this rule to replace references to the Rule 960 series with references to the New Rule 8000 and 9000 Series, delete references to Rule 50, which is replaced by New Rule 9553, and make conforming updates to the titles of Rules 98, 705, 754, 756, 792, 794, 795, 797, 798, 803, 902, 903, 904, 905, 906, and 907. The Exchange is also

adding Rule 774 to the list of rules applicable to PSX, which, as discussed above, is being adopted as an express requirement that Member Organizations and Members not engage in disruptive quoting and trading activity. Last, the Exchange is deleting reference to Rules 70, 71, 72, 73, 74, 75, and 76, which are being deleted as part of this proposal.

■ Rule 3219 concerns the withdrawal of quotations in PSX. The Exchange is replacing reference to the MORC with reference to the Exchange Review Council under Subparagraph (f) of the rule, which concerns jurisdiction over proceedings brought by PSX Market Makers seeking review of the denial of an excused withdrawal pursuant to the rule, or the conditions imposed on their reentry.

■ Rule 3220 concerns the voluntary termination of registration. The Exchange is replacing reference to the MORC with reference to the Exchange Review Council under Subparagraph (e) of the rule, which concerns jurisdiction over proceedings brought by market makers seeking review of their denial of a reinstatement pursuant to paragraphs (b) or (d) of the rule.

■ Rule 3312 concerns clearly erroneous transactions. The Exchange is replacing several references to the MORC with references to the Exchange Review Council under Subparagraphs (c), (d)(1), (e)(2) and (f) of the rule. Subparagraph (c) of the rule concerns the review of clearly erroneous determinations. Subparagraph (d)(1) of the rule concerns the requirements for communicating materials to the Exchange. Subparagraph (e)(2) of the rule concerns fees for appeals. Lastly, Subparagraph (f) of the rule concerns refusal to abide by rulings of an Exchange official or the MORC.

■ The Exchange’s Equity Floor Procedure Advices provide fine-based sanctions for violations of the Exchange’s regulations relating to equities trading. The Advices include MRVP violations, consistent with Rule 19d-1(c) under the Act.<sup>160</sup> Under the various fine schedules of these regulations, the fine amount increases with each additional violation of the particular advice violated. Upon reaching a certain number of violations of a particular advice over a certain period (as noted in the schedule), further sanction is discretionary with the BCC. In light of the retirement of the BCC, the Exchange is providing the Phlx Regulation Department, Department of Enforcement, and the Department of Market Regulation with discretionary authority to assess further sanction [sic]

upon Members, Member Organizations or persons associated with a Member Organization for such violations of the Advices.<sup>161</sup> The Exchange believes that these departments are best positioned to make determinations of whether further sanction is warranted under the Advices or whether formal disciplinary action should be pursued for such repeated violations because it is the same prosecutorial discretion that these departments exercise in determining whether matters under investigation warrant formal disciplinary action. As a consequence, Phlx is replacing references in the regulations to the BCC with the Phlx Regulation Department, Department of Enforcement, and the Department of Market Regulation. The Exchange is also deleting certain references in the Equity Floor Procedure Advices that reference Members as being broker-dealers and/or having the obligations of a broker-dealer, or as having associated persons. As described above, Members may not be broker-dealers on the Exchange, and thus would not have such obligations or associated persons.

■ The Exchange is also amending its Option Floor Procedure Advices and Order & Decorum Regulations, which provide fine-based sanctions for violations of the Exchange’s regulations relating to options trading. These regulations include violations of the Exchange’s MRVP relating to options trading. Under the various fine schedules of these regulations, the fine amount increases with each additional violation of the particular advice violated. Upon reaching a certain number of violation [sic] of a particular advice over a certain period (as noted in the schedule) further sanction is discretionary with the BCC. In light of the retirement of the BCC, the Exchange is providing the Phlx Regulation Department, Department of Enforcement, and the Department of Market Regulation with discretionary authority to assess further sanction [sic] upon Members, Member Organizations or persons associated with a Member Organization for such violations of the Advices, other than Order and Decorum Regulations, and to serve as the body to which certain violations are referred.<sup>162</sup>

<sup>161</sup> Notwithstanding, determinations to issue a fine are made on a case by case basis, whereby the Exchange considers the individual facts and circumstances to determine whether a fine of more or less than the recommended amount is appropriate for the violation, or whether the violation requires formal disciplinary action.

<sup>162</sup> For example, Option Floor Procedure Advice B-6 provides, in part, that “In any instance where an order is misrepresented in this fashion due to factors which give rise to the concern that it was

Continued

<sup>156</sup> See *supra* note 3.

<sup>157</sup> See Securities Exchange Act Release No. 58179 (July 17, 2008), 73 FR 42874 (July 28, 2008) (SR-Phlx-2008-31).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> 17 CFR 240.19d-1(c).

As noted above, the Exchange believes that these departments are best positioned to make determinations of whether further sanction is warranted under the Advices or whether formal disciplinary action should be pursued for such repeated violations because it is the same prosecutorial discretion that these departments exercise in determining whether matters under investigation warrant formal disciplinary action.<sup>163</sup> As a consequence, Phlx is replacing references in the Advices to the BCC with the Phlx Regulation Department, Department of Enforcement, and the Department of Market Regulation.<sup>164</sup> For Order and Decorum Regulations, the Exchange is proposing to provide only the Phlx Regulation Department with discretionary authority to assess further sanction upon Members, Member Organizations or persons associated with a Member Organization for such violations. The Exchange notes that, by definition, such violations arise from the trading floor, which the Phlx Regulation Department is best positioned to determine what the appropriate sanction is for repeated violation of these regulations in light of its physical presence on the trading floor. In addition, the Exchange is replacing certain references to the MORC with references to the Exchange Review Council, since the MORC's responsibilities are subsumed into those of the Exchange Review Council, as discussed above. The Exchange is also deleting certain text in the Advices that reference persons associated with Members or otherwise make it unclear as to whether the rule applies to an associated person of a Member, which as described above does not exist.<sup>165</sup> The Exchange is also replacing references the [sic] "members" with

the result of anything other than an inadvertent error, the Exchange may determine to bypass the fine schedule below and refer the incident to the Business Conduct Committee for possible disciplinary proceedings in accordance with those procedures set forth under the Exchange's Disciplinary Rule 960." The Exchange is replacing the Business Conduct Committee with the Phlx Regulation Department, Department of Enforcement, and the Department of Market Regulation, and is also replacing reference to the Disciplinary Rule 960 with reference to the New Rule 8000 and 9000 Series.

<sup>163</sup> As noted above, determinations to issue a fine are made on a case by case basis. See *supra* note 161.

<sup>164</sup> In Options Floor Procedure Advice F-11, the Exchange is replacing the uppercase word "Discretionary" with a lowercase word and is deleting the word "the" to conform the Advice with other Advices.

<sup>165</sup> For example, in Options Floor Procedure Advice C-9 the Exchange is making it clear that the rule concerns persons on the floor associated with a member organization.

references to "member organization" in Advices concerning obligations of registered broker-dealers.<sup>166</sup> The Exchange is updating rule citations in the Advices to reflect the appropriate rules in the New Rules. Last, the Exchange is deleting the upper case term "Member Organization" and is replacing it with the lower case term "member organization," which is the convention used throughout the rules.

### Conclusion

The changes proposed herein will allow the Exchange to harmonize its investigatory and disciplinary processes with the processes of BX and Nasdaq, thus providing a uniform process for the investigation and discipline of members and persons associated with members across all three self-regulatory organizations as administered by FINRA pursuant to RSAs. Harmonizing the investigatory and disciplinary processes of all three self-regulatory organizations will bring efficiency to FINRA's administration of its responsibilities under the RSAs because the process [sic] it must follow are nearly identical, and are all based on the process that FINRA itself follows. Harmonized processes will bring consistency to investigations and adjudications of rule violations, and will reduce the number of disciplinary processes and requirements with which Members, Member Organizations, and Associated Persons, as well as their counsel, must be familiar.

The Exchange believes that the new investigatory and disciplinary processes are substantially similar to the existing process, and where there are differences between the new and old processes, the Exchange believes that the new process does not disadvantage its Members, Member Organizations or Associated Persons. To the contrary, the Exchange believes that the new process will benefit all parties as it provides greater detail and specificity than the retired rules, and consequently is more transparent. Moreover, the Exchange notes that nearly two thirds of Phlx Member Organizations are also members of FINRA. Thus, those firms are already familiar with the FINRA disciplinary process.

The Exchange intends to announce the operative date of the new rules at least 30 days in advance via a regulatory alert. To facilitate an orderly transition

<sup>166</sup> The Exchange is also making a clarifying change to Options Advice F-23 "Clerks in the Crowd" to make it clear that a clerk is an Associated Person, and that the rule is referring to Member Organizations and not Members in describing the entity unable to effect transactions on the trading floor.

from the current rules to the new rules, the Exchange is proposing to apply the current rules to all matters that the BCC has reviewed prior to the operative date. In terms of formal disciplinary matters, any matter that has been approved for the issuance of a Statement of Charges by the BCC will continue under the existing rules. In terms of applying the Advices, any fine that is subject to review by the BCC, but has not yet been reviewed by the BCC to determine whether to exercise its discretion to apply a fine or authorize disciplinary action as of the operative date, will instead be reviewed by the Phlx Regulation Department, Department of Market Regulation, or Department of Enforcement. Any fine that was imposed prior to the operative date that is contested will continue under the existing rules. As a consequence of this transition process, the Exchange will retain the BCC and the existing processes during the transition period until such time that there are no longer any matters proceeding under the current rules. To facilitate this transition process, the Exchange will retain a transitional rule book that will contain the Exchange's rules as they are at the time of that this proposal is [sic] filed with the Commission, including the Rule 960 series. This transitional rule book will apply only to matters initiated prior to the operational date of the changes proposed herein and it will be posted to the Exchange's public rules Web site. When the transition is complete and there are no longer any member organizations or persons subject to the Rule 960 series, the Exchange will remove the transitional rule book from its public rules Web site.

### 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>167</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>168</sup> 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, and are [sic] not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange also believes that the proposed rule is consistent with Section 6(b)(6) of the Act,<sup>169</sup> which requires the rules of an exchange provide that its

<sup>167</sup> 15 U.S.C. 78f(b).

<sup>168</sup> 15 U.S.C. 78f(b)(5).

<sup>169</sup> 15 U.S.C. 78f(b)(6).

members be appropriately disciplined for violations of the Act as well as the rules and regulations thereunder, or the rules of the Exchange, by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction.

The Exchange believes that the proposed changes are consistent with these requirements because the changes harmonize Phlx's investigative and adjudicatory processes with similar processes used by BX and Nasdaq. The new processes are well-established as fair and designed to protect investors and the public interest, providing greater detail and transparency in the processes than is currently provided under the Rule 960 Series. Because the Exchange is adopting these Rules materially unchanged from the related BX and Nasdaq rules, with only minor differences based on the need to account for the Exchange's trading floor and the Phlx Regulation Department's involvement in matters, the Exchange believes that the proposed changes should facilitate prompt, appropriate, and effective discipline of Members, Member Organizations, and Associated Persons consistent with the Act. The proposed rule change also makes miscellaneous changes to Exchange rules to account for the adoption of the New Rule 8000 and 9000 Series, and to make minor updates and corrections to the Exchange's rules.

Moreover, the Exchange believes that harmonizing the investigative and adjudicatory processes with those of BX and Nasdaq will reduce the burden on Members, Member Organizations, and Associated Persons that are also members or member organizations of BX, Nasdaq, and/or FINRA as they only will need to be familiar with a single process going forward. As discussed above, the new process will benefit all parties as it provides greater detail and specificity than the retired Rules and, consequently, is more transparent.

The Exchange also believes that adopting an Exchange Review Council is consistent with the Act because the committee's mandate is to, among other things, ensure consistent and fair application of the Exchange rules pertaining to discipline of Members, Member Organizations and Associated Persons. The Exchange Review Council will be a body appointed by the Exchange Board of Directors and composed of representatives of the securities industry as well as persons from outside the securities industry. The broad membership of the new Exchange Review Council will ensure

that the decisions and guidance it provides will be fair and balanced. The Exchange Review Council will be similar in structure and function to the Review Councils of BX and Nasdaq, as well as FINRA's National Adjudicatory Council. In addition to reviewing appeals of disciplinary actions, the Exchange Review Council will also have jurisdiction to review decisions to deny applications for membership in the Exchange, and appeals regarding limitations placed on members or their employees that are subject to a statutory disqualification. Additionally, the Exchange Review Council may consider and make recommendations to the Board on policy and rule changes relating to business and sales practices of Exchange Members, Member Organizations and Associated Persons, and enforcement policies, including policies with respect to fines and other sanctions. Thus, the Exchange Review Council will provide the Exchange and market participants with a fair and impartial body overseeing disciplinary matters, as well as the rules and policies concerning the disciplinary process. Last, the Exchange notes that Exchange Review Council will have significant overlap in membership with the current BCC, thereby ensuring familiarity with Exchange rules and membership issues. For these reasons, the Exchange believes that adoption of the Exchange Review Council is consistent with the Act.

The Exchange also believes that incorporating the functions of the MORC into the Exchange Review Council is consistent with the requirements of the Act because it will bring efficiency to the committee process, by vesting a single Board committee with responsibilities that would otherwise be spread across the MORC and proposed Exchange Review Council, while ensuring that such responsibilities are performed to a high regulatory standard. In this regard, the Exchange Review Council is, by every measure, a more diverse body than the MORC that it replaces, yet it will maintain overlapping membership with current MORC members. The broad membership of the new Exchange Review Council will ensure that decisions made with respect to the MORC's former responsibilities are made fairly. Maintaining overlap in membership will ensure continuity and familiarity with the MORC responsibility and processes. In terms of similarity between the compositional requirements of the two committees, the Exchange notes that the proposed Exchange Review Council will have the same MORC requirement that not more

than 50 percent of the committee's members be engaged in market making activity or employed by Exchange member organization whose revenues from market making exceed 10 percent of its total revenues.<sup>170</sup> The Exchange notes that the proposed By-Laws will limit Exchange Review Council members to a maximum of two consecutive three-year terms unlike the MORC, which has no stated limit in the By-Laws.<sup>171</sup> This requirement ensures that there is a consistent influx of new members to the Exchange Review Council. The proposed By-Laws further require that membership of the Exchange Review Council to [sic] be divided into three classes of members, whose terms expire in different years, thus ensuring that the Review Council is not completely reconstituted in any given year.<sup>172</sup> Accordingly, the Exchange believes that the proposed changes will serve to protect the public interest and promote appropriate discipline of members for violations of securities laws and rules of the Exchange. The Exchange notes that both BX and Nasdaq incorporated their respective MORCs into their Review Councils, making the same changes proposed herein.<sup>173</sup> Moreover, members of the MORC will be included in the membership of the Exchange Review Council. Thus, the change will not impose any burden on Members, Member Organizations, and Associated Persons, while reducing the burdens and inefficiencies experienced by the Exchange in managing multiple committees.

The Exchange believes that eliminating the BCC is consistent with Sections 6(b)(5) and 6(b)(6) of the Act,<sup>174</sup> because the Exchange is replacing the BCC with other groups and processes that, while different, will continue to provide Members, Member Organizations and Associated Persons with a fair investigative and adjudicatory process. In particular, the functions of the BCC will be handled by the ODA, Phlx Regulation Department, Department of Market Regulation, or Department of Enforcement, and the

<sup>170</sup> See Phlx By-Law, Article V, Section 5–3(d) and New Phlx By-Law, Article V, Section 5–3(b)(ii).

<sup>171</sup> See Phlx By-Law, Article V, Section 5–3(d) and New Phlx By-Law, Article V, Section 5–3(b)(iv). Note that under New Phlx By-Law, Article V, Section 5–3(b)(iv), an Exchange Review Council member may serve greater than two terms if the member is appointed to fill a term of less than one year, in which case the member may serve up to two consecutive three-year terms following the expiration of such member's initial term.

<sup>172</sup> See New Phlx By-Law, Article V, Section 5–3(b)(iv).

<sup>173</sup> See *supra* note 95.

<sup>174</sup> 15 U.S.C. 78f(b)(5) and (6).

Exchange's CRO. The ODA will authorize the issuance of complaints, which is currently the responsibility of the BCC. The Phlx Regulation Department, Department of Market Regulation, or Department of Enforcement will each individually have the authority to assess, and determine the amount of, fines under the Advices after repeated violations thereof, with the exception of the Advices relating to Order and Decorum for which the Phlx Regulation Department will be solely responsible for assessing and determining the amount of fines thereunder. Although, the BCC currently is responsible for this, the Exchange notes that it believes that these departments are best positioned to make determinations of whether further sanction is warranted under the Advices or whether formal disciplinary action should be pursued for such repeated violations because it is the same prosecutorial discretion that these departments exercise in determining whether matters under investigation warrant formal disciplinary action. As described above, the ODA will review any such recommendation for formal disciplinary action. As described above, the CRO will have responsibility for the current BCC functions of approving of customer account guarantees and appointing of World Currency Options Margin committees, which do not fall within the ODA's purview. The Exchange believes that the CRO is best suited to manage these responsibilities. The Exchange notes that the CRO has general supervisory responsibility over the Exchange's regulatory operations, including the responsibility for overseeing its surveillance, examination, and enforcement functions and for administering any regulatory services agreements with another self-regulatory organization to which the Exchange is a party. The CRO meets with the regulatory oversight committee of the Board of Directors. As such, the Board will remain apprised of the formation of, and any regulatory decisions made by, the CRO, and any World Currency Options Margin Committee. In sum, each BCC function will be handled in a fair manner and provide Members, Member Organizations and Associated Persons with a well-known process.

The Exchange believes that its proposal furthers the objectives of Section 6(b)(7) of the Act,<sup>175</sup> in that it is designed to provide a fair procedure for the disciplining of members and persons associated with members, the denial of membership to any person

seeking membership therein, the barring of any person from becoming associated with a member thereof, and the prohibition or limitation by the exchange of any person with respect to access to services offered by the exchange or a member thereof. Specifically, the Exchange believes that the proposed investigatory and disciplinary process is consistent with Section 6(b)(7) of the Act<sup>176</sup> because it is based on the existing processes used by BX and Nasdaq. The process is well-established as consistent with the Act and where there are differences from the processes used by BX and Nasdaq, such as accounting for conduct on the Exchange's floor, the Exchange has proposed a fair process that includes elements of existing Exchange processes and processes of BX and Nasdaq. For example, the Exchange is proposing to vest the Phlx Regulation Department, Department of Enforcement, and the Department of Market Regulation with the authority to determine whether repeated violations of the Advices warrant additional fines or formal disciplinary proceedings, which is currently vested with the BCC. Notwithstanding, the Exchange will continue to make determinations to issue a fine on a case by case basis, whereby the Exchange considers the individual facts and circumstances to determine whether a fine of more or less than the recommended amount is appropriate for the violation, or whether the violation requires formal disciplinary action. Although the Exchange is replacing the BCC, which is independent of the investigatory and disciplinary processes, with the Phlx Regulation Department, Department of Enforcement, and the Department of Market Regulation, which are not, the Exchange believes that this will provide a fair procedure because these departments must gain approval to issue a complaint and [sic] settlements generally from the ODA, an entity independent of the enforcement function, if they determine formal disciplinary action is appropriate in lieu of a fine under the Advices. Moreover, if these departments determine that an additional fine is appropriate in lieu of pursuing formal disciplinary action, the departments are constrained by the maximum fine allowed under the Advices, which is the same constraint that the BCC has to the extent it determines an addition [sic] fine is appropriate.<sup>177</sup> If these departments

instead determine that formal disciplinary action is warranted, they must gain approval to issue a complaint from the ODA, as discussed above.

Last, the Exchange believes that its proposal to phase-in the implementation of the new disciplinary process is consistent with Section 6(b)(7)<sup>178</sup> of the Act because both the current and proposed disciplinary processes are consistent with the Act, providing fair procedures for disciplining Members, Member Organizations and Associated Persons. The Exchange is proposing to provide advanced notice of the implementation date of the new process, and will apply the new process to new matters that are initiated on or after that implementation date. Any matters initiated prior to the implementation date will be completed using the current process. As a consequence, the Exchange will delete the Rule 960 series from the rule book, but maintain a transitional rule book on the Exchange's public rules Web site (<http://nasdaqphlx.cchwallstreet.com/>), which will contain the Exchange rules as they are at the time of filing this rule change.<sup>179</sup> These transitional rules will apply exclusively to the matters initiated prior to the implementation date. Upon conclusion of the last matter to which the transitional rules apply, the Exchange will remove the defunct transitional rules from its public rules Web site. Thus, the transition will be conducted in a fair, orderly and transparent manner.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. The proposed rule change is not intended to address competitive issues, but it should reduce burdens on Members, Member Organizations, and Associated Persons. Specifically and as described in detail above, the Exchange believes that this change will bring efficiency and consistency in application of the investigative and adjudicatory processes, thereby reducing the burden on Members, Member Organizations, and Associated Persons who are also members of BX and/or Nasdaq.

<sup>175</sup> *Supra* note 175.

<sup>179</sup> The posting of the transitional rules on the public rules Web site will make it clear what disciplinary proceedings are governed by the transitional rules (*i.e.*, matters initiated prior to the implementation date).

<sup>176</sup> *Id.*

<sup>177</sup> As described above, the Exchange may assess fines up to \$10,000 under the Advices in lieu of pursuing formal disciplinary proceedings.

<sup>175</sup> 15 U.S.C. 78f(b)(7).

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were either solicited or received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>180</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>181</sup>

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.

<sup>180</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>181</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-Phlx-2017-92 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-2017-92. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements

with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-Phlx-2017-92 and should be submitted on or before December 20, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>182</sup>

**Eduardo A. Aleman,**

*Assistant Secretary.*

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<sup>182</sup> 17 CFR 200.30-3(a)(12).

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Vol. 82, No. 228

Wednesday, November 29, 2017

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### FEDERAL REGISTER PAGES AND DATE, NOVEMBER

|                  |    |                  |    |
|------------------|----|------------------|----|
| 50491-50798..... | 1  | 55027-55304..... | 20 |
| 50799-51148..... | 2  | 55305-55492..... | 21 |
| 51149-51332..... | 3  | 55493-55722..... | 22 |
| 51333-51548..... | 6  | 55723-55922..... | 24 |
| 51549-51752..... | 7  | 55923-56150..... | 27 |
| 51735-51972..... | 8  | 56151-56528..... | 28 |
| 51973-52172..... | 9  | 56529-56702..... | 29 |
| 52173-52642..... | 13 |                  |    |
| 52643-52822..... | 14 |                  |    |
| 52823-53396..... | 15 |                  |    |
| 53397-54288..... | 16 |                  |    |
| 54289-55026..... | 17 |                  |    |

### CFR PARTS AFFECTED DURING NOVEMBER

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

|                               |                     |       |
|-------------------------------|---------------------|-------|
| <b>2 CFR</b>                  | 3419.....           | 52250 |
| Ch. IX.....                   | 50491               |       |
| <b>3 CFR</b>                  |                     |       |
| <b>Proclamations:</b>         |                     |       |
| 9665.....                     | 51535               |       |
| 9666.....                     | 51537               |       |
| 9667.....                     | 51539               |       |
| 9668.....                     | 51541               |       |
| 9669.....                     | 51543               |       |
| 9670.....                     | 51547               |       |
| 9671.....                     | 51965               |       |
| 9672.....                     | 52641               |       |
| 9673.....                     | 52821               |       |
| 9674.....                     | 55025               |       |
| 9675.....                     | 55301               |       |
| 9676.....                     | 55303               |       |
| 9677.....                     | 55719               |       |
| 9678.....                     | 55721               |       |
| <b>Administrative Orders:</b> |                     |       |
| <b>Notices:</b>               |                     |       |
| Notice of October 31,         |                     |       |
| 2017.....                     | 50799               |       |
| Notice of November 6,         |                     |       |
| 2017.....                     | 51967               |       |
| Notice of November 6,         |                     |       |
| 2017.....                     | 51969               |       |
| Notice of November 6,         |                     |       |
| 2017.....                     | 51971               |       |
| <b>Memorandums:</b>           |                     |       |
| Memorandum of                 |                     |       |
| November 21,                  |                     |       |
| 2017.....                     | 56529               |       |
| <b>4 CFR</b>                  |                     |       |
| 81.....                       | 51753               |       |
| <b>5 CFR</b>                  |                     |       |
| 532.....                      | 50801               |       |
| Ch. XXIII.....                | 50491               |       |
| 5601.....                     | 50493               |       |
| 9801.....                     | 51333               |       |
| <b>Proposed Rules:</b>        |                     |       |
| 890.....                      | 51170               |       |
| <b>7 CFR</b>                  |                     |       |
| 1.....                        | 51149               |       |
| 205.....                      | 52643               |       |
| 301.....                      | 50801               |       |
| 319.....                      | 56531               |       |
| 402.....                      | 55723               |       |
| 407.....                      | 55723               |       |
| 457.....                      | 55723               |       |
| 905.....                      | 53397, 55305        |       |
| 944.....                      | 55035               |       |
| 984.....                      | 56151               |       |
| 986.....                      | 56152               |       |
| 1703.....                     | 55923               |       |
| 1734.....                     | 55923               |       |
| 1735.....                     | 55923               |       |
| 4279.....                     | 50802               |       |
| <b>Proposed Rules:</b>        |                     |       |
| 340.....                      | 51582               |       |
| <b>8 CFR</b>                  |                     |       |
| 214.....                      | 55493               |       |
| <b>10 CFR</b>                 |                     |       |
| 2.....                        | 52823               |       |
| 9.....                        | 52823               |       |
| 40.....                       | 52823               |       |
| 50.....                       | 52823               |       |
| 61.....                       | 52823               |       |
| 71.....                       | 52823               |       |
| 73.....                       | 52823               |       |
| 110.....                      | 52823               |       |
| Ch. II.....                   | 50491               |       |
| Ch. III.....                  | 50491               |       |
| Ch. X.....                    | 50491               |       |
| <b>Proposed Rules:</b>        |                     |       |
| 26.....                       | 55954               |       |
| 30.....                       | 51363               |       |
| 50.....                       | 52862, 55954        |       |
| 52.....                       | 52862, 55954        |       |
| 61.....                       | 55790               |       |
| 73.....                       | 55954               |       |
| 140.....                      | 55954               |       |
| 430.....                      | 56181               |       |
| 431.....                      | 50844               |       |
| <b>11 CFR</b>                 |                     |       |
| <b>Proposed Rules:</b>        |                     |       |
| 110.....                      | 52863               |       |
| <b>12 CFR</b>                 |                     |       |
| Ch. VI.....                   | 56536               |       |
| 3.....                        | 55309, 56630        |       |
| 25.....                       | 55734               |       |
| 34.....                       | 51973               |       |
| 47.....                       | 56630               |       |
| 50.....                       | 56630               |       |
| 195.....                      | 55734               |       |
| 204.....                      | 51754               |       |
| 209.....                      | 52173               |       |
| 213.....                      | 51975               |       |
| 217.....                      | 55309               |       |
| 226.....                      | 51973, 51977        |       |
| 228.....                      | 55734               |       |
| 265.....                      | 55495, 55496        |       |
| 324.....                      | 55309               |       |
| 345.....                      | 55734               |       |
| 704.....                      | 55497               |       |
| 1013.....                     | 51975               |       |
| 1026.....                     | 51973, 51977        |       |
| 1040.....                     | 55500               |       |
| 1041.....                     | 54472               |       |
| 1301.....                     | 55744               |       |
| <b>Proposed Rules:</b>        |                     |       |
| 211.....                      | 55791               |       |
| 238.....                      | 55791               |       |
| <b>13 CFR</b>                 |                     |       |
| 107.....                      | 52174               |       |
| <b>14 CFR</b>                 |                     |       |
| 21.....                       | 51549, 51550, 52826 |       |

|                                                                                                                                                                                             |                                    |                                                                                                                                                   |                                                                                    |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------|
| 25.....50496, 50500, 50502, 55500                                                                                                                                                           | <b>20 CFR</b>                      | 917.....53411                                                                                                                                     | 97.....50580                                                                       |
| 33.....53400                                                                                                                                                                                | 1011.....52186                     | 943.....54292                                                                                                                                     | 180.....51351, 51355, 52669, 53423, 56173                                          |
| 39.....51335, 51338, 51340, 51552, 51979, 52644, 52827, 52830, 52832, 52835, 52838, 52840, 52844, 55027, 55032, 55037, 55040, 55752, 55755, 55757, 55939, 56156, 56158, 56163, 56165, 56167 | <b>21 CFR</b>                      | Ch. XII.....50532                                                                                                                                 | 372.....52674                                                                      |
| 71.....50502, 50503, 50504, 50505, 50506, 50508, 50509, 50510, 51342, 51756, 55042, 55941, 55942, 55943                                                                                     | 1.....51345, 55503                 | <b>31 CFR</b>                                                                                                                                     | <b>Proposed Rules:</b>                                                             |
| 73.....51344                                                                                                                                                                                | 73.....51554                       | 515.....51998                                                                                                                                     | 52.....50851, 50853, 51178, 51594, 52259, 52682, 52683, 54307, 54309, 55065, 55966 |
| 95.....51981                                                                                                                                                                                | 117.....51345                      | 543.....52209                                                                                                                                     | 60.....51787, 51788, 51794, 55339                                                  |
| 97.....55043, 55045, 55047, 55049                                                                                                                                                           | 507.....51345                      | 1010.....51758                                                                                                                                    | 62.....51380                                                                       |
| <b>Proposed Rules:</b>                                                                                                                                                                      | 573.....52207                      | <b>33 CFR</b>                                                                                                                                     | 63.....51380                                                                       |
| Ch. I.....51178                                                                                                                                                                             | 862.....51558                      | 100.....50575, 51765, 53414, 55318, 55945                                                                                                         | 110.....55542                                                                      |
| 21.....53432                                                                                                                                                                                | 866.....50530, 51560, 51567, 52647 | 117.....50577, 51158, 51766, 52004, 52005, 52210, 55320, 55322, 55510, 55945                                                                      | 112.....55542                                                                      |
| 25.....50581                                                                                                                                                                                | 876.....52649                      | 165.....50578, 51347, 51767, 52005, 52007, 52210, 52212, 53418, 53421, 56170, 56566, 56568                                                        | 116.....55542                                                                      |
| 27.....50583                                                                                                                                                                                | 1271.....54289, 54290              | 334.....53422                                                                                                                                     | 117.....55542                                                                      |
| 29.....50583                                                                                                                                                                                | 1308.....51154, 55504              | <b>Proposed Rules:</b>                                                                                                                            | 122.....55542                                                                      |
| 39.....50847, 50849, 51170, 51172, 51175, 51364, 51367, 51583, 51782, 52015, 52022, 52676, 54302, 54304, 55057, 55332, 55527, 55955, 55958                                                  | <b>Proposed Rules:</b>             | Ch. II.....56192                                                                                                                                  | 147.....55968                                                                      |
| 61.....55791                                                                                                                                                                                | 11.....52036                       | 110.....54307                                                                                                                                     | 230.....55542                                                                      |
| 71.....50593, 50594, 50596, 55060, 55061, 55063, 55964, 55965                                                                                                                               | 73.....52037                       | 117.....52678                                                                                                                                     | 232.....55542                                                                      |
| 121.....55791                                                                                                                                                                               | 101.....52036                      | 165.....52680, 55336                                                                                                                              | 300.....55542                                                                      |
| Ch. II.....51178                                                                                                                                                                            | 170.....53433                      | 328.....55542                                                                                                                                     | 302.....55542                                                                      |
| Ch. III.....51178                                                                                                                                                                           | 570.....53433                      | 334.....53438, 53440                                                                                                                              | 401.....55542                                                                      |
| <b>15 CFR</b>                                                                                                                                                                               | 573.....50598                      | <b>34 CFR</b>                                                                                                                                     | 1037.....53442                                                                     |
| 740.....50511, 51983                                                                                                                                                                        | 880.....51585                      | 681.....53373                                                                                                                                     | <b>41 CFR</b>                                                                      |
| 746.....51983                                                                                                                                                                               | 1308.....55333                     | <b>36 CFR</b>                                                                                                                                     | Ch. 109.....50491                                                                  |
| 922.....55502                                                                                                                                                                               | <b>23 CFR</b>                      | Ch. I.....50532                                                                                                                                   | <b>42 CFR</b>                                                                      |
| <b>Proposed Rules:</b>                                                                                                                                                                      | 450.....56540                      | Ch. II.....50580                                                                                                                                  | 405.....52976                                                                      |
| 801.....52863                                                                                                                                                                               | <b>Proposed Rules:</b>             | <b>Proposed Rules:</b>                                                                                                                            | 410.....52976                                                                      |
| 922.....55529                                                                                                                                                                               | Ch. I.....51178                    | 13.....52868                                                                                                                                      | 413.....50738                                                                      |
| <b>16 CFR</b>                                                                                                                                                                               | Ch. II.....51178                   | <b>37 CFR</b>                                                                                                                                     | 414.....50738, 52356, 52976, 53568                                                 |
| 314.....52846                                                                                                                                                                               | Ch. III.....51178                  | 1.....52780                                                                                                                                       | 416.....52356                                                                      |
| <b>Proposed Rules:</b>                                                                                                                                                                      | <b>25 CFR</b>                      | 41.....52780                                                                                                                                      | 419.....52356                                                                      |
| 305.....52024                                                                                                                                                                               | Ch. I.....50532                    | 42.....51570, 52780                                                                                                                               | 424.....52976                                                                      |
| <b>17 CFR</b>                                                                                                                                                                               | Ch. II.....50532                   | 201.....52213, 52221                                                                                                                              | 425.....52976                                                                      |
| 23.....56169                                                                                                                                                                                | Ch. III.....50532                  | 202.....52224                                                                                                                                     | 484.....51676                                                                      |
| <b>Proposed Rules:</b>                                                                                                                                                                      | Ch. V.....50532                    | 360.....55323                                                                                                                                     | <b>Proposed Rules:</b>                                                             |
| 229.....50988                                                                                                                                                                               | Ch. VI.....50532                   | 380.....55946                                                                                                                                     | 71.....54314                                                                       |
| 230.....50988                                                                                                                                                                               | Ch. VII.....50532                  | 386.....55946                                                                                                                                     | 73.....54314                                                                       |
| 232.....50988                                                                                                                                                                               | <b>Proposed Rules:</b>             | <b>Proposed Rules:</b>                                                                                                                            | 84.....54315                                                                       |
| 239.....50988                                                                                                                                                                               | 514.....52253, 55064               | 201.....51369, 52258                                                                                                                              | 405.....56336                                                                      |
| 240.....50988                                                                                                                                                                               | <b>26 CFR</b>                      | 202.....51369, 52258                                                                                                                              | 417.....56336                                                                      |
| 249.....50988                                                                                                                                                                               | 1.....52848                        | 381.....51589                                                                                                                                     | 422.....56336                                                                      |
| 270.....50988                                                                                                                                                                               | 54.....55507                       | <b>38 CFR</b>                                                                                                                                     | 423.....56336                                                                      |
| 274.....50988                                                                                                                                                                               | <b>29 CFR</b>                      | 4.....50802                                                                                                                                       | 498.....56336                                                                      |
| 275.....50988                                                                                                                                                                               | 1904.....55761                     | 17.....51770                                                                                                                                      | <b>43 CFR</b>                                                                      |
| <b>18 CFR</b>                                                                                                                                                                               | 1926.....51986                     | 21.....54295                                                                                                                                      | Subtitle A.....50532                                                               |
| 35.....53403                                                                                                                                                                                | 2550.....56545                     | 61.....51158                                                                                                                                      | Subtitle B.....50532                                                               |
| Ch. I.....50517                                                                                                                                                                             | 2560.....55507, 56560              | 62.....51158                                                                                                                                      | <b>Proposed Rules:</b>                                                             |
| 1301.....51757, 52647                                                                                                                                                                       | 2590.....55507                     | <b>Proposed Rules:</b>                                                                                                                            | 8360.....55340                                                                     |
| <b>Proposed Rules:</b>                                                                                                                                                                      | 4022.....52848                     | 17.....55547                                                                                                                                      | <b>45 CFR</b>                                                                      |
| 40.....55535, 56186                                                                                                                                                                         | <b>30 CFR</b>                      | <b>39 CFR</b>                                                                                                                                     | 1630.....55053                                                                     |
| <b>19 CFR</b>                                                                                                                                                                               | Ch. II.....50532                   | 111.....55947                                                                                                                                     | 1631.....55053                                                                     |
| 24.....50523                                                                                                                                                                                | Ch. IV.....50532                   | <b>40 CFR</b>                                                                                                                                     | <b>Proposed Rules:</b>                                                             |
| 111.....50523                                                                                                                                                                               | Ch. V.....50532                    | Ch. I.....51160                                                                                                                                   | 147.....51052                                                                      |
| 122.....55760                                                                                                                                                                               | Ch. VII.....50532                  | 52.....50580, 50807, 50811, 50814, 51349, 51575, 52651, 52655, 52664, 52667, 54298, 54299, 54300, 55052, 55053, 55510, 55511, 55951, 56172, 56173 | 153.....51052                                                                      |
|                                                                                                                                                                                             | 700.....54924                      | 61.....52667                                                                                                                                      | 154.....51                                                                         |

|                        |                                      |
|------------------------|--------------------------------------|
| 2.....                 | 50820                                |
| 15.....                | 50820                                |
| 18.....                | 50820                                |
| 22.....                | 55766                                |
| 43.....                | 55323                                |
| 54.....                | 55767                                |
| 63.....                | 55323                                |
| 69.....                | 56570                                |
| 73.....                | 50820, 51178, 54301,<br>55771, 55772 |
| 74.....                | 50820, 55771, 55772                  |
| 78.....                | 50820                                |
| 80.....                | 50820                                |
| 87.....                | 50820                                |
| 90.....                | 50820                                |
| 101.....               | 50820                                |
| <b>Proposed Rules:</b> |                                      |
| 1.....                 | 50598                                |
| 25.....                | 52864                                |
| 51.....                | 55970                                |
| 52.....                | 55970                                |

|                        |                     |
|------------------------|---------------------|
| 54.....                | 51180               |
| 73.....                | 56574               |
| 96.....                | 56193               |
| <b>48 CFR</b>          |                     |
| Ch. 1.....             | 51526               |
| 1.....                 | 51527, 51773        |
| 4.....                 | 51527, 51773        |
| 9.....                 | 51527, 51773        |
| 17.....                | 51527, 51773        |
| 22.....                | 51358, 51527, 51773 |
| 42.....                | 51526, 51773        |
| 52.....                | 51358, 51527, 51773 |
| Ch. 9.....             | 50491               |
| 1009.....              | 53426               |
| 1052.....              | 53426               |
| <b>Proposed Rules:</b> |                     |
| Ch. 12.....            | 51178               |
| <b>49 CFR</b>          |                     |
| 40.....                | 52229               |

|                        |                                             |
|------------------------|---------------------------------------------|
| <b>Proposed Rules:</b> |                                             |
| Ch. I.....             | 51178                                       |
| Ch. II.....            | 51178                                       |
| Ch. III.....           | 51178                                       |
| Ch. V.....             | 51178                                       |
| Ch. VI.....            | 51178                                       |
| 613.....               | 56540                                       |
| Ch. VII.....           | 51178                                       |
| Ch. VIII.....          | 51178                                       |
| Ch. X.....             | 51178                                       |
| Ch. XI.....            | 51178                                       |
| <b>50 CFR</b>          |                                             |
| Ch. I.....             | 50532                                       |
| 20.....                | 51538                                       |
| 32.....                | 51940, 52009                                |
| 36.....                | 52009                                       |
| 300.....               | 52849, 56177                                |
| Ch. IV.....            | 50532                                       |
| 622.....               | 50839, 51577, 51777,<br>52248, 55952, 56178 |

|                        |                                                              |
|------------------------|--------------------------------------------------------------|
| 635.....               | 55512, 55520                                                 |
| 648.....               | 51578, 51778, 52249,<br>52675, 52851, 53430, 55522,<br>56180 |
| 660.....               | 51166, 55775                                                 |
| 679.....               | 51168, 52011, 55053,<br>55055, 55953, 56571                  |
| 680.....               | 52011                                                        |
| <b>Proposed Rules:</b> |                                                              |
| Ch. I.....             | 51382                                                        |
| 17.....                | 50606, 52262, 55550                                          |
| 91.....                | 56201                                                        |
| 224.....               | 51186                                                        |
| 226.....               | 51186                                                        |
| 300.....               | 52700                                                        |
| 622.....               | 55074                                                        |
| 648.....               | 51492, 51594                                                 |
| 660.....               | 51381, 55551, 56204                                          |
| 697.....               | 52871                                                        |

---

**LIST OF PUBLIC LAWS**

---

**Note:** No public bills which have become law were received by the Office of the Federal Register for inclusion

in today's **List of Public Laws**.

Last List November 21, 2017

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